eJournal of Tax Research (2024) vol. 22, no. 1, pp. 41-94

Designing orthopaedic boots for a clay-footed giant: unconventional fixes for the international corporate tax system

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Abstract

The development of economic activities and the corresponding attribution of income (and wealth) to economic actors for tax purposes have undergone various processes of de-territorialisation and de-materialisation that have accelerated as a result of digitalisation. Recent international (OECD and EU) and, to a lesser extent, domestic initiatives have attempted to adapt the structure of corporate taxation to those changes. However, corporate taxes continue to be built on traditional concepts such legal personality, residence and income which, due to structural weaknesses, may appear to inadequately determine what types of contributions may be required from corporate actors. Therefore, while acknowledging the merits of recent international initiatives such as Pillars 1 and 2 of the OECD Base Erosion and Profit Shifting project, it is of value to explore alternatives VXFK DV PRUH WDUJHWHG WD[HV EDVHG RQ WUDQVDFWLRQV DQG YDOXH DV actors. Three possibilities are analysed: transaction-based taxes, taxes on corporate value, and the elaboration

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activities. Corporations range from small and closely held proprietary companies that deliver personal services, or trade on a small scale, to large multinational corporate groups operating in countries around the world.[12]

nexus' FRQQHFWLQJ LQFRPH DQG WHUULWRU\ IRU WKH activation of new mechanisms for allocating them amongst different jurisdictions.[15]

As far as Pillar 2 is concerned, Avi-Yonah merely says in the same article that the United States (US) should support it through a sharp increase in the corporate tax rate, so as to benefit as much as possible from it. He does not propose an in-depth assessment thereof but implies an overall positive assessment of the plan.[16]

Miranda Stewart, too, in some of her articles,[17] stated that one of the most problematic aspects of BEPS, which requires close attention, is the coordination of the tension between some of the dichotomies on which modern tax systems are based: residence and source; production and consumption; capital-import and capital-export countries. The key to resolving these tensions lies in international cooperation, so much so that new conceptions of state sovereignty can be envisaged based on the ability of states to significantly extend their ability to levy tax abroad by relying on the ever-widening networks of cooperation between tax administrations.

More recently, Professor Michael Devereux[18] welcomed the Pillars stating that even after BEPS the existing international tax system is undermined by the existence of a scattering of very small open economies acting as tax havens. In his view, only a broad consensus on the Pillars, leading to their effective implementation, can create a critical mass to force large multinational enterprises to pay a fair share of taxes in the countries where they operate. According to Devereux, without the achievement of such a critical mass, it will never be possible to defuse the competitive dynamics that nowadays plague relations between states and are at the root of the race to the bottom in tax rates, and thus in revenue.

After stressing the need to reach a critical mass, Devereux, together with John Vella and Heydon Wardell-Burrus[19] in a policy brief, added that overall the Pillar 2 should have a significant impact on tax competition, albeit not as notable as some may have hoped, and certainly not a straightforward impact. Even if all the states were to find common ground for the minimum tax, several avenues for competition would remain open, eg, the offering of government grants, with economic consequences very similar to the current ones. As grants are treated as additional income rather than a reduction in taxes,

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[15] Interestingly, Avi-Yonah suggested to the US policy-makers not to reject the Pillar 1 logic, as Treasury Secretary Steven Mnuchin seemed to do at the time, but rather to tax the web giants, as many of them have their residence in the US.

[16] He even goes so far as to say in his conclusions that the success of these projects could be crucial in providing states with the resources they need to cope with the inequalities caused by globalisation and subsequent shocks, such as Brexit.

[17] 6HH LQ SDUWLFXODU Abuse and Economic Substance in a Digital BEPS World 69(6/7) Bulletin for International Taxation

WKHLU XVH FDQ DOORZ IRU PXFK ORZHU UHDO ¶ HIIHF per cent statutory
in the OECD Global Anti-Base Erosion (GloBe) (Pillar 2) proposal.

Even more recently, Wolfgang Schön too emphasised that the BEPS and the subsequent Pillars were, overall, a success story.[20] This success, however, is largely based on cooperation, and in 2023 the world witnessed a series of changes in the global political framework that jeopardised these achievements; in his words:

> This success story is strangely at odds with the visible fragmentation and de-globalisation of world politics where major actors like the United States, the 3HRSOH¶V 5HSXEOLF RI &KLQD 5XVVLD RU ,QGLD
> from multilateral commitments and assume a more confrontational stance.

He draws a valuable parallel between the international political situation and tax competition among states, asking whether it is possible to isolate it and keep it at a low level in such difficult times. His analysis is particularly interesting because it is not based on strictly legal arguments, but questions whether budgetary constraints may be insufficient for encouraging states to continue to cooperate, since a number of them may find it more convenient (or more opportune) to go back to acting in a selfish mode.

All the literature cited, as well as much of the tax literature on this topic, seems to agree that the BEPS and the Pillars that followed it are a complex project that is producing some positive outcomes. The present authors agree with this position and there seems
WR EH QR GRXEW WKDW WKH LQWHUQDWLRQDO WD[V

introduced concepts of limited liability,[34] while the US Supreme Court contributed to refining the legal framework of the corporation.[35]

In 1896, in the United Kingdom (which ruled the British Empire at the time), the House of Lords delivered the landmark judgment in the case *Salomon v Salomon*[36] that concerned claims of certain unsecured creditors in a liquidation process.[37] They established the foundations of how a modern corporation exists and functions including the principle of separate legal personality.[38] 5 H Y H U V L Q J   W K H   & R X U W   R I $ S according to which the corporation is a myth, the Lords held that, when duly incorporated, it is an independent person with its rights and liabilities regardless of the motives of those who took part in its promotion. They can, for instance, sue and be sued in their own name.[39] This legal fiction became a legal reality and went down in history D V   W K H   µ F R U S R U D W H   Y H L O ‘between’ the company and its controllers and owners.

As for the legal studies on corporation, in the 1970s, what is known as the agency theory[42] was developed according to which corporations act as agents for their shareholders since the latter entrusted their investments to the directors and management.

Along with the development of corporate governance and a broad process of financialisation, in corporate law the corporation began to be perceived as more than MXVW WKH VXP RI LWV PHPEHUV 7KH LGHD WKDW FI materialise together with shareholder primacy according to which firms should be managed with an exclusive view to maximising financial returns to shareholders. In this SHUVSHFWLYH VKDUHKROGHUV GR QRW RZQ WKH FRPS means that, not being entitled to directly access its assets while it is a going concern, they do have rights over the surplus that it generates.[43] This view allowed shareholders ± and other persons controlling the companies ± to benefit from the best of both worlds. On the one hand, the distinct legal personality of the corporation would work advantageously as a shield from any liability claims arising from the economic activities

Some tax systems include temporal elements in this definition thus also taking into consideration the regularity of the calculated flow. This is why, in certain circumstances, large gifts and inheritances may be considered as additions to capital rather than constituent elements of income.

Different justifications exist in the literature[62] for adopting a corporate (income) tax. However, many of these arguments are justifications as to whether corporations should be subject to tax (the main reason being that most of the money in a market economy previously. They were additionally considered as a counterpart to the legal protection offered to undertakings by public authorities.[64]

Although all these arguments, as well as the one described later considering corporate taxation as a complement to the taxation of individuals, can justify the taxation of

Corporate tax residence has two main functions in modern tax systems: (i) providing a

referred to as the Fourth Industrial Revolution,[92] which is considered to be the most important development in the world economy since the Industrial Revolution. It is strongly characterised by the fusion of the physical, digital and biological worlds[93] as well as, in the case of the sharing economy, by certain boundaries between consumers and producers becoming indistinguishable.[94]

Business operations rely heavily on digitalisation and, from an economic perspective, the faster and more efficient it becomes, the more significant the time and cost savings will be for the product and service development processes. This is boosting the economic performances of these corporations to such an extent that, in certain cases, there is even a tendency towards the monopolisation of their respective markets due to network effects, scale effects, restrictions of use, patent to differentiate, and multi-sided platforms.[95] It is not surprising that, in light of the dimension of these types of businesses, Denmark went so far as to appoint a digital ambassador to deal with large MNEs in the digital sector.[96]

Concerning the characteristics of these business models that are posing the greatest challenges to tax systems, the most relevant factors are that digital goods are highly mobile, and a physical presence of a business in the market country is often not required RIWHQ UHIHUUHG WR µDVVHW OLJKW¶ EXVLQHVV PRGHOV [97] Digital business models generally rely on intangible property such as licences, brands, trademarks and copyrights and place great importance on the use of innovative technologies such as a cloud, analytics, algorithms DQG VPDUW PDFKLQHV 6RPH RI WKHP DUH DOVR XVH multinational businesses of which the activities are chiefly focused on manufacturing DQG WDQJLEOH LWHPV ZKLOH RWKHUV DUH [98] PRUH µW\S

business/Naja Bentzen, Mar Negreiro, Vincent Reillon, Nikolina Sajn and 0DUFLQ 6]F]HSDQVNL µAdapting Taxation to New Digital Realities: Main Issues and Policy Responses¶ (XURSHDQ 3DUOLDPHQWDU\ 5HV Briefing, April 2018) available at: https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2018)614734

[92] Klaus 9<0050>-4<0044>9<0055>-3<0057>-4<0003>-75<0050>-4<0044>9<0046004B004C>-5<0051>11B342 T

4.2 Digitalisation and recognition of value and income for CIT purposes

Digitalisation affects income, value creation and recognition. Its ultimate essence is about removing most of the mediators that are present in the market.[99] If one thinks about the book market, for example, the business model of Amazon removes most of the mediators between the publishing house and the final consumer, of which the most familiar is the bookstore. The possibility to download a book, more specifically a digital and dematerialised version of the same product, goes even further by also removing the courier who delivers to private homes, ie, one of the last mediators who still 'survives' with the e-commerce business model.[100] Likewise, the business model of eBay also removes a number of mediators and allows goods to circulate among individuals who possess nothing of the business structures that are necessary in a materialised economy.[101]

Similarly, email goes directly from the writer to the reader. All of the intermediary steps, individuals and structures have been removed, eg, purchasing a stamp and envelope, the mail carrier, the post office, etc.

Even Google and Yahoo, in a way, remove a number of mediators. Although they are *per se* not experts in anything, they are currently two of the most relevant sources of information in existence. This is made possible due to their use of algorithms, which are mathematical formulas that are able to direct requests for information according to previously decided indications.

These new business models are radically transforming most production processes, making it problematic to determine where the value is created and which factors contribute to it. In its interim report on tax challenges arising from digitalisation, the OECD[102] identifies three types of value creation processes. The first is the value chain which is a theory of the firm where value is created by converting inputs into outputs through discrete but related sequential activities. The second is the value network which relies on mediating technologies such as, for example, those used by platform operators to link customers interested in engaging in a transaction or relationship (whether for financial consideration or not). Third is the value shop that operates in one-sided markets where interactions take place with one specific type of user or customer such as medical technology used to diagnose and characteristic is the use of an intensive technology applied in order to solve a specific customer demand or problem.

The digital economy also modifies the business models typical of industrial societies because they operate widely with the primary resource of data collected from users. Many social networks, for example, rely significantly on user participation and the

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[99] Alessandro Baricco, *The Game* (Einaudi, 2018) 73.

[100] Montserrat Hermosín Álvarez and José Miguel Martín Rodríguez, *Los nuevos productos de la economía digital. Características, criterios de identificación*

flow of wealth characterising materialised economies. Returning once again to the example of the company in the De Beers Consolidated Mines case, it is evident that replacing the mine activities in South Africa with an internet activity based on the exploitation of an algorithm becomes problematic when applying the reasoning of the Court and determining where the corporation has its chief seat of management and its centre of trading Indeed, under the current legal framework, it may be difficult to determinH ZKHUH DQ DOJRULWKP LV µSUHVHUYHG¶ RU Theoretically, it may be in the jurisdiction where the company using it is located, where the final customer lives at that moment or permanently resides, or even in the one or more jurisdictions where the servers supporting the operations or the mathematicians updating the formula are located.

The statement above also derives from the fact that, from an international law standpoint, the notion of value creation is not among the traditional concepts.[108] It did not play a crucial role in the drafting of the OECD Model Tax Convention nor in the drafting of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations until the BEPS project.[109] On the contrary, when the modern day system of international agreements on the avoidance of double taxation was conceived E\ WKH /HDJXH RI 1DWLRQV LQ WKH V WKH LGHD R to a certain jurisdiction served as a guiding principle for the allocation of taxing rights.[110] 7KLV LV WKH FRQWH[W WKDW JLYHV ULVH IRU H[DPSO establishment.[111] It derives from a compromise that considers this threshold as a sufficient nexus for the exercising of taxing rights by states other than the residence state.[112] The assumption underlying the adopted solution is that such a regime would have led to an allocation of taxing rights in conformity with the benefit principle. In

refrain from exercising source taxing rights despite being entitled to do so in order to attract intellectual property or investment. The businesses relying widely on intellectual property and intangible assets often have many opportunities for exploiting this kind of international competition. This is not something that is exclusively exploitable by ‘purely’ digital businesses but the fact th
dematerialised (eg, a software) or that a significant part of the value added consists of dematerialised components facilitates the artificial allocation of profits in elected jurisdictions. In other cases, certain digital business models allow for a significant presence in the economic life of a country without a corresponding physical presence.

All this is made possible by the exploitation of the three fictions mentioned above that enable substantial wealth to be created but without it forming a substantial income tax base in any high-tax jurisdiction.[115]

As to the innovations that allow business activities to be disconnected from the physical presence in the target market, they undermine the applicability of the rules described above aimed at subjecting income to taxation. While the formal criteria for determining

is devoted to the digital economy in a document referred to as Addressing the Tax Challenges of the Digital Economy.[121]

According to the OECD, the characteristics of the digital economy required a broad approach to address the very basis of taxation and its allocation across jurisdictions. The final version of the previously mentioned report previously advocated the need ± given the significant divergence between where the sale of digital goods and services takes place and where the corresponding income is taxed ± to develop forms of taxation that do not require a physical presence. In particular, the recognition of a permanent establishment in the territory of the states where digital multinational businesses are active is recommended. This Action is divided into 10 chapters and is structured around the following points after a review of the basic principles of tax policy in the digital economy as well as the business models and technical aspects of the main innovations leading to a technical revolution. The OECD first identifies the possibilities for base erosion and profit shifting in the digital economy (chapter 5), then develops strategies to address them (FKDSWHU DQG FRQFOXGHV ZLWK WKUHH FK to address the broader challenges that are raised.

The Action suggests the use of the concepts of significant economic presence, commonly also called virtual permanent establishment, as a main strategy with the aim of identifying a criterion of connection with the law of a state. It recommends using a series of additional parameters, or at least some diverging from the traditional ones, as well as the concept of connection with the territory to verify the requirements deemed qualifying.

The OECD assumes that the evolution of business models and the growth of the digital economy have led to profound changes but not in the fundamental nature of the core activities that firms perform within a business model to generate profits. In fact, the OECD notes that firms still need to source and acquire inputs, create or add value, and sell to customers.[122] With regard to the possibility of creating a taxable presence in a certain jurisdiction where a non-resident business has a significant presence, the OECD states that it should be based on factors that demonstrate a voluntary and sustained interaction with the economy of that jurisdiction through technology or other automatic tools.

These factors should be combined with one based on revenue from remote transactions in the jurisdiction to ensure that only cases of real significant economic presence are covered.[123] The OECD argues that revenue generated in a jurisdiction on a sustained basis can be considered one of the clearest potential indicators of significant economic SUHVHQFH DOWKRXJK LW DOVR UHFRJQLVHV WKDW jurisdiction do not always coincide.[124]

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[121] OECD, Meeting the Tax Challenges of the Digital Economy, Action 1 – Final Report 2015, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing, October 2015).

[122] Ibid 100.

[123] Ibid 107.

[124] For analyses on this point, see, among others, Pasquale Pistone, João FP Nogueira and Betty Andrade Rodríguez, ‘The 2019 OECD Proposals for Addressing the Tax Challenges of the Digitalization of the Economy: An Assessment’ International Tax Studies; Isabella Cugusi, ‘Prospects for Taxation RI WKH 'LJLWDO (FRQRP\ EHWZHHQ ³7D[/DZ DQG 1HZ (FRQRP\´ DQ (2020) 12(4) World Tax Journal 763.

As for other factors to be considered in conjunction with revenue, the OECD focuses on those that, as in the traditional economy, make interaction with users and customers possible, ie, a local domain name, a local digital platform and local payment options. Regarding user-based factors, the OECD proposes to take into account monthly active users, the conclusion of online contracts and data collected in a certain jurisdiction.

In contrast to the other Actions, the OECD continued its reflection on the tax impact of digitalisation. It finally published an interim report entitled Tax Challenges of Digitalisation[125] that begins by examining some of the main features of the digital economy of which the main concept is that of the massless transnational scale. According to the OECD, as described above, digitalisation has allowed companies in many sectors to locate different stages of their production processes in different countries while having access to a larger number of customers worldwide.

As a result, it also allows highly digitalised companies to become heavily involved in the economic life of a jurisdiction without any or a significant physical presence thus achieving local scale operation without local mass. Following this introductory section, the report assesses the state of implementation of the BEPS project. It indicates that, on the one hand, although it is still relatively early in its implementation, evidence is available that jurisdictions have taken a significant step towards widespread implementation of the various BEPS measures and that this is already having an impact.[126]

On the other hand, it is recognised that the relevance and impact of BEPS measures that have been implemented is far more indistinguishable for the broader direct tax challenges raised by digitalisation (eg, nexus) as, for many jurisdictions, these

The OECD also notes a divide between those states supporting the idea that a state SURYLGLQJ WKH PDUNHW ZKHUH D IRUHLJQ FRPSDQ\¶V sufficient nexus for creating an exclusive nexus for tax purposes, and those that reject it and prefer to continue to use the traditional criteria for allocating taxing powers.[130]

In conclusion, the report identifies as a basis for future work the belief shared by many jurisdictions that there is a need to review the rules on the nexus and profit allocation and also argues that, pending this review, there is no need to recommend the adoption of specific interim measures.

5.2 The Actions on transfer pricing: a partial attempt to change perspective while keeping the DUP¶V OHQJWK SULQFLSOH

The BEPS project focused strongly on transfer pricing rules. This is because both governments and scholars have always seen transfer pricing as one of the main means of implementing aggressive tax planning and avoidance schemes.

In past years, the debate has mainly concerned the suitability of the principle to meet the needs to which the transfer pricing rules respond and has gradually shifted to the relationship between transfer pricing and the dematerialised economy.[131]

Among the 15 BEPS Actions, four relate directly or indirectly to transfer pricing. To summarise the purpose of Action 8 is to develop rules to prevent BEPS through transfers of intangible assets between members of the group; Action 9 develops rules to prevent the transfer of risks or allocation of excessive capital between group companies; Action 10 serves to counter BEPS conduct carried out through involvement in transactions that do not or very rarely occur between third parties and Action 13 aims, among other things, to revise the rules on transfer pricing documentation to improve transparency in communications with tax authorities.

As a whole, Actions 8 to 10 aim at aligning transfer pricing outcomes with value creation.[132] 7KH 2(&' LQ IDFW QHYHU H[SUHVVHG WKH LQWH principle but rather to adapt it to the needs of the present time.[133] On the basis of this approach, it can be stated that the work of the OECD in this area has not been conclusive in the sense that the underlying problems, such as the arbitrary shifting of risks and capital, still remain to a large extent.[134]

assumed or whether there is inconsistency between the contractual provisions and the S D U W L H V ¶ D F W X D O F R Q G X F W nexus concept is proposed that does not depend on the physical presence of the company but is based primarily on sales volume with the establishment of country specific thresholds calibrated so that even states with smaller economies can benefit from tax revenues; (c) a new profit allocation rule going beyond the arm's length principle is approved that concerns taxpayers falling within the scope of the proposal whether they are physically present (with a permanent establishment or subsidiary) in the marketing RU GLVWULEXWLRQ MXULVGLFWLRQ ZKHWKHU WK; and (d) greater tax certainty is sought for taxpayers and tax administrations through the three-tier mechanism. However, this does not affect the right to maintain the current rules when they are more appropriate to meet the needs of a particular case.

Such a mechanism gives market jurisdictions the right to tax in three steps[142]: (1) the calculation of Amount A that corresponds to a share of the presumed residual profit allocated to the market jurisdictions according to a formula, ie, the new right to tax; (2) the calculation of Amount B that consists of a fixed remuneration for the basic marketing and distribution functions that take place in the market jurisdiction; and (3) the calculation of Amount C, ie, a binding and effective dispute avoidance and resolution mechanism relating to the application of the proposal.

As for the development of a new concept of nexus (that would coexist with the traditional concept of permanent establishment), the document[143] states that it should be applicable in all cases when a company has significant and ongoing involvement in the economy of the market jurisdiction. This could occur, for example, through the interaction and involvement of users and consumers there irresp WLYH RI WKH FRPSD physical presence in that jurisdiction.[144]

Based on stakeholder feedback, the Inclusive Framework and the G20 agreed on a new 3LOODU DJHQGD WKH µ'HFODUDWLRQ¶ LQ -DQXDU\ 2019.[145] The Declaration focuses primarily on Amount A that is intended to be the main response to the tax challenges of the digital economy and emphasises that taxing rights granted to market jurisdictions on the basis of specific formulas could be exercised on part of the residual profits of specific categories of business taxpayers. These include: (i) businesses that provide automated digital services to a globally extended customer or user base operating remotely and using little or no local infrastructure; (ii) consumer

occurring without reference to theoretical tax principles[152] such as those developed internationally by the OECD. Overall, domestic legal systems are certainly better equipped today to face the challenges of globalisation and the digital economy than they were previously.

However, these developments have taken place within the framework of corporate income tax. The OECD efforts have aimed at better coordinating the existing domestic income taxation systems at the global level. The idea that remains behind all this work is that companies are autonomous entities residing in a particular place, therefore they have to be considered for tax purposes, and consequently they have to report income and pay taxes in that jurisdiction. In the policies outlined by the OECD, there seems to be a firmly rooted belief that through a globalised set of corporate income tax rules a state of residence can be continuously and clearly identified for companies and, consequently, the taxing powers of all the jurisdictions where a particular company operates can be coherently allocated.

It is nevertheless worth noting that recent developments have shown significant departures from traditional categories on three levels.

First, Pillar 1 and, even more clearly, Pillar 2 constitute a shift from individual corporate taxpayer liability to a broader notion of group liability therefore partly disconnecting liability to tax from an individual legal personality.

Secondly, envisaging the situation of the group from a global perspective also constitutes a partial departure from the concept of residence. According to Pillar 2, the income of a company may be taxed in a jurisdiction other than that of residence (and the source jurisdiction that often uses – residence of the payer – as a proxy).

Thirdly, in Pillar 1, proxies other than residence are used to connect the taxable base to a territory, in particular the presence of customers.

The actual tendency seems therefore to preserve the current structure of income tax systems and, consequently, to find solutions that continue to distinguish between residents and non-residents as well as natural persons and legal persons. They must all submit accounting and tax documents in each jurisdiction from which their income is

achieving one of the three proposed BEPS objectives, specifically (i) limiting tax avoidance by multinational enterprises by shifting resources to low-tax jurisdictions (base erosion and profit shifting); (ii) tying the value produced by MNEs to a jurisdiction and taxing it there (value creation), and (iii) making multinational enterpriseV FRQWULEXWH PRUH fairly to WKH VWDWHV¶ EXGJHWV.

The first objective is to focus on payments since profit shifting and base erosion occur mainly through transactions carried out against payment.

The second is to consider the value of the enterprise which has little or nothing to do with its income. Regardless of its income, in fact, the entirety of stocks, bonds and assets have a measurable value.

The third and last, and perhaps the most innovative, would be to request large multinational enterprises for in-kind and money contributions to earmarked funds.

This approach focuses exclusively on taxation and omits other aspects closely linked to it, such as the possibility of intervening on accounting principles or company law. To give an example, we have already seen how the tax calculation begins after the directors KDYH DOUHDG\ GHFLGHG LQ IXOO DXWRQRP\ KRZ WR D taxation is effectively asked to resolve a large part of the inequities of our societies.

An idea not directly connected to tax law could be to oblige companies to link a part of the dividends distributed or the profits accumulated to activities that have some positive social impact, but this would require intervention that comes into operation before taxation.

5.5.1 Transaction-based taxes

The first conclusion that can be drawn from the analysis carried out is that one should look for alternative proxies other than income to assess corporate ability to pay. As highlighted previously, income is quite appropriate as a proxy for individuals even in a globalised world (of course, subject to transparency requirements for foreign income); however, it is far from optimal for corporations and especially for multinational entities. An alternative should be to focus on transactions rather than income, which can be made in different ways. A number of proposals have been made regarding transaction-based taxes.

One of the first alternatives discussed that comes to mind are, of course, the general turnover taxes, like VAT/goods and services tax (GST). VAT/GST, although labelled as a consumption tax, can also be seen as a proper tax on businesses. Businesses not therefore, business-to-business (B2B) transactions are not supposed to bear any economic burden even though they are legally subject to tax.

Secondly, numerous transactions remain out of scope either because they are not considered as supplies of good or services (for example, capital contributions or dividend distributions) or because they are exempted (most financial transactions). It could also simply be because they are considered as being located outside the jurisdiction that imposes the tax (typically B2B or transactions with foreign clients).

Reforming VAT can play a role in strengthening the system to avoid loopholes. First, subjecting all transactions effectively to VAT (which implies eliminating most of the H[HPSWLRQV ZRXOG QRW RQO\ LQFUHDVH FRUSRUDWH allow transaction reporting that could be used for other purposes. Considering the fact that the right to deduct can be denied in the case of fraud but also abuse, additional conditions for cross-border transactions with certain jurisdictions could be imposed on the taxpayer to ensure that the intention behind the transaction is genuine.

Another idea that has been developed is destination-based cash flow taxes.[162] This type

would be applied in purely domestic situations (whenever the beneficiary would benefit from a preferential regime on the payment received).

This could be seen as a type of withholding exit tax applied on a territorial basis. Refunds or exemptions could be granted in the case of final effective taxation in the hands of the ultimate beneficiary. In addition, personal requirements could also be added for the payer or recipient, for instance, if wanting to restrict the personal scope only to transactions between (related) companies.

Banking and financial institutions could be actively involved in the reporting and taxation of those transactions, at least regarding those from the territory of the state and intended for the purchase of goods and services. The information should always be available to the tax authorities and ultimately, for each reporting period, the system could be structured in such a way that it is either the taxable person or the intermediary who has made the electronic payment possible that remits the payment to the treasury. In any event, the other two parties involved should be held responsible in the event of non-payment so that the treasury may always rely on effective means to collect the sums due.

This solution can be widely applied and is independent of the type of taxpayer, ie, natural or legal person, their residence, their income, or their balance sheets and accounting documents. It would enable all the legal fictions described above to be overcome as well as the practical problems including the need for close international cooperation. Once the scope of application of the withholding tax has been delineated, in fact, no international cooperation would be required, and it would be sufficient only to rely on instruments over which the tax administration has effective power to intervene, eg, current accounts with local banks, credit cards issued within the jurisdiction, etc.

Taxation systems which could be used to develop innovative solutions already exist in various parts of the world. One such example is the Malaysian withholding tax on contract payments. Under section 107A of the *Income Tax Act 1967*, all contract payments for services connected or attributable to activities in Malaysia under a contract paid to non-resident contractors are subject to a withholding tax. Part of this levy, however, is not final but a payment in account and is offset against the final tax liability of the non-resident contractor (based on the tax return submitted).[171]

Although an in-depth analysis of these aspects would be beyond the scope of the present

provided that the tax would be calculated by the Internal Revenue Service (IRS) on the basis of published information on the fair market value of stock and debt. By adopting this approach, the calculation by tax authorities would ensure that a uniform rule was used across the United States.

Such a tax would affect one of the most evident demonstrations of wealth creation since changes in the value of securities traded on the stock exchange are one of the tests that best and almost in real time measure business performances.

This would also be compatible with the principle of ability to pay since a company that performs advantageously on the stock exchange can certainly distribute a dividend in a short time.

Directly or indirectly affecting shareholders with a tax levy would also discourage NHHSLQJ ODUJH DPRXQWV RI FDVK µSDUNHG¶ LQ FRPS increase in the value of shares would encourage the distribution of dividends. This typ of tax could also have positive effects in regulatory terms, discouraging speculative

taxation is levied accordingly. With regard to the form of taxation envisaged herein,

western Europe did in decades past by assuming their corporate social responsibility in a more direct and transparent way.[184]

This approach could be in conjunction with a broader debate on the role of companies similar to what occurred in the field of company law on the need for a new theory of companies.[185] On closer inspection, from whichever perspective the phenomenon of companies is viewed, eg, concession theory, trust and freedom of association theory, fiction theory, contract theory, etc,[186] the common trait is always that companies essentially have the possibility for one or more natural persons to create a purely artificial third party. Each and every one of these theories pays attention to one IXQGDPHQWDO HOHPHQW statute, and thus indirectly the state LH LV WKH FRPSDQ\¶V V that allows the natural persons to create this artificial third party that may act in the real world. Ultimately, it can be said that companies owe their existence and capacity to act to the intervention of the state.

7KHUHIRUH FRPSDQLHV VKRXOG QRW EHKDYH LQ D Z objectives (for example, by not honouring contracts and debts with other economic actors). However,