Tax Challenges of a Digitalizing Europe – A Comparative Analysis of the Multilateral Two-Pillar Solution with the European Commission's Proposals

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Table of Contents

Abstract

The challenge of adapting the customary international corporate tax system to the digitalising economy persists as a transnational issue affecting multiple States globally. In resolving such a transnational issue in corporate taxation, it might have

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seemed an opportune moment for the European Union (EU) to apply its approach towards supranational governance or the Monnet method. Yet, despite the European Commission advancing three solutions, two Interim and one Comprehensive, to confront the corporate tax challenges of the digitalising economy, the Monet Method revealed its limits, with the proposals failing to attain unanimity among EU Member States. Simultaneously, such proposals have drawn severe academic and political criticism for their protectionism. Instead, with the parallel conclusion of a multilateral Two-Pillar Solution, the Commission has since withdrawn its unilateral proposals and pledged its support towards implementing the Two-Pillar Solution. The focus of this article shall thus be to ultimately draw a comparative analysis of the Two-Pillar Solution with the Commission's proposals while exploring how the former has since made some improvements upon the latter in tackling the corporate tax challenges of the digitalising economy. Further opinions on the Two-Pillar Solution's design flaws and appropriate alternative solutions will also be briefly provided within this article.

Keywords: Corporate Taxation, BEPS, Digital Economy, European Union, OECD, Internal Market, Two Pillar Solution, Digital Taxes, Digital Permanent Establishment, WTO

A. Introduction

The European Union (EU) has been presented as a new and *effective* supranational platform to resolve challenges that transcend national borders and which no individual State can successfully tackle through its own efforts, in clear contrast to the discredited intergovernmental models subsisting during the first half of the last century.[1] Dubbing the EU's approach towards supranational governance as "the Monnet method"[2] in 2017, the then President of the European Central Bank, Mr. Mario Draghi, lauded key aspects of the method, including transfers of sovereign powers "to common institutions",[3] majority rule, and common approaches to problem solving, as effective means by which individual Member State governments could improve the governance of their peoples.[4]

Nevertheless, the partial implementation of this very method has arguably failed to provide for the EU a solution to a key transnational issue in corporate taxation,

1 https://www.ecb.europa.eu/press/key/date/2017/html/ecb.sp170504.en.html (27/6/2022); *Grin*, in: Jean Monnet Foundation for Europe (ed.), p. 13–15; *Monnet*, in: Laffont (ed.), p. 53 and 106–107.
2 https://www.ecb.europa.eu/press/key/date/2017/html/ecb.sp170504.en.html (27/6/2022).
3 Ibid.; *Monnet*, L'Europe et la nécessité, in: Jean Monnet Foundation for Europe (ed.).
4 https://www.ecb.europa.eu/press/key/date/2017/html/ecb.sp170504.en.html (27/6/2022); *Grin*, in: Jean Monnet Foundation for Europe (ed.), p. 14–15; *Monnet*, L'heure du choix de l'Europe, in: Jean Monnet Foundation for Europe (ed.).

namely the "Tax Challenges of the Digital Economy"[5] as first identified by the Organisation for Economic Co-operation and Development (OECD). To tackle the issue head-on, the European Commission had first proposed two Directives in 2018,[6] and another the year after.[7] However, none of these proposals have since been formally adopted into law.[8] In fact, the consistent opinion of the Commission,[9] other EU Institutions,[10] several EU Member States,[11] and EU trading partners such as the USA,[12] would be to prioritise a *globally harmonised*, and not merely EU-wide, legal solution where available.

Despite lengthy, uncertain negotiations,[13] that global solution was finally formally presented in October 2021 as the Two-Pillar Solution, having then received intergovernmental agreement among 136 countries and jurisdictions participating within the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (IF).[14] The Commission has also indicated its support for the Two-Pillar Solution,[15] which

5 *OECD*, Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report, p. 16.

6 *European Commission,* Communication from the Commission to the European Parliament and the Council, Time to establish a modern, fair and efficient taxation standard for the digital economy, COM(2018) 146 final, p. 6 and 8.

7 *Council of the European Union*, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services – Political agreement, 6873/19, p. 2.

8 *European Commission,* Communication from the Commission to the European Parliament and the Council, Business Taxation for the 21st Century, COM(2021) 251 final, p. 5 (particularly footnote 20); *European Parliament*, Resolution of 29 April 2021 on digital taxation: OECD negotiations, tax residency of digital companies and a possible European Digital Tax, P9_TA(2021)0147, p. 4.

9 *European Commission,* Communication from the Commission to the European Parliament and the Council, Time to establish a modern, fair and efficient taxation standard for the digital economy, COM(2018) 146 final, p. 5.

10 *European Council*, Statement of the Members of the European Council, SN 18/21, p. 5; *Council of the European Union*, Outcome of Proceedings from the General Secretariat of the Council to the Delegations, Council conclusions on fair and effective taxation in times of recovery, on tax challenges linked to digitalisation and on tax good governance in the EU and beyond, 13350/20, p. 4–5; *European Parliament*, Resolution of 29 April 2021 on digital taxation: OECD negotiations, tax residency of digital companies and a possible European Digital Tax, P9_TA(2021)0147, p. 7.

11 *Council of the European Union*, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services – Political agreement, 6873/19, p. 3.

12 https://gop-waysandmeans.house.gov/house-ways-and-means-senate-finance-leaders-statement-on-unilateral-digital-services-taxes-oecd-negotiations-to-address-the-tax-challenges-of-the-digitalization-of-the-economy/ (27/6/2022).

13 *European Parliament*, Resolution of 29 April 2021 on digital taxation: OECD negotiations, tax residency of digital companies and a possible European Digital Tax, P9_TA(2021)0147, p. 7–9.

14 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 1.

15 *European Commission*, Press Release – Taxation: Historic global agreement to ensure fairer taxation of multinational enterprises, IP/21/3582, p. 1.

would effectively spell the end of the Commission's own proposals given the Two-Pillar Solution's barring of future unilateral measures.[16] It is this juxtaposition of the Two-Pillar Solution against those of the Commission's proposals that shall serve as the focal point for analysis within this article, thereby presenting a case study on the limits to EU-wide solutions and the Monnet method in an increasingly globalised legal landscape.

Section B of this article opens the discussion by introducing and analysing the EU's various proposals to address the tax challenges of the digitalising economy in efforts to supersede the Member States' own unilateral measures, as well as the various criticisms that these proposals have drawn. Section C subsequently directs this article's focus towards introducing the IF's Two-Pillar Solution and examining key aspects of the two Pillars. Building upon the earlier Sections, Section D draws a comparative analysis of the Two-Pillar Solution against the Commission's proposals, while briefly commenting on the Two Pillar Solution's drawbacks and possible alternative solutions. Section E concludes.

B. The Commission's Proposals to Address the Tax Challenges of a Digitalizing Europe

I. Failures to Adopt the Commission's Proposals as Limits to the Monnet Method

In 2018, the Commission published to the Council its first package of proposals on EU-wide measures to address the tax challenges of the digitalising economy, known as the "Digital Taxation Package".[17] Within that first package, two proposals are of central relevance to this article. The first would have concerned an EU-wide interim measure, referred to as the proposed Council Directive for a Digital Services Tax (DST), envisioned to supersede the various Member States' own digital taxes.[18] That DST, if it had been implemented, was proposed as remaining in place until a more "comprehensive solution" was finally instituted, whether at the EU or multilateral level.[19] The second would concern the Commission's proposal for an EU-wide comprehensive solution, known as the proposed Council Directive for corporate

16 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 3.

17 *Council of the European Union*, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services – Political agreement, 6873/19, p. 2.

18 *European Commission*, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final, p. 5.

19 *European Commission,* Communication from the Commission to the European Parliament and the Council, Time to establish a modern, fair and efficient taxation standard for the digital economy, COM(2018) 146 final, p. 3.

taxation of a significant digital presence (SDP).[20] The Commission itself was keen to stress that the latter proposal could and would be easily adapted to accommodate the eventual provisions of a multilateral solution, in a bid to assure detractors that the proposal would not jeopardise the capacity for the multilateral solution to be reached.[21]

Despite the proposals' publication, it is clear from the subsequent proceedings that the Commission's employment of elements of the Monnet method in this instance, i.e. a common approach to problem-solving via common institutions, does possess limits in relation to matters on direct taxation. While the proposed directives incorporated supranational solutions in line with the Monnet Method's common approach towards problem solving, the legislative processes in arriving at those solutions still relied upon intergovernmental arrangements, i.e. the initiated routes being Articles 113 and 115 of the Treaty on the Functioning of the European Union (TFEU) for the DST and the SDP Directives respectively, both of which required unanimity among Member States within the Council.[22] As regards the proposed DST Directive, it can be gleaned from the Council's records that the Member States were initially unanimous on implementing an interim measure while a multilateral solution was being sought; the disagreement instead lay with the scope of the proposal itself.[23] A renewed proposal for an interim digital tax was instead formulated the following year, albeit on a narrower scale than previously envisioned by the Commission, in the form of the subsequently proposed Council Directive for a Digital Advertising Tax (DAT).[24] This DAT shall also be of relevance to this article.

Although the content of the proposed DAT was itself subject to frequent revisions and the proposal itself never achieved unanimous adoption, what was certainly interesting within the proposed Directive as published was the inclusion of a sunset clause referring to the institution of a multilateral solution at the OECD level and not that of an EU-wide comprehensive solution.[25] It would thus appear that several Member States' desire not to jeopardise the then-ongoing negotiations under the OECD/G20 Inclusive Framework, and their preference for a multilateral solution, had led to the Commission's proposal for an EU-wide comprehensive solution being dropped from focus.[26] In parallel, this inclination also contributed to the sub-

20 *European Commission*, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final.
21 Ibid., p. 6.
22 OJ C 326 of 26/10/2012, p. 94–95.
23 *Council of the European Union*, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services – Political agreement, 6873/19, p. 2.
24 Ibid.
25 Ibid, p. 2–3 and 30 (Art. 25).
26 *Council of the European Union*, Note from the General Secretariat of the Council to the Delegations, Bulgarian Presidency digital taxation roadmap, 9052/18, p. 4.

sequent lack of unanimous support for the DAT proposal itself.[27] Ultimately, the Commission's interim and comprehensive solutions have been withdrawn,[28] with the Commission having recently proposed, as at time of writing, a draft Directive implementing Pillar Two of the multilateral Two-Pillar Solution agreed only last year.[29] Thus, thrice has been the failure of the Monnet method to reach a satisfactory solution at EU level, with the source of a solution finally presenting itself via the wider, multilateral framework.

II. Critical Commentary on the Commission's Proposals

The following discussion shall provide critical commentary on key elements of the three Commission proposals as introduced in the previous sub-section.

1. The Digital Services Tax (DST) – the First Interim Solution

As mentioned previously, the Commission's proposed Directive for a DST was its first attempt at an EU-wide interim measure to capture lost tax revenues resulting from the digitalising economy, thereby superseding Member States' proposed or implemented parallel but uncoordinated domestic measures.[30] The proposal centred on implementing an indirect tax, but with a targeted approach that pursued those corporate revenues generated within the EU by certain large digital MNEs from multisided platforms, user participation and exploitation of user data.[31] It would appear that with guidance from the ECOFIN Council, the Commission had chosen to pursue an indirect tax on corporate *revenues* instead of a direct tax on corporate *profits*, since it was assessed that the former tax would avoid direct conflicts that the latter would face with existing double tax conventions concluded between the Member States, and between the Member States and third countries.[32]

27 *Council of the European Union*, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services – Political agreement, 6873/19, p. 3.

28 *European Commission,* Communication from the Commission to the European Parliament and the Council, Business Taxation for the 21st Century, COM(2021) 251 final, p. 5 (particularly footnote 20).

29 *European Commission*, Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM(2021) 823 final, p. 1.

30 *European Commission,* Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final, p. 5.

31 Ibid., p. 5 and 7.

32 *European Commission*, Commission Staff Working Document, p. 56–57.

a) Key elements

Under Article 4 of the draft DST, the tax was meant to place within its scope certain taxable persons, namely legal entities which satisfied two conditions, by firstly reporting total worldwide revenues above EUR 750 million within a specified financial year, and secondly obtaining taxable revenues above EUR 50 million within the EU during that same financial year.[33] According to Article 4 (6), where a taxable person belonged to a "consolidated group for financial accounting purposes", the revenue thresholds would have applied instead to the whole group.[34] Taxable revenues were defined under Article 3 as being derived from the provision of the following three digital services:

(a) the placing on a digital interface of advertising targeted at users of that interface;
(b) the making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users;
(c) the transmission of data collected about users and generated from users' activities on digital interfaces.[35]

Article 5 (1) also made clear that the taxable revenues were to be deemed as being obtained in a particular Member State if users with respect to the services earlier listed in Article 3 were found to be located in that Member State.[36] Under Articles 6 to 8, the DST would then be due within a Member State upon such taxable revenues attributed in accordance with Article 5, and calculated by applying a 3% rate upon such revenues.[37]

Thereon, under Chapter 3 of the draft Directive, the taxable person would have been required, to the Member State where its DST liability arose, to notify its DST liability, submit a DST return, and pay its DST due.[38] Where DST liability extended to more than one Member State, the taxable person would have been permitted to choose the Member State to whom it would fulfil the same obligations.[39] Under such a case, the Member State to whom the DST liability was paid would then have distributed the appropriate proportion of that amount to the respective Member States.[40] Consolidated groups for financial accounting purposes would also have been permitted to name an entity to fulfil the same obligations.[41]

33 *European Commission*, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final, p. 25.
34 Ibid., p. 26.
35 Ibid., p. 24.
36 Ibid., p. 27.
37 Ibid., p. 28.
38 Ibid., p. 29 and 31–32.
39 Ibid., p. 29.
40 Ibid., p. 32.
41 Ibid., p. 29.

b) Analysis

It is highly likely that without a comprehensive solution implemented at the multilateral level, the proposed DST would ultimately have generated more costs than benefits for the EU and its Member States.

One key merit of the DST proposal would have been in its implementation, assuming the proposal itself survived challenges to its compatibility with the Member States' existing international obligations under double taxation treaties, as well as EU and WTO law. Certainly, through a directive obliging Member States to impose a harmonised indirect tax, the Commission would have achieved one of its goals of preventing the fragmentation of and distortion of competition within the Internal Market by superseding parallel, yet uncoordinated measures proposed or implemented by the Member States unilaterally.[42] On the other hand, the converse view weighs stronger since the DST's substantive provisions would not be as effective in achieving the Commission's other 3 stated goals, namely achieving "social fairness" and "a level playing field" by ensuring taxation of profits is aligned with value creation, protecting the integrity of Member States' tax bases, and fighting "aggressive tax planning".[43]

Regarding the Commission's objective of aligning taxation of profits with value creation, one should take reference from Devereux and Vella's criticisms of the little value this principle would provide towards tackling the tax challenges of the digitalising economy, specifically that "profit is not commensurate with benefit".[44] This author agrees with the opinion that value is presently created within the digitalising economy from harnessing the interaction of multi-sided platforms, user participation and data as a resource, but which is being undertaxed by States where such value is derived since such value is currently not being comprehensively reflected in corporate financial data.[45] Thus, aligning taxation of *just* profits with value creation would mean that States would *still* be under-taxing value created upon their territories from those overlapping aspects,[46] and therein failing to appropriately fulfil the Commission's goals of "social fairness"[47] and "a level playing field".[48] A more appropriate objective would therefore have been to ensure that economic value is taxed where it is generated.

The unfortunate effect of this misconceived objective in aligning taxation of profits with value creation is thus reflected within the DST proposal itself. On one hand, there is some merit in Article 4's revenue thresholds for in-scope companies which

42 *European Commission*, Commission Staff Working Document, p. 79–80; *European Commission*, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final, p. 5; *Kofler/Sinnig*, Intertax 2019/2, p. 196.
43 *European Commission*, Commission Staff Working Document, p. 22–23.
44 *Devereux/Vella*, BTR 2018/4, p. 393 and 402.
45 *Devereux/Vella*, Intertax 2018/6/7, p. 557; see also *Cooper*, BIT 2021/11/12, p. 5.
46 *Zetzsche/Anker-Sørensen,* WTJ 2021/2, p. 219.
47 *European Commission*, Commission Staff Working Document, p. 23.
48 Ibid.

would most certainly have targeted those digital MNEs reaping especially low ETRs as opposed to other enterprises, thereby addressing even temporarily some of the concerns on tax fairness and restoring a level playing field for business competition while raising vital political capital.[49] Nevertheless, one should also note the limitations behind Article 3 read with Article 5 which mandate the direct targeting of an in-scope enterprise's taxable revenues as derived from the digital services listed under the Article 3, where such revenue is derived from users based in a particular Member State as listed under Article 5.[50] Both Articles 3 and 5 direct their focus upon the limited concept of *revenues* which, as mentioned in the previous paragraph, do not necessarily correlate to value creation, thereby still resulting in some, albeit reduced, under-taxation of digital MNEs.[51] Leaving aside the practicality of taxing value creation uncaptured by revenue or profits, the DST, while arguably meant to be temporary and easy-to-implement,[52] would have amounted to an imperfect means of addressing the corporate tax challenges posed by new business models within the digitalising economy.

More importantly, it is also doubtful whether the DST proposal would have adequately protected Member States' tax bases. If one takes reference from the recent implementation of a Spanish DST which draws heavily on the Commission's DST proposal, multi-faceted criticism has been heaped upon the Spanish DST for adding little by way of revenue to Spanish state coffers, while increasing legal uncertainty for taxpayers due to its ambiguous legal provisions on covered services and tax calculation, raising difficulties for taxpayers in relation to often inaccessible user data, and potentially transferring the tax burden from companies to consumers.[53] The same issues could arguably be applied *mutandis* to the Commission's DST proposal, thus raising questions on the actual viability of the proposal in the long run.[54]

Lastly, in relation to fighting aggressive tax planning, it must be noted that while the DST proposal could have partially recovered tax revenue lost due to BEPS strategies such as avoided PEs by digital MNEs, its main focus would have been to address under-taxed value creation from digital MNEs as a result of the inability of the existing international corporate tax system to adapt to new business models and value creation methods.[55] The proposal would not have, by itself, comprehensively addressed the larger BEPS confluence of economic scale without mass fragmenta-

49 *de Wilde,* Intertax 2018/6, p. 472.
50 *European Commission*, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final, p. 24 and 27.
51 *Plekhanova*, eJTR 2020/2, p. 304–305; *Zetzsche/Anker-Sørensen,* WTJ 2021/2, p. 219.
52 *European Commission*, Commission Staff Working Document, p. 48.
53 *Escribano*, Intertax 2021/6/7, p. 530–531.
54 *Devereux/Vella*, BTR 2018/4, p. 403; *Kofler/Sinnig*, Intertax 2019/2, p. 199–200; *Hadzhieva,* Study requested by the European Parliament's Committee on Financial Crimes, Tax Evasion and Tax Avoidance (the TAX3 Committee), Policy Department A – Economic, Scientific and Quality of Life Policies, Impact of Digitalisation on International Tax Matters, IP/A/TAX3/2018-02, p. 57–59; *Sinnig*, ECTR 2018/6, p. 333.
55 *Devereux/Vella*, BTR 2018/4, p. 389; *Kofler/Sinnig*, Intertax 2019/2, p. 181; *de Wilde,* Intertax 2018/6, p. 473.

tion and harnessing of intangibles that are now being employed by *both* digital and traditional enterprises.[56] Therefore, the DST proposal should have included an appropriate sunset clause to premise the EU's ability to adapt to a more definitive solution instead of raising the risk of the inefficient DST's undesirable permanence.[57]

Thus far, the DST proposal has failed to address adequately 3 of the 4 goals as proposed by the Commission in support of the draft DST. Yet, there remain further issues which the DST proposal must contend with, such as its compliance with the EU's and Member States' international obligations and the Rule of Law.[58]

This author's views align with other academic opinion that the DST would ultimately have been deemed an indirect tax in form and in substance and so would not have fallen afoul of existing double tax conventions on income and capital.[59] Similarly, in light of recent CJEU jurisprudence on the Hungarian advertising tax cases,[60] the DST would more likely than not have escaped a challenge on its compatibility with EU law, in particular the fundamental freedoms.[61] The chief concern would be the DST's compliance with World Trade Organisation (WTO) law.[62]

It is arguable that the DST would have violated Article XVII National Treatment of the General Agreement on Trade in Services (GATS), requiring WTO member states to provide to foreign service suppliers no less favourable treatment than that of domestic ones.[63] Academic opinion has perceived that, in light of the revenue thresholds in Article 4 of the DST proposal, the DST, while formally applying to EU-tax resident and third country tax-resident service providers, was meant to target large digital MNEs mostly based in the USA.[64] The DST would thus have been likely to fall afoul of Article XVII:1 read with Article XVII:3 of the GATS which prohibits formally identical treatment should such treatment modify conditions of competition in favour of like services of service suppliers.[65] The DST, as an indirect

56 *Kofler/Sinnig*, Intertax 2019/2, p. 197; *de Wilde*, Intertax 2018/6, p. 472.

57 *Kofler/Sinnig*, Intertax 2019/2, p. 199; *de Wilde,* Intertax 2018/6, p. 472; *Sinnig*, ECTR 2018/6, p. 334; *Wissenschaftlicher Beirat beim Bundesministerium der Finanzen*, Stellungnahme zu den EU-Vorschlägen für eine Besteuerung der digitalen Wirtschaft, p. 5.

58 *OECD*, Tax Challenges Arising from Digitalisation – Interim Report 2018, p. 181.

59 *Kofler*, ECTR 2021/2, p. 51*; Hohenwarter,* et. al., Intertax 2019/2, p. 143; *Ismer/Jescheck*, Intertax 2018/6/7, p. 577.

60 CJEU, case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2020:139, (Case C-75/18 *Vodafone*); CJEU, case C-323/18, *Tesco-Global Áruházak Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága,* ECLI:EU:C:2020:140, (Case C-323/18 *Tesco-Global*).

61 *Kofler*, ECTR 2021/2, p. 52; *Szudoczky/Karolyi*, Intertax 2022/1, p. 82; *Mason*, TNI 2020/2, p. 169; *Parada*, TNI 2019/5, p. 406.

62 *OECD*, Tax Challenges Arising from Digitalisation – Interim Report 2018, p. 184.

63 *WTO,* Marrakesh Agreement Establishing the World Trade Organization, Annex 1B General Agreement on Trade in Services (GATS), 1994, Art. XVII.

64 *Kofler*, ECTR 2021/2, p. 53; *Mason/Parada*, TNI 2018/92, p. 1185; *Mason/Parada*, VTR 2020/1, p. 187.

65 *WTO,* Marrakesh Agreement Establishing the World Trade Organization, Annex 1B General Agreement on Trade in Services (GATS), 1994, Art. XVII; *Nogueira*, ITS 2019/1, p. 18–19; see also *Forsgen* et al., TLO 2020, p. 48 for a cross-applicable analysis on a French DST based on the Commission's DST proposal; see also *Mitchell* et al., MJIL 2019/20, p. 100–101 for a similar analysis on a proposed Australian DST.

tax, would also not have benefitted from one of the General Exceptions to the Article XVII National Treatment obligation since Article XIV (e) of the GATS specifies that general exceptions from Article XVII include instances for "the imposition or direct collection of direct taxes"[66] but not indirect taxes.[67] Even without resort to the GATS, the Office of the US Trade Representative (USTR) has already launched investigations into, and subsequent retaliatory trade measures against French, Spanish, Italian, and Austrian digital services taxes, all of which have drawn heavily upon the Commission's own DST proposal.[68] The prospect of a wider, more economically damaging trade war between the EU and the USA, as well as the potential reputational costs to the EU of a finding against it for violating WTO law,[69] thus calls into question whether the DST proposal's benefits do in fact justify its costs.

2. The Digital Advertising Tax (DAT) – the Second Interim Solution

As previously explained, the DAT came into being as the Commission's second proposal for an EU-wide interim solution, following the failure of the DST proposal to achieve unanimity within the Council.[70] While the Council was initially united upon the idea of implementing an interim indirect tax measure targeting digital MNEs, the Member States clearly disagreed upon the scope of the measure.[71] What resulted was thus a draft of less ambitious scope than that of the DST proposal.

66 *WTO,* Marrakesh Agreement Establishing the World Trade Organization, Annex 1B General Agreement on Trade in Services (GATS), 1994, Art. XIV(e).

67 Ibid., Art. XIV; *Nogueira*, ITS 2019/1, p. 19.

68 *USTR*, Report on France's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974, 2019, p. 27; *Barloon,* USTR Notice of Action in the Section 301 Investigation of France's Digital Services Tax, Federal Register/Vol. 85, No. 137/Thursday, July 16, 2020/Notices, p. 43292; *USTR*, Report on Italy's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974, 2021, p. 10; *Peisch,* USTR Notice of Action in the Section 301 Investigation of Italy's Digital Services Tax, Federal Register/Vol. 86, No. 107/Monday, June 7, 2021/Notices, p. 30350; *USTR*, Report on Austria's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974, 2021, p. 10; *Peisch,* USTR Notice of Action in the Section 301 Investigation of Austria's Digital Services Tax, Federal Register/Vol. 86, No. 107/Monday, June 7, 2021/Notices, p. 30361; *USTR*, Report on Spain's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974, 2021, p. 10; *Peisch,* USTR Notice of Action in the Section 301 Investigation of Spain's Digital Services Tax, Federal Register/Vol. 86, No. 107/Monday, June 7, 2021/Notices, p. 30358.

69 *Kofler*, ECTR 2021/2, p. 53; *Mitchell* et al., MJIL 2019/20, p. 123.

70 *Mitchell* et al., MJIL 2019/20, p. 122.

71 *Council of the European Union*, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services – Political agreement, 6873/19, p. 2.

a) Key Elements

Article 4 of the draft DAT retained worldwide and EU-derived revenue thresholds for a taxable person similar to those of the DST.[72] The rules on attribution of taxable revenue to a Member State by virtue of users' location, on the calculation of the tax liability due in each Member State, and on the rate of 3% itself, also remained unchanged.[73]

The key difference lay with the reduced scope of digital services from which taxable revenues for the DAT were to be derived. As defined under Article 3 of the DAT proposal, the scope of digital services was to be confined *only* to the "the placing on a digital interface of targeted advertising by an entity".[74]

Another saliant difference lay in the fulfilment of a taxable person's obligations under Chapter 3 of the draft Directive. In contrast to the centralised notification, return submission and payment of EU-wide DST liability to a single Member State under the DST proposal,[75] a DAT-liable taxable person would instead have been required to carry out the same obligations to each and every single Member State where its DAT liability would have arisen.[76]

b) Analysis

The proposed DAT, being at its core an indirect tax imposed upon revenues generated from specified digital services by entities caught within the relevant revenue thresholds, bore large similarities to that of the DST, and much of the criticisms that have been directed within this article against the DST would therefore be of relevance to the DAT.

On one hand, the DAT shared the same merits as that of the DST by preventing the fragmentation of and distortion of competition within the Internal Market. The DAT, as a harmonised indirect tax applicable across the EU, would have removed

72 Ibid., p. 18.

73 *Council of the European Union*, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services – Political agreement, 6873/19, p. 19 (Art. 5) and 21 (Art. 7 and 8).

74 *Council of the European Union*, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services – Political agreement, 6873/19, p. 17.

75 *European Commission,* Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final, p. 29 and 31–32.

76 *Council of the European Union*, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services – Political agreement, 6873/19, p. 23 (Art. 10), 25 (Art. 14), 26 (Art. 16).

those threats to the Internal Market by superseding similarly purposed, yet uncoordinated measures implemented at the Member State level.[77]

On the other, the DAT, as a watered-down proposal, provides less of a remedy than that of the DST against the tax challenges posed by new business models within the digitalising economy.[78] While both proposals shared the same inherent flaw of taxing *revenues* which therein under-capture the value creation generated from the synergy of multi-sided platforms, user participation and data as a free resource,[79] the DAT is of an even more limited scope than that of the DST since it targets only one out of the three digital services within the DST's scope.[80] The reduction of under-taxation of large digital MNEs under the DAT would thus definitely be of a smaller impact than under the DST.

Moreover, it is arguable the DAT might have added more compliance costs to MNEs than that of the DST, which could also have been passed thereon to consumers as explained earlier.[81] Whereas Chapter 3 of the DST draft permitted enterprises to centralise the fulfilment of its DST liabilities within one Member State,[82] Chapter 3 of the DAT draft would have removed such centralisation to oblige enterprises to fulfil its DAT liabilities in each Member State where such liabilities arose.[83] Coupling such increased compliance costs with that of the limited substance of the DAT, questions would certainly have been raised on the few, if any, additional revenues that would have been raised for the purpose of protecting Member States' tax bases.

Next, the DAT proposal's focus on new digital business models,[84] like the DST proposal, does not by itself address comprehensively the wider BEPS strategies being employed by *both* traditional and digital enterprises to exploit tax loopholes resulting from the existing international corporate tax system's failure to adapt to the

77 *Council of the European Union*, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services – Political agreement, 6873/19, p. 7–8.

78 Ibid., p. 3.

79 *Plekhanova*, eJTR 2020/2, p. 304–305; *Zetzsche/Anker-Sørensen,* WTJ 2021/2, p. 219.

80 *Council of the European Union*, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services – Political agreement, 6873/19, p. 17.

81 *Kofler/Sinnig*, Intertax 2019/2, p. 199; *de Wilde*, Intertax 2018/6, p. 472.; *Sinnig*, ECTR 2018/6, p. 334; *Wissenschaftlicher Beirat beim Bundesministerium der Finanzen*, Stellungnahme zu den EU-Vorschlägen für eine Besteuerung der digitalen Wirtschaft, p. 5.

82 *European Commission,* Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final, p. 29 and 31–32.

83 *Council of the European Union*, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services – Political agreement, 6873/19, p. 23 (Art. 10), 25 (Art. 14), 26 (Art. 16).

84 Ibid., p. 8.

digitalising economy.[85] Neither proposal would thus have served as a definite comprehensive solution for the EU, with the one benefit of the DAT proposal over that of the DST being the inclusion of a draft sunset clause anticipating the DAT's demise after a few years' duration or pending the implementation of a comprehensive multilateral solution.[86]

Lastly, this author is also of the opinion that the DAT proposal, like the DST, would have precipitated a violation of WTO rules, specifically the Article XVII National Treatment obligation under the GATS,[87] as well as triggered retaliatory action by the USA in a wider trade war.[88] The economic and reputational damage[89] that would have arisen for the EU and its Member States would likely have outweighed the few benefits generated by the DAT proposal.

3. Corporate Taxation of a Significant Digital Presence (SDP) – the Commission's Comprehensive Solution

Herein, this article turns to the final Commission proposal for an EU-wide comprehensive solution, being the proposed Directive for corporate taxation of a significant digital presence (SDP), which was released alongside the Commission's first interim proposal.[90] As mentioned, the comprehensive solution nevertheless never achieved unanimity within the Council,[91] and was subsequently withdrawn,[92] in light of the Member States' considerations towards the parallel negotiations for a wider, multilateral solution under the auspices of the OECD/G20 Inclusive Framework on BEPS.[93]

The Commission's choice for a comprehensive solution proceeded upon a wider scope than that of simply imposing a new tax upon the largest digital MNEs' revenue generated from a few specified digital services. Instead, the proposal called for expanding upon the existing (physical) PE concept within customary international corporate tax law to formulate a new type of digital PE known as the SDP, therein

85 *Kofler/Sinnig*, Intertax 2019/2, p. 197; *de Wilde*, Intertax 2018/6, p. 472.
86 *Council of the European Union*, Note from the Presidency to the Permanent Representatives Committee/Council, Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services – Political agreement, 6873/19, p. 30 (Art. 25).
87 *WTO,* Marrakesh Agreement Establishing the World Trade Organization, Annex 1B General Agreement on Trade in Services (GATS), 1994, Art. XVII.
88 *Nogueira*, ITS 2019/1, p. 19.
89 *Kofler*, ECTR 2021/2, p. 53; *Mitchell* et al., MJIL 2019/20, p. 123.
90 *European Commission*, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final, p. 4.
91 *Council of the European Union*, Note from the General Secretariat of the Council to the Delegations, Bulgarian Presidency digital taxation roadmap, 9052/18, p. 4.
92 *European Commission,* Communication from the Commission to the European Parliament and the Council, Business Taxation for the 21st Century, COM(2021) 251 final, p. 5 (particularly footnote 20).
93 *Council of the European Union*, Note from the General Secretariat of the Council to the Delegations, Bulgarian Presidency digital taxation roadmap, 9052/18, p. 4.

allocating more corporate profits from an expanded list of digital activities,[94] while potentially catching more in-scope MNEs.[95]

a) Key elements

Clearly evincing the proposal's expanded, more ambitious scope, Article 2 of the draft Directive stated that it would have applied to "entities irrespective of where they are resident for corporate tax purposes, whether in a Member State or in a third country".[96] It must be noted that no mention was made of the entity's size, unlike the DST and DAT proposals. Nevertheless, the draft Directive would *not* have applied to all entities due to two limitations. The first would be in relation to the introduction of the concept of SDP under Article 4.[97] An entity would thus only have been caught under the draft Directive where it had possessed such an SDP, defined as existing when an entity carried on business through "the supply of digital services through a digital interface" *and* met *one or more* of the following conditions:

(a) the proportion of total revenues obtained in that tax period and resulting from the supply of those digital services to users located in that Member State in that tax period exceeds EUR 7 000 000;
(b) the number of users of one or more of those digital services who are located in that Member State in that tax period exceeds 100 000;
(c) the number of business contracts for the supply of any such digital service that are concluded in that tax period by users located in that Member State exceeds 3 000.[98]

Common to all the conditions and being similar to the DST and DAT proposals, the location of users would have been the connecting factor between an entity's SDP and a Member State. The second limitation would then be in relation to non-EU tax resident entities. In order to avoid conflicts with Member States' existing double taxation conventions with third countries, such entities would, under Article 2, only have been caught under the draft Directive should provisions similar to two of the Directive's Articles have been incorporated.[99] Those two draft Articles would have been Article 4 on the designation of an SDP, and Article 5 on the attribution of profits derived from an SDP to a Member State.[100]

94 *Hadzhieva,* Study requested by the European Parliament's Committee on Financial Crimes, Tax Evasion and Tax Avoidance (the TAX3 Committee), Policy Department A – Economic, Scientific and Quality of Life Policies, Impact of Digitalisation on International Tax Matters, IP/A/TAX3/2018-02, p. 56.
95 *Sinnig*, ECTR 2018/6, p. 329.
96 *European Commission*, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final, p. 14.
97 Ibid., p. 16.
98 Ibid.
99 Ibid., p. 7 and 14.
100 Ibid., p. 14, 16 and 17.

The definition of "digital services" for the purposes of Article 4 was then set out under Article 3 (5) to include an exhaustive yet wide-ranging list of digital services under Article 3 (5) and Annex II to the draft Directive but excluding those services listed under Annex III.[101]

Finally, Article 5 (1) would have allocated corporate profits attributable to an entity's SDP within a Member State to be taxed under that Member State's existing domestic corporate tax regime.[102] Thus, no new additional tax would have been imposed. However, Article 5 (1) would have only applied if, under Article 5 (2), such allocated profits would have been earned by the SDP if that presence were a "separate and independent enterprise" possessing like circumstances as defined in Article 5 (2), as determined "on a functional basis".[103] Article 5 thus conforms to the customary international profit allocation rules as set out within Article 7 of the OECD Model Tax Convention.[104]

b) Analysis

It would also have been likely that implementing the Commission's proposal for corporate taxation of an SDP as a comprehensive solution would have incurred more costs than benefits to the EU and its Member States, in light of the proposal's inherent design.

As with the DST and DAT proposals, this proposal would have cleared the relatively low bar of preserving the integrity and "proper functioning"[105] of the Internal Market as intended by the Commission,[106] assuming the proposal met the pre-requisites of compatibility with EU law and the Member States' existing international legal obligations. Implemented as a Directive, the proposal would have bound, by Article 288 TFEU,[107] *all* Member States as to the result to be achieved, in this case introducing across the EU an expanded notion of PE with the concept of SDP, as well as the correlative profit attribution rules. Such a result would have predicated the superseding of the Member States' unilateral measures targeting the corporate tax revenues lost as a result of the digitalising economy, and thereby preventing the fracturing of the Internal Market.[108]

More significantly, there remains serious doubt as to whether the proposal would have adequately protected the Member States' tax bases as envisioned among the Commission's stated goals for the proposal,[109] given the need to ensure the proposal's compatibility with the Member States' existing double taxation conventions

101 Ibid., p. 14–15.
102 Ibid., p. 17.
103 Ibid.
104 *Cui,* NTJ 2019/4, p. 843.
105 *European Commission*, Commission Staff Working Document, p. 21.
106 Ibid.
107 OJ C 326 of 26/10/2012, p. 172.
108 *European Commission*, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final, p. 5.
109 *European Commission*, Commission Staff Working Document, p. 22–23.

with third countries.[110] As noted above, Article 2 of the draft Directive indicates that the proposal would not have been applicable to entities tax resident in third countries with whom the Member States have not amended their existing double taxation conventions to include the proposal's expanded notion of PE and the associated profit allocation rules.[111] On one hand, it is known that many of the MNEs reaping huge benefits from the inability of the international corporate tax system to adapt to the digitalising economy are based in the USA,[112] and it is without doubt that re-negotiating EU Member States' double tax conventions with the USA to align with the Commission's comprehensive solution would have been protracted, or even impossible, given that the proposal might have been perceived as giving rise to discriminatory effects.[113] Thus, the likely limited rise in additional revenue as a result of the proposal, coupled with the likely high additional administrative costs of the proposal, makes it difficult to perceive significant additional benefits in protecting the Member States' tax bases.

In relation to the Commission's goal of combatting aggressive tax planning,[114] it would seem that this proposal would have, like the DST and DAT proposals, been able to *partially* counter wider BEPS strategies such as avoided PEs by digital MNEs. Yet, like the other interim proposals, it is clear that this comprehensive proposal's focus would have been geared largely towards remedying the inability of the international corporate tax system to adapt to new business models and value creation methods.[115] The SDP proposal envisioned that the expanded concept of PE under Article 4 would have included business involving the supply of *digital* services where such supply exceeded certain revenue, user participation or business contract thresholds.[116] Thus, the proposal does not, on its own, provide a comprehensive solution to the larger BEPS issues incorporating economic scale without

110 *European Commission*, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final, p. 7.

111 Ibid., p. 14.

112 *Hadzhieva,* Study requested by the European Parliament's Committee on Financial Crimes, Tax Evasion and Tax Avoidance (the TAX3 Committee), Policy Department A – Economic, Scientific and Quality of Life Policies, Impact of Digitalisation on International Tax Matters, IP/A/TAX3/2018-02, p. 14; *High Level Expert Group on Taxation of the Digital Economy*, Report of the Expert Group for the European Commission, 2014, p. 24; *Collin/Colin*, Mission d'expertise sur la fiscalité de l'économie numérique – Rapport aux Ministres, p. 18; https://taxfoundation.org/digital-tax-europe-2020/ (27/6/2022).

113 *Sinnig*, ECTR 2018/6, p. 330 (particularly footnote 72); *Hadzhieva,* Study requested by the European Parliament's Committee on Financial Crimes, Tax Evasion and Tax Avoidance (the TAX3 Committee), Policy Department A – Economic, Scientific and Quality of Life Policies, Impact of Digitalisation on International Tax Matters, IP/A/TAX3/2018-02, p. 59; *Mason/Parada*, TNI 2018/92, p. 1197.

114 *European Commission*, Commission Staff Working Document, (fn. 32), p. 22–23.

115 *Devereux/Vella*, BTR 2018/4, p. 389; *Hadzhieva,* Study requested by the European Parliament's Committee on Financial Crimes, Tax Evasion and Tax Avoidance (the TAX3 Committee), Policy Department A – Economic, Scientific and Quality of Life Policies, Impact of Digitalisation on International Tax Matters, IP/A/TAX3/2018-02, p. 56.

116 *European Commission*, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final, p. 16.

mass, fragmentation and harnessing of intangibles that are now being employed by *both* digital and traditional enterprises within the digitalising economy.

Moreover, several issues remain with this comprehensive solution being able to fulfil the Commission's goal of achieving "social fairness" and "a level playing field".[117] The first key concern lies with Article 5 whereby *profits* attributable to an SDP within a Member State would have been subject to corporate tax liability within that Member State.[118] Article 5 therein reflects the Commission's flawed pre-occupation with the principle of aligning taxation of profits with value creation.[119] As mentioned previously, value to an enterprise can be generated within the digitalising economy without involving the passing of monetary consideration, and therefore would not be captured as profit or revenue within corporate accounts.[120] Taxation of only corporate profits from digital services can thus result in under-taxation of value generated for an enterprise exploiting the digitalising economy.[121] Such criticism of utilising profits or revenue as a proxy for value creation within the digitalising economy can also be directed towards the flawed employment of revenue thresholds as one of the conditions for identifying an SDP within a Member State under Article 4.[122] Another key criticism would be Article 4's use of uniform thresholds throughout all Member States to identify an SDP for profit allocation to the Member States, instead of measuring SDPs relative to a Member State's economic size and population.[123] Naturally, such uniform thresholds would affect Member States differently, with the thresholds being too high for smaller Member States and too low in larger ones.[124]

Finally, while questions remain as to whether the proposal's employment of thresholds to identify an SDP would have been compatible with the anti-discrimination prohibitions under the Fundamental Freedoms,[125] it is likely that the proposal would have prompted accusations of protectionism, and thereafter trade countermeasures by the EU's trading partners against the EU.[126] Absent a comprehensive solution being implemented at the multilateral level, what little benefits gained from unilateral comprehensive measures by the EU to counter the corporate tax chal-

117 *European Commission*, Commission Staff Working Document, , p. 23.
118 *European Commission*, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final, p. 17.
119 *Devereux/Vella*, BTR 2018/4, p. 393 and 402.
120 *Devereux/Vella*, Intertax 2018/6/7, p. 557; see also *Cooper*, BIT 2021/11/12, p. 5.
121 *Zetzsche/Anker-Sørensen,* WTJ 2021/2, p. 219.
122 *European Commission*, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final, p. 16.
123 *Sinnig*, ECTR 2018/6, p. 330–331; *Hadzhieva,* Study requested by the European Parliament's Committee on Financial Crimes, Tax Evasion and Tax Avoidance (the TAX3 Committee), Policy Department A – Economic, Scientific and Quality of Life Policies, Impact of Digitalisation on International Tax Matters, IP/A/TAX3/2018-02, p. 62; *Zetzsche/Anker-Sørensen,* WTJ 2021/2, p. 232.
124 Ibid.
125 *Mason/Parada*, TNI 2018/92, p. 1197.
126 Ibid.; *Kofler*, ECTR 2021/2, p. 53; *Mitchell* et al., MJIL 2019/20, p. 123.

lenges of the digitalising economy would certainly have been offset by losses to the EU in an ensuing trade war with its trading partners such as the USA.

C. The Multilateral Two-Pillar Solution

Amidst the failure of the Commission's proposals to achieve unanimity among the Member States, a multilateral Two-Pillar Solution to address the tax challenges of the digitalising economy was finally agreed upon on 8th October 2021 by 136 countries and jurisdictions engaged in negotiations under the OECD/G20 Inclusive Framework on BEPS (IF).[127] The following subsections shall provide a breakdown of the key features of both Pillars.

I. Pillar One – New Profit Reallocation Rules and Taxing Rights

Pillar One's objective is focused on adapting the present customary international corporate tax system to new business models,[128] by mainly introducing novel corporate profit reallocation rules and taxing rights for jurisdictions where the "largest and most profitable"[129] MNEs possess customers and/or users.[130] It is expected that the new profit reallocation rules and taxing rights under Pillar One will be implemented among signatory jurisdictions by way of a multilateral convention.[131] Concurrently, that multilateral convention implementing Pillar One will mandate that all convention parties "remove all Digital Services Taxes and other relevant similar measures with respect to all companies", while placing a moratorium on introducing similar measures in future.[132]

As regards its scope, Pillar One will apply to *all* MNEs possessing "global turnover above 20 billion euros" and profitability before tax being "above 10%", apart from those engaged in extractives and regulated financial services.[133] It is also envisaged that the global turnover threshold will be lowered to EUR 10 billion pending successful implementation of Pillar One under the original thresholds and a review being conducted 7 years after the entry into force of the multilateral convention implementing Pillar One.[134] It must be noted at the outset that the agreed Pillar One, while retaining revenue thresholds for in-scope MNEs, omits an "activity test" meant to limit in-scope MNEs to those engaged in Automated Digital Services

127 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 1.
128 *OECD*, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint, p. 11.
129 *OECD*, Highlights Brochure: Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 4.
130 Ibid.
131 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 6.
132 Ibid., p. 7.
133 Ibid., p. 1.
134 Ibid.

(ADS) such as sale of user data and social media platforms, and in Consumer-Facing Businesses (CFB) such as e-commerce.[135]

In relation to the new profit reallocation rules, Pillar One requires 25% of "residual profit" generated by in-scope MNEs, known as Amount A, to then be allocated among "market jurisdictions with nexus".[136] Residual profit has been defined as "profit in excess of 10% of revenue" as determined by financial accounting, while market jurisdictions with nexus will be identified using "special purpose nexus" rules.[137] Under such nexus rules, a market jurisdiction will in general qualify as a market jurisdiction with nexus "when the in-scope MNE derives at least 1 million euros in revenue from that jurisdiction".[138] In tandem, a lower qualifying nexus rule of EUR 250 000 in revenue will exist for "smaller jurisdictions with GDP lower than 40 billion euros".[139] Separately, MNEs' revenue as referred to in the profit reallocation and nexus rules would be confined to revenue sourced from "end market jurisdictions where goods or services are used or consumed" under revenue sourcing rules, the details of which for defined types of transactions are awaited.[140] Lastly, Amount A will be apportioned among market jurisdictions with a nexus using "a revenue-based allocation key", i.e. according to the level of revenues generated from market jurisdictions as referred to in the revenue sourcing rules.[141]

In order to preserve tax certainty and in particular, to prevent double taxation of Amount A, Pillar One therefore provides for "mandatory and binding" "dispute prevention and resolution mechanisms" which in-scope MNEs will be able to utilise in relation "to all issues related to Amount A".[142]

II. Pillar Two – A Novel Global Minimum Corporate Tax Rate

By contrast, Pillar Two aims to place "a floor on tax competition on corporate income tax" mainly through introducing Global anti-Base Erosion (GloBE) rules.[143] The GloBE rules comprise two rules, namely the Income Inclusion Rule (IIR) and the Undertaxed Payment Rule (UTPR), which together will ensure a global minimum tax rate of 15% is applied to a larger group of MNEs than those caught under

135 *OECD*, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint, p. 22, 24–25, and 37–38.
136 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 2.
137 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 1–2.
138 Ibid, p. 1.
139 Ibid.
140 Ibid., p. 2.
141 *OECD*, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint, p. 120.
142 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 2.
143 *OECD*, Highlights Brochure: Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 4.

Pillar One.[144] Unlike Pillar One which is meant to be implemented via a multilateral convention, the GloBE rules will be implemented at IF members' option as harmonised domestic rules.[145] It is also anticipated that the GloBE rules will be implemented in the USA alongside its existing Global Intangible Low-Taxed Income (GILTI) regime,[146] which imposes a minimum tax upon excess profits earned from intangible property owned by non-US corporations controlled by US-based MNEs.[147]

As regards their scope, the GloBE rules will be applicable to entities and PEs forming part of an MNE whose Ultimate Parent Entity (UPE) records revenue of EUR 750 million or more within its consolidated financial statements, known as the "consolidated revenue test".[148] UPEs that are considered "[g]overnment entities, international organisations, non-profit organisations, pension funds or investment funds" will be exempt from the rules although their revenue will be included under the consolidated revenue test.[149] The GloBE rules next envision that the tax jurisdiction of each entity and PE of the in-scope MNE be determined.[150] Each entity will then calculate its covered taxes paid, and adjusted net income or loss made (the GloBE Income or Loss), for its tax jurisdiction, with appropriate allocations made to its associated PEs.[151] Subsequently, that MNE's effective tax rate (ETR) within each of its applicable tax jurisdictions will be ascertained by dividing the total covered taxes paid by its entities within each jurisdiction by the total GloBE income or loss made by its entities within the same jurisdiction.[152]

Should an in-scope MNE's ETR for a particular tax jurisdiction be found to fall below the global minimum tax rate of 15 %, the IIR will apply top-up tax for that low-tax jurisdiction imposed upon the MNE's UPE.[153] The top-up tax is determined by multiplying the MNE's Jurisdictional Excess Profit from the low-taxed jurisdiction with the Top-up Tax percentage.[154] The Top-up Tax percentage is de-

144 Ibid.; *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 3.
145 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 3.
146 Ibid., p. 5.
147 https://www.wsj.com/articles/new-tax-on-overseas-earnings-hits-unintended-targets-1522056600 (27/6/2022); https://taxfoundation.org/multinational-tax/ (27/6/2022).
148 *OECD*, Fact sheets: Overview of the Key Operating Provisions of the GloBE Rules, p. 2; *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 4.
149 *OECD*, Fact sheets: Overview of the Key Operating Provisions of the GloBE Rules, p. 2.
150 Ibid.
151 Ibid., p. 3–4.
152 Ibid., p. 5; *OECD*, Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar Two), p. 28.
153 *OECD*, Fact sheets: Overview of the Key Operating Provisions of the GloBE Rules, p. 6; *OECD*, Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar Two), p. 11.
154 *OECD*, Fact sheets: Overview of the Key Operating Provisions of the GloBE Rules, p. 5.

rived from deducting the MNE's ETR for that low-tax jurisdiction from the 15% global minimum tax rate.[155] The Jurisdiction Excess Profit is obtained by deducting the Substance Based Income Exclusion or Substance Carve-Out applicable to the MNE within the low-tax jurisdiction from the MNE's GloBE income within that same low tax jurisdiction, thereby excluding "an amount of income that is 5% of the carrying value of tangible assets and payroll"[156].[157] The MNE in question can also benefit from the *de minis* exclusion which encompasses jurisdictions where the MNE obtains GloBE revenue of less than EUR 10 million *and* GloBE losses or income being less than EUR 1 million averaged over three years.[158] To the extent that an MNE's GloBE income for a low-taxed jurisdiction is not subject to the IIR, the UTPR operates as a backstop mechanism to deny deductions to or require appropriate corrections from the MNE's entities within that same low-taxed jurisdiction.[159]

On top of the domestic GloBE rules, Pillar Two also introduces a treaty-based rule, the Subject to Tax Rule (STTR).[160] The rule grants developing IF jurisdictions from which specified related party payments such as interest and royalties originate taxing rights on such payments, should such payments be taxed by recipient IF jurisdictions at corporate tax rates below the STTR minimum of 9%.[161] As and when such developing origin jurisdictions so request, those recipient jurisdictions would incorporate the STTR into their double tax conventions with those developing origin jurisdictions.[162] It is envisioned that the developing IF jurisdictions' taxing rights under the STTR would be calculated by deducting from the 9% minimum rate the tax rate imposed by the recipient IF jurisdictions.[163]

155 Ibid.; *OECD*, Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar Two), p. 29.
156 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 4.
157 *OECD*, Fact sheets: Overview of the Key Operating Provisions of the GloBE Rules; *OECD*, Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar Two), p. 29.
158 *OECD*, Fact sheets: Overview of the Key Operating Provisions of the GloBE Rules, p. 5.
159 Ibid., p. 3; *OECD*, Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar Two), p. 12; *Englisch*, ECTR 2021/3, p. 137; *European Commission*, Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM(2021) 823 final, p. 6.
160 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 3.
161 Ibid., p. 3 and 5; *OECD*, Highlights Brochure: Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 4.
162 Ibid.
163 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 5.

D. Commentary on the Two-Pillar Solution

This Section shall provide a comparative analysis of the Two-Pillar Solution against the Commission's Interim and Comprehensive proposals, while making brief comments on the Two Pillar Solution's drawbacks and possible alternative solutions.

The first immediate improvement that can be discerned from implementing the multilateral Two-Pillar Solution within the EU legal order over that of the Commission's Interim and Comprehensive proposals would be the possibility of having the EU avoid bruising trade conflicts with its trading partners such as the USA while preserving the integrity of the Internal Market.[164] As regards ensuring the Internal Market's integrity, it must be noted that all EU Member States have in principle, notwithstanding continuing on-off objections from Poland and Hungary, come round to pledge their support to the Two-Pillar Solution,[165] with the European Commission also moving swiftly to introduce a proposed Directive implementing within the EU legal order the domestic GloBE rules of Pillar Two.[166] As for Pillar One, it is anticipated that all Member States would be able to implement in equivalent fashion the new corporate profit reallocation rules and taxing rights via the multilateral convention to be proposed by the OECD.[167] Thus, across all Member States' tax jurisdictions, in-scope MNEs would expect to be subject to substantially similar rules in accordance with the Two-Pillar Solution, provided such rules are compatible with the imperatives of the Fundamental Freedoms.[168] As regards avoiding trade conflicts, the EU and its major trading partners such as the USA, in implementing the Two-Pillar Solution, would thus be in agreement of their respective shares of global corporate tax revenue, and the EU would no longer need to consider the Commission's unilateral proposals which have drawn criticisms of populist protectionism and threats of trade countermeasures from the USA.[169] Nevertheless, such optimism comes with the caveat that the US Congress would still be willing to ratify and implement the Biden Administration's agreement to the Two-Pillar Solu-

164 *European Commission*, Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM(2021) 823 final, p. 1; https://gop-waysandmeans.house.gov/brady-applauds-eu-abandonment-of-tax-proposal-on-digital-services/ (27/6/2022).

165 *OECD*, Members of the OECD/G20 Inclusive Framework on BEPS joining the October 2021 *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* as of 4 November 2021, p. 1–2; https://home.kpmg/xx/en/home/insights/2021/10/etf-459-g20-finance-ministers-endorse-key-components-of-the-two-pillars.html (27/6/2022); https://www.reuters.com/markets/europe/eu-fails-agree-corporate-tax-reform-hungary-vetoes-overhaul-2022-06-17/ (27/6/2022).

166 *European Commission*, Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM(2021) 823 final, p. 1.

167 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 6.

168 *Englisch*, ECTR 2021/3, p. 136.

169 *Mason/Parada*, TNI 2018/92, p. 1184 and 1197; *Kofler*, ECTR 2021/2, p. 53; *Mitchell* et al., MJIL 2019/20, p. 123.

tion,[170] bearing in mind the uncertain congressional mid-term elections in November 2022.

One other improvement of the Two-Pillar Solution from that of the Commission's proposals would be the significance of Pillar Two in achieving a near-global agreement on a minimum corporate tax rate of 15% among IF members, thereby combatting the devastating effects of corporate tax competition as exacerbated by the digitalising economy.[171] As noted in previous Sections, the key focus for the Commission in introducing its Interim and Comprehensive proposals would be to enable the Member States' corporate tax systems to adapt to effectively taxing new digital business models, and not to combat the triple confluence of economic scale without mass, fragmentation and intangibles which have come to characterise BEPS strategies utilised by *both* digital *and* traditional enterprises within the digitalising economy.[172] On one hand, the abandonment of the Commission's Interim and Comprehensive proposals lays to rest early criticisms of the impracticality of ring-fencing the digitalising economy and discriminating against a handful of digital businesses.[173] On the other, while such criticisms could have been countered by noting that the Commission had intended to implement its Interim and Comprehensive proposals in conjunction with its Common Consolidated Corporate Tax Base (CCCTB) reforms which were intended to combat corporate aggressive tax avoidance generally,[174] it must also be noted that the combined reforms absent near-global minimum tax rates would never have been as effective in reducing tax competition as that of the Pillar Two's GloBE rules which do possess such a rate.

While Pillar Two's ground-breaking success of achieving a global minimum corporate tax rate should be lauded, the author does have some reservations in relation to aspects of the GloBE rules. The first would be in relation to the operation of the IIR and the UTPR, the former proposing that an in-scope MNE's UPE be made liable for Top-Up Tax resulting from jurisdictions where the MNE possesses low ETRs,[175] and the latter being only applicable upon that MNE's entities within the

170 *Brauner,* Intertax 2022/1, p. 4; *Schön*, WTJ 2021/3, p. 371.

171 *OECD*, Highlights Brochure: Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 3–4.

172 *Devereux/Vella*, BTR 2018/4, p. 389; *Hadzhieva,* Study requested by the European Parliament's Committee on Financial Crimes, Tax Evasion and Tax Avoidance (the TAX3 Committee), Policy Department A – Economic, Scientific and Quality of Life Policies, Impact of Digitalisation on International Tax Matters, IP/A/TAX3/2018-02, p. 56.

173 *Brauner,* Intertax 2022/1, p. 3; *Devereux/Vella*, Intertax 2018/6/7, p. 550.

174 *European Commission,* Press Release – Commission proposes major corporate tax reform for the EU, IP/16/3471, p. 1–2; *European Commission,* Communication from the Commission to the European Parliament and the Council, Time to establish a modern, fair and efficient taxation standard for the digital economy, COM(2018) 146 final, p. 6–7; *Sinnig*, ECTR 2018/6, p. 331.

175 *OECD*, Fact sheets: Overview of the Key Operating Provisions of the GloBE Rules, p. 6; *OECD*, Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar Two), p. 11.

low-tax jurisdiction to the extent that the IIR does not apply.[176] One should firstly note the criticism directed against the GloBE rules that such rules operate in effect to entrench inter-State inequity by protecting the tax bases of developed states at little corresponding benefit to the developing ones.[177] Nevertheless, this author is also of the opinion that outright reparations for colonialisation would be more appropriate to redressing inter-State inequity than through global corporate tax reform. One must also not forget Pillar Two's compromise in favour of developing States through the treaty-based STTR benefitting such States.[178] Another reservation would concern the Substance Carve-Out that would be available to in-scope MNEs in the process of calculating the top-up tax that would be made liable to such MNE's UPEs.[179] It is conceivable that in-scope MNEs would perceive the Substance Carve-Out as an avenue for renewed tax planning since the Carve-Out would incentivise such MNEs to shift more assets to low-tax jurisdictions in order to benefit from income exemptions under the Carve-Out.[180] Such a result would thus run counter to the main goal of the GloBE rules to "place a floor on tax competition on corporate income tax".[181] One other reservation would be in relation to the retention of the USA's GILTI regime alongside Pillar Two's GloBE rules within the USA tax jurisdiction.[182] While details remain to be fleshed out as to how the coexistence would be sustained, one key concern would be whether the GILTI regime would accord more taxable income to the USA tax jurisdiction than would be the case if the GloBE rules solely existed,[183] thereby prompting more disputes between the USA and other jurisdictions claiming that income.

Moving towards Pillar One which is meant to adapt the customary international corporate tax system towards new business models within the digitalising economy,[184] there also remain doubts as to the improvements that could be achieved in

176 *OECD*, Fact sheets: Overview of the Key Operating Provisions of the GloBE Rules, p. 3; *OECD*, Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar Two), p. 12; *Englisch*, ECTR 2021/3, p. 137; *OECD*, Tax Challenges Arising from the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar Two), p. 6.

177 *Brauner,* Intertax 2022/1, p. 2 and 4; *Baraké* et al., Revenue Effects of the Global Minimum Tax: Country-By-Country Estimates, EU Tax Observatory Note No. 2 October 2021, p. 3; *Ozai,* CJLJ 2020/33, p. 339; *Fedan,* BIT 2021/8, p. 398–399.

178 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 3.

179 Ibid., p. 4.

180 *Baraké* et al., Minimizing the Minimum Tax? The Critical Effect of Substance Carve-Outs, EU Tax Observatory Note No. 1 July 2021, p. 3; *Hey,* Intertax 2021/1, p. 12–13; *Dourado*, Intertax 2020/2, p. 154.

181 *OECD*, Highlights Brochure: Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 4.

182 Ibid., p. 5.

183 *Gadea,* La Imposición Mínima Global de los Grupos de Sociedades OCDE, Trabajo para el editor, en el marco del Grupo de Investigación "Fiscalidad Empresarial (GI-19/1)" de la Universidad a Distancia de Madrid, 2021, p. 23; *Hey,* Intertax 2021/1, p. 11; *Schön*, WTJ 2021/3, p. 377.

184 *OECD*, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint, p. 11.

comparison to the Commission's Interim and Comprehensive proposals. One first turns to criticisms surrounding the restrictiveness of Pillar One's revenue and profitability thresholds.[185] In particular, it has been noted that Amazon, labelled by politicians as one of the biggest targets of global corporate tax reform, would have fallen outside the scope of Pillar One for 2020 since it then possessed profitability of 6.3%, which is well below the Pillar One profitability trigger of 10% for in-scope MNEs.[186] By contrast, Amazon's 2020 global sales revenue of USD 386 billion and Europe-wide sales revenue of EUR 44 billion via a Luxembourg-based subsidiary,[187] would easily have fulfilled the revenue thresholds under the Commission's proposals for a DST and corporate taxation of an SDP, being proposals which would now be barred from implementation under Pillar One.[188] While the Statement on the Two-Pillar Solution has indicated that the global revenue thresholds for in-scope MNEs could be lowered pending the success of the current thresholds,[189] it remains to be seen whether such flexibility would be extended to the profitability threshold as well.

The next criticism turns to Pillar One's new profit allocation rules regarding Amount A, which allocate to end-market jurisdictions *a portion*, being only 25%, of MNEs' excess or supernormal profits, i.e. profits above "normal" profit margins deemed as 10% of revenue,[190] as earned from certain as-yet-unspecified transactions conducted within those end-market jurisdictions under the digitalising economy.[191] On one hand, granting end-market jurisdictions taxing rights over such supernormal profits should be welcomed since these new rights attempt to fulfil the objective of aligning taxation where value is created which current physical PE rules do not,[192] and counters the current prevalence of such profits being undertaxed due to BEPS strategies combining economic scale without mass with fragmentation and use of intangibles.[193] Moreover, Pillar One's co-existence with the existing international corporate taxation system by subjecting "normal" profits to the latter would avoid concerns of double taxation that have been directed against the Commission's Interim and Comprehensive proposals.[194] The flexibility of Pillar One's nexus rules should also be welcomed since they seek to address the concerns of both smaller

185 *Valenduc,* ETUI PB 2021/10, p. 6; *Brauner,* Intertax 2022/1, p. 3; *Cooper*, BIT 2021/11/12, p. 7–8.
186 https://www.theguardian.com/technology/2021/jun/06/global-g7-deal-may-let-amazon-off-hook-on-tax-say-experts (27/6/2022).
187 Ibid.
188 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 7.
189 Ibid., p. 1.
190 Ibid., p. 2.
191 *Valenduc,* ETUI PB 2021/10, p. 5.
192 Ibid.; *Dourado,* Intertax 2021/1, p. 4.
193 *Devereux/Vella*, BTR 2018/4, p. 393 and 402.
194 *Hadzhieva,* Study requested by the European Parliament's Committee on Financial Crimes, Tax Evasion and Tax Avoidance (the TAX3 Committee), Policy Department A – Economic, Scientific and Quality of Life Policies, Impact of Digitalisation on International Tax Matters, IP/A/TAX3/2018-02, p. 58 and 61.

and larger jurisdictions,[195] in contrast to the legitimate concerns surrounding the rigidity of EU-wide revenue, user participation and business contract thresholds under the Commission's proposal for corporate taxation of an SDP.[196]

On the other, Pillar One's Amount A rules unfortunately commit the same error as that of the Commission's Interim and Comprehensive proposals in relying upon existing financial data such as revenue and profits as a proxy for estimating value creation within the digitalising economy. As previously mentioned in Section B.II, this author aligns with Devereux and Vella's views in doubting the usefulness of having the taxation of profits align with value creation as a guiding principle in adapting the international corporate tax system to emerging business models within the digitalising economy.[197] In light of the shortcomings of existing financial data concepts such as revenue and profits, a more appropriate solution in estimating value generated within the digitalising economy could be that of Data Point Pricing as formulated by Zetzsche and Anker-Sørensen.[198]

Under Data Point Pricing, digital businesses harnessing "data collection and analysis" would be required to offer a price to their users reflecting the valuation of data generated by those businesses from their users.[199] Thereon, those users would be given the option to utilise the amount reflecting the value of their data as consideration for utilising the digital business's services.[200] Should the users wish to have that amount paid to them in cash, the users would then have to locate alternative non-cash means of consideration such as cession of rights to proceed with utilising the digital business's services.[201]

One significant improvement of Data Point Pricing over that of Pillar One's Amount A rules as well as the Commission's Interim and Comprehensive Proposals is that Data Point Pricing forces new business models relying upon user participation and data as a free resource to translate active and passive engagement by users into recordable financial data.[202] Through such financial data, tax authorities would be able to follow a tax-generating financial trail that incorporates valuations of raw data, records of value added to that raw data when such data is processed by software such as digital algorithms, and ultimately a true global valuation of digital multi-sided platforms offered by these new business models.[203] Arguments might be made that such a solution might amount to the much-criticised ring-fencing of the

195 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 1.
196 *Sinnig*, ECTR 2018/6, p. 330–331; *Hadzhieva,* Study requested by the European Parliament's Committee on Financial Crimes, Tax Evasion and Tax Avoidance (the TAX3 Committee), Policy Department A – Economic, Scientific and Quality of Life Policies, Impact of Digitalisation on International Tax Matters, IP/A/TAX3/2018-02, p. 62; *Zetzsche/Anker-Sørensen,* WTJ 2021/2, p. 232.
197 *Devereux/Vella*, BTR 2018/4, p. 393 and 402.
198 *Zetzsche/Anker-Sørensen,* WTJ 2021/2, p. 234.
199 Ibid., p. 236.
200 Ibid.
201 Ibid.
202 Ibid., p. 237.
203 Ibid.

digitalising economy,[204] but one could counter in return that exploitation of data as the "new oil"[205] represents a new business model unique to the digitalising economy and continues to undercompensate users for their data.[206] Where "datafied"[207] digital businesses continue to record high valuations,[208] as well as lower ETRs than traditional businesses,[209] data point pricing might prove to be first step in achieving fairer taxation of digital businesses and consequently levelling the playing field among all types of businesses.

Moreover, there remain two other reservations regarding Amount A rules' adaptation of transfer pricing concepts normally utilised on a case by-case basis.[210] The first relates to deeming 10% to be the "normal" profit margin for *all* in-scope MNEs.[211] Imposing this universal figure would risk distorting competition within the digitalising economy since different digital business models would possess varying normal profit margins and supernormal profit amounts corresponding to the realities of their different revenue-generating digital activities.[212] The second relates to fixing Amount A as 25% of supernormal profits for *all* in-scope MNEs.[213] According to the OECD's Report on Pillar One Blueprint, the rationale for the reallocation percentage reflects an acknowledgment that a substantial portion of in-scope MNEs supernormal profits would be generated from activities "such as trade intangibles, capital and risk"[214] that would be unrelated to Amount A.[215] Even assuming the rationale is sound, the universal reallocation percentage would still risk distorting competition among in-scope MNEs since different MNEs would deem different percentages of their supernormal profits to be generated from Amount A activities.[216]

Overall, in respect of tackling the tax challenges of the digitalising economy, the Two-Pillar Solution generates mixed improvements when compared with the Commission's Interim and Comprehensive proposals. Certainly, in addressing the BEPS strategies that both digital and traditional enterprises have employed via economic

204 *Brauner,* Intertax 2022/1, p. 3; *Devereux/Vella*, Intertax 2018/6/7, p. 550.
205 *Zetzsche/Anker-Sørensen,* WTJ 2021/2, p. 235; see also *Cui,* NTJ 2019/4, p. 850–851.
206 *Zetzsche/Anker-Sørensen,* WTJ 2021/2, p. 237; *Cui,* NTJ 2019/4, p. 848.
207 *Zetzsche/Anker-Sørensen,* WTJ 2021/2, p. 220.
208 Ibid.; *Gautier/Lamesch*, CESifo Working Papers 2020/8056, p. 2.
209 *High Level Expert Group on Taxation of the Digital Economy*, Report of the Expert Group for the European Commission, 2014; *European Commission,* Communication from the Commission to the European Parliament and the Council, Time to establish a modern, fair and efficient taxation standard for the digital economy, COM(2018) 146 final, p. 4.
210 *Valenduc,* ETUI PB 2021/10, p. 4.
211 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 2.
212 *Valenduc,* ETUI PB 2021/10, p. 4; *Cooper*, BIT 2021/11/12, p. 8.
213 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 2.
214 *OECD*, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint, p. 124.
215 Ibid.
216 *Valenduc,* ETUI PB 2021/10, p. 4; *Cooper*, BIT 2021/11/12, p. 8.

scale without mass, fragmentation and use of intangibles, Pillar Two's GloBE rules imposing a global minimum tax rate of 15% would be of greater effect in tackling tax competition exacerbated by the digitalising economy than that of the Commission's proposals. However, as regards to adapting the customary international corporate tax system to new business models under the digitalising economy, it remains likely that the focus upon existing financial data such as revenues and profits under Pillar One and the Commission's proposals would fall short in ensuring that value creation by digital business models is appropriately captured for taxation. A more radical solution in capturing the true global value generated by digital business models' activities would thus be necessary to comprehensively protect IF Members' tax bases, while ensuring "social fairness" and "a level-playing field" between digital and traditional businesses.[217]

E. Conclusion

Where the European Union's characteristic supranational governance or the Monnet method has been presented as a new way forward for its Member States to confront transnational issues affecting all of them,[218] this article has demonstrated that the EU's partial employment of the method has not been successful in implementing the Commission's Interim and Comprehensive proposals to confront one key transnational issue in corporate taxation, being the tax challenges of the digitalising economy.[219] As previously illustrated, the proposals presented common approaches to problem solving in line with the Monnet Method,[220] be it through the DST, DAT or corporate taxation of an SDP. Yet, the legislative avenues towards implementing such proposals ultimately relied upon intergovernmental channels such as Articles 113 and 115 TFEU,[221] with a central concern of those Member States withholding their support being the imperative not to have such unilateral proposals jeopardise the delicate multilateral negotiations for a comprehensive global solution occurring simultaneously.[222]

Even if the Commission's proposals had been successfully implemented, major criticism of their legitimacy and effectiveness would have surfaced. Firstly, it has

217 *European Commission*, Commission Staff Working Document, p. 23.

218 https://www.ecb.europa.eu/press/key/date/2017/html/ecb.sp170504.en.html (11/11/2021); *Grin*, in: Jean Monnet Foundation for Europe (ed.), p. 13–15; *Monnet*, in: Laffont (ed.), p. 53 and 106–107.

219 *European Commission,* Communication from the Commission to the European Parliament and the Council, Business Taxation for the 21st Century, COM(2021) 251 final, p. 5 (particularly footnote 20); *European Parliament*, Resolution of 29 April 2021 on digital taxation: OECD negotiations, tax residency of digital companies and a possible European Digital Tax, P9_TA(2021)0147, p. 4.

220 *European Commission*, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final, p. 5.

221 OJ C 326 of 26/10/2012, p. 94–95.

222 *Council of the European Union*, Note from the General Secretariat of the Council to the Delegations, Bulgarian Presidency digital taxation roadmap, 9052/18, p. 4.

been argued that the global scope of the tax challenges of the digitalising economy stretches far beyond the limited EU-wide nature of the challenge in reconciling domestic corporate exit taxes with the Internal Market. Almost all States, as a result of benefitting from growing trade liberalisation and a globalised, digitalising economy, would have been forced to adapt their corporate tax systems to deal with the former challenge,[223] thus necessitating a globally harmonised solution preferable to the Commission's limited EU-wide solutions.

Secondly, the Commission's proposals would have drawn charges of protectionism,[224] thus triggering damaging trade countermeasures against the EU from one of the EU's largest trading partners, the USA.[225] As argued previously, the underlying rationale for the Commission's proposals, given the then-uncertain outcome of multilateral negotiations under the Inclusive Framework,[226] was to have prioritised preserving the Internal Market's integrity by imposing harmonised supranational solutions to supersede the Member States' parallel yet uncoordinated unilateral measures dealing with the same issues.[227] Yet, such unilateralism would naturally have drawn a strong retaliatory response from the USA who would have condemned the proposals' revenue thresholds as being designed to target USA-based digital MNEs.[228] The resulting trade war would have been to neither the EU's nor the USA's advantage. Moreover, should the view that the DST and DAT would have violated Articles XVII National Treatment of the GATS be proven correct, the EU would also have suffered reputational damage as a supposed adherent to the Rule of Law.[229]

Other criticisms include the Commission's misconceived objective in aligning taxation of profits with value creation,[230] which has been shown in this article as missing the proverbial forest for the trees. As previously demonstrated, value creation by new business models within the digitalising economy through multisided platforms, are not easily captured by existing financial data such as revenue and profits.[231] The Commission's proposals had all proposed been aimed at tackling un-

223 https://gop-waysandmeans.house.gov/house-ways-and-means-senate-finance-leaders-statement-on-unilateral-digital-services-taxes-oecd-negotiations-to-address-the-tax-challenges-of-the-digitalization-of-the-economy/ (27/6/2022); *OECD*, Highlights Brochure: Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 3.

224 *Mason/Parada*, TNI 2018/92, p. 1197; *Kofler*, ECTR 2021/2; *Mitchell* et al., MJIL 2019/20, p. 123.

225 See fn. 68 for examples.

226 *European Parliament*, Resolution of 29 April 2021 on digital taxation: OECD negotiations, tax residency of digital companies and a possible European Digital Tax, P9_TA(2021)0147, p. 7–9.

227 *European Commission*, Commission Staff Working Document, (fn. 32), p. 79–80; *European Commission*, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final, p. 5; *Kofler/Sinnig*, Intertax 2019/2, p. 196.

228 See fn. 68 for examples.

229 *Kofler*, ECTR 2021/2, p. 53; *Mitchell* et al., MJIL 2019/20, p. 123.

230 *Devereux/Vella*, BTR 2018/4, p. 393 and 402.

231 *Devereux/Vella*, Intertax 2018/6/7, p. 557; see also *Cooper*, BIT 2021/11/12, p. 5.

der-taxation of digital MNEs under the existing international corporate tax system,[232] but the focus on taxing more profits under the 3 proposals would still have resulted in some, albeit reduced, under-taxation of digital MNEs. Moreover, the proposals, with their singular focus upon digital businesses,[233] would also have had a limited impact in tackling the wider BEPS strategies harnessed by both digital and traditional businesses within the digitalising economy via economic scale without mass, fragmentation and the use of intangibles. Coupling these 2 criticisms with the additional costs of administering these complex proposals,[234] doubts would certainly have been raised as to whether the limited additional revenue would have adequately protected the Member States' tax bases.

Therefore, despite the failure of the Commission's proposals, the recent publication of the Two-Pillar Solution has been a welcome development. Assuming the Solution would receive impending approval from at least the US Congress and all EU Member States, its nature as a globally harmonised solution requiring the prohibition of existing or future unilateral measures would avoid trade conflicts unlike the Commission's proposals,[235] while still enabling EU Member States to implement substantially the same rules and thereby avoid fracturing the Internal Market.

Additionally, under Pillar Two's GloBE rules imposing a global minimum corporate tax rate of 15%,[236] such rules would work to counter tax competition resulting from traditional and digital businesses' use of BEPS strategies within the digitalising economy by employing economic scale without mass, fragmentation, and intangibles. These rules can thus be viewed as a significant improvement upon the Commission's proposals, even if the CCCTB's implementation were to be taken into account.

Nonetheless, such optimism would be hard to replicate in relation to Pillar One's Amount A rules, since these rules betray the same mistaken belief as reflected in the Commission's proposals that existing financial data such as profits and revenue would serve as an appropriate proxy for value creation by new business models within the digitalising economy.[237] It is for this reason that this author has expressed

232 *Devereux/Vella*, BTR 2018/4, p. 389; *Hadzhieva,* Study requested by the European Parliament's Committee on Financial Crimes, Tax Evasion and Tax Avoidance (the TAX3 Committee), Policy Department A – Economic, Scientific and Quality of Life Policies, Impact of Digitalisation on International Tax Matters, IP/A/TAX3/2018-02, p. 56.

233 Ibid.

234 *Devereux/Vella*, BTR 2018/4, p. 403; *Kofler/Sinnig*, Intertax 2019/2, p. 199-200; *Hadzhieva,* Study requested by the European Parliament's Committee on Financial Crimes, Tax Evasion and Tax Avoidance (the TAX3 Committee), Policy Department A – Economic, Scientific and Quality of Life Policies, Impact of Digitalisation on International Tax Matters, IP/A/TAX3/2018-02, p. 57-59; *Sinnig*, ECTR 2018/6, p. 333.

235 *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 7.

236 *OECD*, Highlights Brochure: Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 4; *OECD*, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, p. 3.

237 *Devereux/Vella*, BTR 2018/4, p. 393 and 402.

his support for the idea of Data Point Pricing as formulated by Zetzsche and Anker-Sørensen.[238] Such pricing leaves a financial trail which would address the under-valuation of data exploitation and the under-compensation of users for their data, while providing a platform for more appropriate taxation of value creation within the digitalising economy,[239] and thereby redressing social fairness and levelling the playing field for all types of businesses.[240]

Beyond a comparison of the Two-Pillar Solution against the Commission's proposals, concerns have also been raised in this article on the design of the rules under the two Pillars. As regards the effects of Pillar Two, both the continued entrenchment of inter-State inequity,[241] and the opportunity for further tax competition via the Substance Carve-Outs,[242] have been referenced. As for Pillar One, there remains the possibility that its profitability thresholds for in-scope MNEs would leave out some low-ETR MNEs which have raised the ire of politicians, NGOs, and the public.[243] Another point for contention includes the potential for distortions of competition, since Amount A's rigid rules attempt to adapt transfer pricing concepts normally utilised on a case-by-case basis.[244]

While the criticisms above certainly highlight that the Two-Pillar Solution remains far from perfect, its scope as a multilateral solution is arguably a marked improvement from the EU-first unilateralism evident in the Commission's proposals. What is definite is that far more work still exists on the horizon for the IF members as they seek to firstly implement the Two-Pillar Solution and remedy the above-mentioned deficiencies further down the line.

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238 *Zetzsche/Anker-Sørensen,* WTJ 2021/2, p. 234.
239 Ibid., p. 237.
240 *European Commission*, Commission Staff Working Document, (fn. 32), p. 23.
241 *Brauner,* Intertax 2022/1, p. 2 and 4; *Baraké* et al., Revenue Effects of the Global Minimum Tax: Country-By-Country Estimates, EU Tax Observatory Note No. 2 October 2021, p. 3; *Ozai,* CJLJ 2020/33, p. 339; *Fedan,* BIT 2021/8, p. 398–399.
242 *Baraké* et al., Minimizing the Minimum Tax? The Critical Effect of Substance Carve-Outs, EU Tax Observatory Note No. 1 July 2021, p. 3; *Hey,* Intertax 2021/1, pp. 12–13; *Dourado*, Intertax 2020/2, p. 154.
243 *Valenduc,* ETUI PB 2021/10, p. 6; *Brauner,* Intertax 2022/1, p. 3; *Cooper*, BIT 2021/11/12, p. 7–8; https://www.theguardian.com/technology/2021/jun/06/global-g7-deal-may-let-amazon-off-hook-on-tax-say-experts (27/6/2022).
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