

Recent Developments on the E.U.'s Digital Tax Proposal

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Many European tax authorities believe Google, Apple, Facebook, and Amazon (often referred to as GAFA) do not pay their fair share of corporate income taxes in the European market.¹ This sentiment has grown over time, culminating in March 2018 with the European Commission (EC) proposing digital taxes on large multinational technology companies conducting business in the E.U. In response, U.S. Treasury Secretary Steven Mnuchin indicated in multiple statements that the U.S. firmly opposed any tax that singled out digital companies.² A group of Republican senators further interpreted several recent EC actions as attempts to curb U.S. participation in the European market and ignite a digital trade war.³

This report reviews several fundamental challenges in cross-border taxation of the digital economy and presents different country perspectives, recent developments toward revising existing laws, and the long-term prospects of digital company taxation in Europe.

BUSINESS MODELS OF DIGITAL COMPANIES

Current international tax principles indicate that if a company conducts business in another country, it is liable for corporate income tax in that country only if it has a permanent establishment (PE). In other words, PE constitutes a taxable presence in a foreign country for companies conducting business internationally. Although each country defines PE thresholds differently, the determination is generally based on whether

nonresident companies have a physical presence in the jurisdiction and the extent of their activities. The PE principle protects businesses from governments that claim even the slightest contact with a country leads to a taxable presence, and safeguards governments from potential revenue losses by preventing businesses from engaging in substantial activities in international jurisdictions without paying taxes.

The concept of PE has been applied well to physical business activities. However, the recent expansion of the digital economy has presented challenges for determining PE, primarily because digital companies' business models are substantially different from those of traditional companies. Several major international organizations, including the International Monetary Fund (IMF) and the Organisation for Economic Co-operation and Development (OECD), recognize that digital companies have the following features:

- **High profitability:** Digital companies that dominate a specific market space usually maintain the first mover advantage, i.e., they are the first ones to discover an underserved demand and establish a technological application to fill the void.
- **Heavy reliance on intangible properties (IP):** Digital companies usually use proprietary algorithms to create personalized or targeted content for potential customers. IPs are highly mobile and can easily migrate to low-tax jurisdictions.
- **Sales with little or no physical presence:** Many digital companies can reach international customers without



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establishing a physical presence in foreign jurisdictions. In addition, digital companies may split various stages of their operations across several different countries without being required to pay corporate income tax.⁴

- **User-generated inputs:** Users provide their data, browsing history, and various other content to digital companies. In many cases, these users are not located in the same country in which the digital companies are headquartered.

Several studies conclude that the high profitability and reliance on IP characteristics are not unique to digital companies.⁵ Monopolies in any industry can have high profitability, and pharmaceutical companies use IP extensively. To a certain extent, sales by companies with a limited physical presence in an international jurisdiction are treated similarly to export sales, although the lack of physical presence does impose challenges in taxing digital companies.

Therefore, the major pressure points created by the digital economy are the definition of PE and the user-generated inputs. In terms of physical presence, the digital economy poses a fundamental challenge to the PE principle with regard to whether the digitalization of business activities makes destination-based taxation (i.e., taxing in the destination country where the customers reside) a viable alternative to the current rule of source-based taxation (i.e., taxing in the source country where the companies are located). If user-generated value indeed forms the basis of whether taxing rights are granted to the destination or source country, the PE rules need to be modified to include digital elements as part of the factors used to determine taxable presence.⁶

In terms of user-generated inputs, users play a major role in providing content and enable value creation in most digital businesses. However, there is no agreement as to how the user input process contributes to value creation, when value is created, and where it happens. Also of dispute is whether individual user inputs have value, or if value only arises through the collective input of millions of users.⁷

The following example highlights how countries characterize the value creation process differently. When an individual uses a free search engine offered by a digital company (e.g., Google), some countries, including the U.S., believe the user gets the search results as a service, and the company receives the user's data in return. The digital company engages in a "value-for-value exchange" instead of creating value in the country where the user is located. Thus, the digital companies are the value creators because they have the unique ability to collect, store, and exploit data, and the user's data has no value until it is put to use by digital companies. From this standpoint, the countries where the companies are located should have taxing rights.

On the other hand, other countries such as France think that if the process is a true "value-for-value exchange" in which user data has the same value as the service provided, the digital companies would not be profitable. The fact that digital companies are highly profitable implies that the user data is worth more than the service received. As such, the users create value during the data input process, and the countries where the users are located should have taxing rights.

DISAGREEMENTS

On the issue of how best to allocate cross-border taxation rights, OECD countries generally respond in one of three different ways, which highlight their disagreement regarding the completeness of current international tax rules.⁸

The first group of countries believes the new and unique features of highly digitalized business models (such as user-generated inputs) caused a mismatch between the location of value creation and the location of profit taxation. Because the current international tax system works fairly well after the OECD's recent base erosion and profit shifting (BEPS) coordination efforts, and since the taxation problems stem from unique features not reflected in the existing international tax framework, these countries argue that the challenges could

be addressed through targeted changes to existing rules without a complete overhaul of the tax system. As such, the international tax rules need refinement instead of a rewrite. Regarding PE and profit allocation, these countries do not believe a country has taxing rights simply because a digital company serves customers in that country. Instead, they believe the profits should be taxed exclusively where the components that produce the income are located, consistent with the existing tax system.

The second group, on the contrary, believes the effect of digitalization spills beyond highly digitalized business models, transforming the ways in which all industries operate and engage with customers. As such, the current international tax rules need an overhaul, and the existing PE and profit allocation rules need to be comprehensively redefined. Within this group, however, there are different views about user-generated value; some believe user inputs are highly valuable, whereas others think they do not substantially contribute to value creation in the user's jurisdiction.

The third group does not think the current international tax system needs further reform after recent efforts to address double non-taxation and other key issues. Within this group, there are also different views about whether user-generated content contributes to value creation.

AVAILABLE OPTIONS

The OECD started researching taxation of the digital economy several years ago as part of its BEPS initiative.⁹ A major goal of the BEPS project is to curtail harmful tax practices that generate stateless income (i.e., corporate income not taxed by any jurisdiction, also known as double non-taxation) or lightly taxed income. In a 2015 report,¹⁰ the task force reviewed several options to address tax challenges raised by the digital economy (discussed below). However, the group could not reach consensus on any of the measures, so the report did not make any concluding recommendations. The report did acknowledge the risk that, due to this lack of consensus, countries could unilaterally

implement these options in their domestic laws as long as their measures are consistent with existing international tax treaties.¹¹

The 2015 report stated that the organization would continue monitoring developments related to the digital economy. In March 2018, the OECD issued an interim report regarding its progress since 2015. This report again did not reach consensus on a course of action and therefore does not offer any specific recommendations. The OECD again reaffirmed that it is seeking global consensus on digital taxation, and that it plans to release a final report in 2020 with more concrete solutions.¹²

The OECD's inaction indeed has coincided with an increasing number of countries taking unilateral actions on taxation of digital companies over the last few years, validating the 2015 report's prediction. About a dozen E.U. countries have considered or implemented their own individual measures. Most recently, the U.K. proposed in its annual budget to implement—by 2020—a 2% turnover tax on large, profitable digital companies with more than £500 million (\$650 million¹³) in global revenue. Several countries in Asia and Latin America, including South Korea, India, Chile, Mexico, and Malaysia, are considering similar taxes.¹⁴

These country-specific actions are generally consistent with the options reviewed but not recommended by the OECD, which include digital PE, a withholding tax, equalization levy, specific rules targeting large multinational companies, and formulary apportionment.¹⁵

Digital PE (Significant Digital Presence)

This approach would expand the PE definition to include digital footprints as a taxable nexus. However, because such activities do not involve physical assets, this concept relies on the notion of significant economic presence—determined based on factors such as number of active users, revenue, and frequency of contact with customers—to measure significant digital presence. India and Israel have enacted laws regarding significant economic presence.

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The EC's long-term measure also seeks to establish a digital PE (see EC Proposals and Reactions section below).

Some view the expansion of PE as similar to the recent U.S. discussion regarding the state taxation of online sales, whereby states rely on significant economic presence to establish nonresident companies' taxable nexus in a certain state. In the U.S. Supreme Court case *South Dakota v. Wayfair, Inc., et al.*,¹⁶ South Dakota challenged the physical presence rule upheld in the 1992 *Quill Corp. v. North Dakota* ruling,¹⁷ which determined that states cannot impose a sales tax collection obligation on remote sellers who do not have a physical presence in the state. Although the U.S. Supreme Court did not provide an explicit blessing to South Dakota's economic presence thresholds, which state that remote merchants with over 200 transactions or more than \$100,000 in in-state sales have a significant economic presence, it struck down the physical presence standard.¹⁸ Many practitioners therefore believe the focus is now on the magnitude of the thresholds instead of whether economic presence is a reasonable standard.

Withholding Tax

Currently, certain exceptions to the PE standard apply to passive income such as interest, dividends, and royalties. For example, a country can impose a withholding tax based on the location of the payer, the jurisdiction where the asset is used, or where the service is provided, even when the nonresident company has no physical presence. In recent years, such "exception" has increasingly been expanded to certain types of digital transactions, including withholding taxes on royalty payments for music streaming and image licensing transmitted through internet, or new types of withholding taxes on income from online advertising. Malaysia and Thailand have measures of this nature.¹⁹

Equalization Levy (Turnover Tax)

The turnover tax is calculated as a percentage of a digital company's revenue instead of its profits. It could be troublesome, since the costs associated with the creation

of revenue are not considered; therefore, all problems relevant to the gross receipts tax—including tax cascading, taxation of companies operating at a loss, and pushing thin-margin companies into losses—apply to the turnover tax.

This type of levy seeks to equalize the tax disparity between foreign and similarly situated domestic businesses in which the foreign businesses have significant economic activities in the country, but currently pay little to no domestic corporate income taxes. On the other hand, it also addresses the disparity between digital companies and traditional brick-and-mortar companies. In this regard, it is challenging to define what business activities or types of businesses should be included. If this tax targets a narrowly defined industry, it may not achieve the overall goal of neutrality between digital and traditional companies. If it includes a wide range of businesses, the tax may potentially cause large distortion in how companies are taxed. Despite these issues, it is a popular choice: Italy, Hungary, and France have rules on the turnover tax, and the EC's short-term measure is a form of a turnover tax.

Specific Rules Targeting Large Multinational Companies

These rules are mostly defensive measures that do not expand the corporate income tax base. Instead, they seek to either enhance transparency, therefore increasing the information available to tax authorities, or to prevent large companies from conducting aggressive tax planning that erodes the tax base. The rules generally apply to all industries, not only digital companies. The diverted profits tax in the U.K. and Australia and the base erosion and anti-abuse tax (BEAT) in the U.S. follow this approach.

Formulary Apportionment

Some believe that because the E.U. is a common market, the tax bases across its member countries could be divided according to several factors that drive profit. This idea is similar to the U.S. apportionment of state-level taxes, which divides profits across states based on their respective share of

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employee payroll, property, and sales. Some recent proposals suggest adding a fourth factor, the collection and use of personal data, to allocate tax profits across different member states. This approach would cause several issues, as discussed above: value of user input data, stages of value creation, and the location of value generation.

EC PROPOSALS AND REACTIONS

In March 2018, only a few days after the OECD issued its interim report, the EC proposed two initiatives regarding taxation of the digital economy. A short-term measure calls for an interim 3% turnover tax on the revenue of large technology companies, defined as companies with €750 million (\$854 million) in global revenue and €50 million (\$57 million) in revenue in the E.U. annually.²⁰ This tax will apply to revenue derived from (1) online advertising, (2) digital intermediary activities that allow users to interact with others or facilitate the sales of goods and services, or (3) the sale of data generated from user-provided information. The EC acknowledges that this is an imperfect approach, but argues that if it does not take action soon, more member countries will implement unilateral measures, further undermining international coordination efforts.

The long-term measure establishes a “virtual PE” standard whereby a digital company will be deemed to have a taxable digital presence if it has annual revenue over €7 million (\$8 million), more than 100,000 users, or over 3,000 completed contracts for digital services provided to businesses in a country in a given year. This option would also ensure that profits are allocated to different E.U. member states based on where the user is at the time of consumption instead of solely in a company’s low-tax European headquarters.²¹

The Fans and Foes

After nine months of debate, the member countries still cannot agree on the scope and structure of the proposals. Most of the contentious issues center on the short-term solution—a 3% turnover tax.

Foes — Czech Republic, Denmark, Finland, Ireland, Luxembourg, Malta, and Sweden, plus the U.S.: To a certain extent, both proposals would shift tax revenue from the U.S. to the E.U., but there would also be a reallocation of tax revenue within E.U. countries. Thus, opponents of the measure include smaller or export-oriented countries that stand to lose the most tax revenue, such as Ireland, home to the European headquarters of both Google and Facebook, and the U.S.

E.U. countries who oppose the turnover tax cited the potential for double taxation and a violation of existing tax treaties as main concerns. For instance, if a country levies a turnover tax while others retain profit-based taxes, that will cause double taxation and make business development more expensive and less attractive in the country with the turnover tax. In addition, the turnover tax may conflict with existing bilateral tax treaties, which may trigger a need for these treaties to be renegotiated to accommodate the 3% levy. Other observers cautioned that despite the E.U.’s insistence that the 3% tax would be a short-term measure, it could be hard to roll it back.²²

The OECD concurs with these potential harmful results, and states that the turnover tax on digital businesses is likely to generate economic distortions and increase uncertainty and complexity for businesses.²³

Fans — Austria, France, Italy, and Spain:

To supporters, the proposals reflect their belief that user participation creates value for digital companies, and the location of such engagement should determine where profits are taxed. After the implementation of the BEPS initiatives and the 2017 U.S. tax reform, which includes provisions that reduce incentives for businesses to hold IP overseas, the phenomenon of stateless income and tax avoidance schemes have largely been addressed.²⁴ Thus, the focus of the turnover tax goes beyond whether the revenue is taxed; instead, it seeks to redistribute taxing rights among countries who believe local consumers contribute to the profits digital companies receive.²⁵

The U.S. agrees that the current rules regarding cross-jurisdictional profit allocation can produce inappropriate results when they are applied to digital models; however, it disagrees with any measures that single-out digital companies.

The international provisions of the Tax Cuts and Jobs Act include several newly created tax code sections that trigger potential World Trade Organization compliance issues. The OECD is reviewing two major provisions: the base erosion and anti-abuse tax and the deduction for foreign-derived intangible income.

The EC disagrees that the digital tax proposal conflicts with any existing treaty or creates double taxation. Because the proposal allows companies to deduct the 3% levy from their corporate income tax base, there are no double taxation concerns, the commission argues.²⁶ In addition, the €750 million threshold would eliminate the vast majority of the concerns on taxing loss companies, alleviating the potential negative effects of taxing revenue.

U.S. Reaction

There is no shortage of U.S. criticism about the turnover tax. In mid-October, the Senate Finance Committee sent a letter to the E.U. requesting that it abandon the short-term proposal.²⁷ The letter reiterates the shortcomings listed above, including the proposal's potential to undermine the international tax treaty system, cause double taxation, remain in effect longer than originally planned, and violate the long-held principle that profits rather than revenues should be taxed. It also states that since the E.U. will have no enforceability against non-E.U. companies with limited operations in Europe, China's digital companies will fall outside of the proposal's scope, which would provide them an edge over U.S. companies. The committee believes this proposal thus unfairly targets U.S. companies. The committee asserts that the E.U. should instead focus on reaching consensus with other economies within the OECD framework.

Compromises

The original digital tax proposals failed to reach unanimous agreement among all 28 member states before the end of 2018, which means any E.U.-wide digital tax is unlikely to be implemented until 2021, as it is customary to grant countries one year to prepare domestic legislation after the EC adopts a unanimous proposal.²⁸ In December 2018, France and Germany offered an alternative to increase the tax's chance of success in the upcoming March 2019 EU meeting.²⁹ This proposal narrows the scope of the tax to include only one of the three elements in the original proposal—the sale of online advertisement revenue—and exclude

the virtual marketplace sales and the sale of user-generated data. Because of the focus on ad revenue, companies with large online advertising activities such as Google and Facebook will be affected more than other technology companies. The reduced scope also means revenue raised per year would be much less than the original €5 billion projection. Finally, unless the OECD reaches consensus before the 2020 deadline, this proposal would be effective in January 2021 and sunset in 2025 to ensure the tax remains an interim measure.

TENSIONS BETWEEN THE U.S. AND THE E.U.

The U.S. agrees that the current rules regarding cross-jurisdictional profit allocation can produce inappropriate results when they are applied to digital models; however, it disagrees with any measures that single-out digital companies. U.S. policymakers believe the rules should be applied widely to any businesses that rely on high-value IP and low physical presence, and establish a long-term coordinated approach. The E.U., on the contrary, is eager to resolve the issue even with an imperfect measure, as it believes the current rules cause a significant loss in tax revenues from the activities of digital businesses. The E.U. also believes users play a major role in value creation, in sharp contrast to the U.S. view that user-generated content has no value until a company combines or analyzes them.

Besides the short period in 2018 when the U.S. and the E.U. struck a trade deal, ending the threat of additional U.S. tariffs on European imports, there has been ongoing tax-related tension between them on multiple dimensions.³⁰

During the discussion of the BEPS initiative five years ago, several high-level U.S. government officials expressed concern that the process disproportionately targeted U.S.-based multinationals.³¹ From 2015 to 2017, several U.S. companies were subject to tax-related scrutiny by the E.U. The most noticeable case involves Apple, which the EC ruled owed Ireland a whopping €14.3 billion in taxes and interest.³² Other cases

include rulings against Starbucks' operations in the Netherlands and Amazon's operations in Luxembourg. In a rare exception in September 2018, the E.U. decided that Luxembourg did not give special tax treatment to McDonald's Corp., and found that the company's stateless income is created by a mismatch between U.S. and Luxembourg tax rules.³³

The international provisions of the Tax Cuts and Jobs Act (TCJA, Pub. Law 115-97) include several newly created tax code sections that trigger potential World Trade Organization (WTO) compliance issues. In March 2018, the E.U. requested that OECD's forum on harmful tax practices review two major provisions of the TCJA: the base erosion and anti-abuse tax (BEAT), and the deduction for foreign-derived intangible income (FDII).³⁴ The BEAT imposes a U.S. minimum tax to prevent large multinational companies from eroding the U.S. tax base by overpaying foreign-related parties. Certain deductions, including royalties, management fees, interests, and funds spent to acquire depreciable property, are denied when calculating the modified taxable income. Although the BEAT is only applicable to U.S. taxpayers, some view its effect as equivalent to imposing an import charge or tariff, because using domestic goods is cheaper than imported goods.³⁵ The potentially more troubling provision is the deduction for FDII. FDII refers to export revenue generated by U.S.-based IP, and only the portion of income that exceeds 10% of the rate of return on tangible assets is considered FDII. Because companies can deduct 37.5% of the FDII against their U.S. corporate income, the effective tax rate is 13.125%.³⁶ Since the deduction generates lower effective tax rates for IP-related export sales that are not applicable to non-U.S. companies or products for domestic consumption, some practitioners therefore view this provision as an export subsidy.³⁷

The OECD review, which will not conclude until early 2019, would be the catalyst for the E.U. filing a formal complaint with the WTO. If the WTO concurs, the E.U. will impose sanctions against U.S. exports and potentially can put the U.S. on its tax haven blacklist.³⁸

CONCLUSION

The rapid rise of the digital economy not only caused challenges between existing international tax rules and new business models, but also created tension between tax authorities. While governments agree there are challenges, they cannot agree on exactly what the challenges are or potential solutions. Treatment of user-generated input and the definition of PE are at the center of the digital economy taxation debate, but there is no agreement as to how the user-generated input creates value, and whether such inputs constitute PE.

The cross-border digital tax issues need to be addressed. The EC's strongest position regarding the turnover tax is that without any action, individual countries will advance their own measures. These measures could include inferior, patchwork solutions that will distort the E.U.'s single market; many different unilateral measures would also be worse than a distortionary E.U.-wide turnover tax. However, although the EC's proposed turnover tax would send a strong message to both large digital companies and the OECD, the most recent compromise appears to be a patchwork measure: it is transient, narrow in scope, and a poor overall solution. Efforts should instead focus on expediting the discussion within the OECD framework, especially regarding an acceptable expansion of the digital PE definition. Furthermore, because many traditional companies are increasingly conducting business through digital means, the digital tax issue should concern all multinationals, not just technology companies.

While governments agree there are challenges, they cannot agree on exactly what the challenges are or potential solutions. Treatment of user-generated input and the definition of PE are at the center of the digital economy taxation debate.

ENDNOTES

1. An alternative version of under-payers in the E.U. includes Facebook, Amazon, Apple, Netflix, and Google (i.e., FAANG). In May 2018, the European General Court denied Netflix's appeal that its broadcasting of video on-demand services from its Netherlands subsidiary to German customers is not taxable under a new Germany law. Germany claims the tax on Netflix's broadcasting is similar to the value

added tax (VAT) on services and is not subject to the country of origin principle. See Joe Kirwin, “Netflix Loses Tax Case Appeal at European Union’s Top Court,” *Bloomberg BNA*, May 16, 2018, <https://www.bna.com/netflix-loses-tax-n73014476025/>.

2. See (1) Department of the Treasury, “Secretary Mnuchin Statement on Digital Economy Taxation Efforts,” October 25, 2018, <https://home.treasury.gov/news/press-releases/sm534>; (2) Department of the Treasury, “Secretary Mnuchin Statement On OECD’s Digital Economy Taxation Report,” March 16, 2018, <https://home.treasury.gov/news/press-releases/sm0316>; and (3) Alan Rappeport, Milan Schreuer, Jim Tankersley, and Natasha Singer, “Europe’s Planned Digital Tax Heightens Tensions with U.S.,” *The New York Times*, March 19, 2018, <https://www.nytimes.com/2018/03/19/us/politics/europe-digital-tax-trade.html>.

3. Senate Joint Economic Committee (Republicans), “The EU’s New Digital Trade War?” September 28, 2018, <https://www.jec.senate.gov/public/index.cfm/republicans/2018/9/the-eu-s-new-digital-trade-war>. This article includes both tax-based and anti-trust, anti-competitive-related fines by the EC.

4. Organisation for Economic Co-operation and Development, *Tax Challenges Arising from Digitalization – Interim Report 2018* (Paris: OECD Publishing, March 2018), Para. 36, <http://www.oecd.org/ctp/tax-challenges-arising-from-digitalisation-interim-report-9789264293083-en.htm>.

5. International Monetary Fund, *IMF Fiscal Monitor*, “Chapter 2: Fiscal Government,” April 2018, <https://www.imf.org/en/Publications/FM/Issues/2018/04/06/fiscal-monitor-april-2018,58-60>.

6. IMF, *IMF Fiscal Monitor*.

7. Consider the following example: A buyer’s positive product review (or, collective positive reviews from many buyers) on a platform (e.g., Amazon) may have contributed to another potential customer’s purchasing decision. If the buyer’s positive review has value, how should this be valued?

8. OECD, *Tax Challenges Arising from Digitalization*, Para 389–394.

9. The BEPS initiative commenced in September 2013 and included 15 actions to address key issues surrounding tax avoidance. By the end of 2015, final reports of these action plans were delivered to G20 leaders. The BEPS initiative is now in the implementation stage.

10. OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1– 2015 Final Report* (Paris: OECD Publishing, October 2015), <http://www.oecd.org/tax/beps/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report-9789264241046-en.htm>.

11. OECD, *Tax Challenges Arising from Digitalization*, Para 20.

12. OECD, *Tax Challenges Arising from Digitalization*, Para 29.

13. Exchange rates used in this report are from early November 2018.

14. See (1) Association of International Certified Professional Accountants (AICPA), “Taxation of the Digitalized Economy,” October 23, 2018, Appendix, <https://www.aicpa-cima.com/news/taxation-of-the-digitalized-economy-policy-paper.html>; and (2) Paul Hannon and Nina Trentmann, “UK to Roll Out First-of-Its-Kind Digital Tax,” *Wall Street Journal*, October 29, 2018, <https://www.wsj.com/articles/u-k-to-roll-out-developed-worlds-first-digital-tax-1540831931>.

15. OECD, *Tax Challenges Arising from Digitalization – Interim Report 2018*, Para 342.

16. *South Dakota v. Wayfair, Inc., et al*, 585 U.S. (2018). See <http://bit.ly/2K0bQdb>.

17. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

18. See (1) Joyce Beebe, *E-Commerce: Recent Developments in State Taxation of Online Sales*, Issue brief no. 07.13.17, Rice University’s Baker Institute for Public Policy, Houston, Texas, <http://bit.ly/2yyQvSS>; and (2) Joyce Beebe, *How Did the Supreme Court Change Online Sales Taxation?*, Issue brief no. 06.26.18, Rice University’s Baker Institute for Public Policy, Houston, Texas, <https://www.bakerinstitute.org/files/13072/>.

19. OECD, *Tax Challenges Arising from Digitalization*, Para 357.

20. See European Commission, “Digital Taxation,” March 21, 2018, http://europa.eu/rapid/press-release_MEMO-18-2141_en.htm, and EC, “Fair Taxation of the Digital Economy,” n.d., https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en. Part of the long-term goal would be to amend the pending E.U. common consolidated corporate tax base (CCCTB) legislation.

21. Rappeport, Schreuer, Tankersley, and Singer, “Europe’s Planned Digital Tax Heightens Tensions with U.S.”

22. AICPA, “Taxation of the Digitalized Economy.”

23. OECD, *Tax Challenges Arising from Digitalization*, Para 368.

24. Ben Stupples, “How Politics Is Hurting the Digital Tax Debate,” *Bloomberg Law, Daily Tax Report: International*, August 27, 2018 (subscription required).

25. Sanger and Thomas, *New Digital Tax Policies*.

26. Joe Kirwin, “EU Leader Austria Plans More Digital Tax Talk As Dissent Remains,” *Bloomberg Law, Daily Tax Report: International*, October 5, 2018, <https://bna.com/news/bna.com/transfer-pricing/eu-leader-austria-plans-more-digital-tax-talk-as-dissent-remains-1>.

27. Senate Finance Committee, “Letter to President of the European Council and President of the European Commission,” October 18, 2018, <http://src.bna.com/CCX>.

28. The EC has the sole right to introduce new tax proposals. It is sent to appropriate tax working groups for discussion, to offer the member countries a chance to reach an agreement. There is no time limit to the discussion and no limit to number of amendments that can be made to the original proposal. Once the working groups have developed a proposal acceptable to all, the EC adopts it, allowing one year of lead time for domestic legislation to be prepared. See Chris Sanger and Rob Thomas, *New Digital Tax Policies: What, When, Where, How and by Whom?* (London: EY, August 2018), <https://www.ey.com/Publication/vwLUAssets/EY-new-digital-tax-policies-what-when->

[where-how-and-by-whom/\\$FILE/EY-new-digital-tax-policies-what-when-where-how-and-by-whom.pdf](https://www.ey.com/Publication/vwLUAssets/EY-new-digital-tax-policies-what-when-where-how-and-by-whom.pdf).

29. Mehreen Kjan and Jim Brunsten, “France and Germany Abandon Plans for EU Digital Tax,” *Financial Times*, December 4, 2018, <https://www.ft.com/content/fc7330d4-f730-11e8-af46-2022a0b02a6c>.

30. Mark Landler and Ana Swanson, “U.S. and Europe Outline Deal to Ease Trade Feud,” *New York Times*, July 25, 2018, <https://www.nytimes.com/2018/07/25/us/politics/trump-europe-trade.html>.

31. See (1) EY, *U.S. Tax Committees Hold BEPS Hearings* (Washington, D.C.: Washington Council of Ernst & Young, December 2, 2015), [https://www.ey.com/Publication/vwLUAssets/US_Tax_Committees_hold_BEPS_Hearings/\\$FILE/2015G_CM6016_US%20Tax%20Committees%20hold%20BEPS%20Hearings.pdf](https://www.ey.com/Publication/vwLUAssets/US_Tax_Committees_hold_BEPS_Hearings/$FILE/2015G_CM6016_US%20Tax%20Committees%20hold%20BEPS%20Hearings.pdf), and (2) Stupples, “How Politics Is Hurting the Digital Tax Debate.”

32. Ireland confirmed that Apple has paid back €14.3 billion in September 2018. However, because Apple and the Irish government’s appeal against the original state aid ruling is still pending, Ireland has put the cash in a protected account (escrow) until the case is concluded. The U.S. government filed an application to assist Apple in defending its appeal in the E.U. court, but the European Court of Justice denied the petition, claiming that the U.S. has no direct interest in the result of the case and did not need to participate. This further infuriated the U.S. government and increased tension between the U.S. and the E.U.

33. Stephanie Bodoni and Aoife White, “McDonald’s EU Tax Probe Ended as Burger Giant Let Off Hook,” *Bloomberg BNA Daily Tax Report*, September 19, 2018 (subscription required).

34. Joe Kirwin, “EU Requests OECD Review of US Tax Law’s Harmful Provisions,” *Bloomberg BNA News*, March 7, 2018, <https://www.bna.com/eu-requests-oecd-n57982089605/>.

35. Reuven S. Avi-Yonah and Martin Vallespinos, *The Elephant Always Forgets: US Tax Reform and the WTO*, Law and Economics Working Papers 151 (Ann Arbor: University

of Michigan Law School, January 28, 2018), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1258&context=law_econ_current.

36. Calculated as $21\% * (1 - 37.5\%) = 13.125\%$. The 10% return is the “routine” or “ordinary” return presumed by tax code that is irrelevant to non-routine return generated by IP.

37. The E.U. does not directly challenge a related provision, the global intangible low tax income (GILTI). It aims to prevent U.S. companies from shifting IP out of the U.S. to avoid taxes. The GILTI is income that exceeds a 10% return of the presumed tangible assets; U.S. companies are subject to an effective GILTI tax rate of between 10.5% and 13.125%.

38. This tax haven blacklist currently includes nine countries: American Samoa, Bahrain, Guam, Marshall Island, Namibia, Palau, St. Lucia, Samoa, and Trinidad and Tobago.

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Cite as:

Beebe, Joyce. 2019. *Recent Developments on the E.U.’s Digital Tax Proposal*. Baker Institute Report no. 01.09.19. Rice University’s Baker Institute for Public Policy, Houston, Texas.