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Some Policy Reflections on Art. 12B UN Model on Automated Digital Services. A Reasonable Alternative?

1. Introduction

First of all, I would like to congratulate Prof. Nykiel with his 70th birthday and I wish him many happy returns of the day in good health, together with his family. I have known Prof. Nykiel for over 20 years and always admired his great professional drive for (international) tax law and the great achievements he realized in this respect, but also his great leadership as rector of the University of Lodz and his efforts for society which were, for instance, expressed in his membership of the Polish Sejm. Moreover, Wlodek is a very pleasant person, who even during very busy periods in his career, always kept an eye on the well-being of the people he worked with and met, supporting them also in difficult personal situations.

My contribution will focus on the recently adopted Art. 12B on automated digital services as to be included in the 2021 update of the 2017 UN Model Double Taxation Convention between Developed and Developing Countries (hereafter: UN Model).[2] After a section dealing with the setting of the scene with respect to the introduction of that

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[2] This article was submitted in July 2021, so references in this article are still to the United Nations, Model Double Taxation Convention between Developed and Developing Countries (New York: UN, 2017) hereafter referred to as "the UN Model"); however it can be mentioned that the UN Model 2021 has recently been published in which Art. 12B has indeed been included.

provision by the UN Committee of Experts in International Co-operation in tax matters (hereafter: the UN Tax Committee) and the work done on the topic in other fora while also including a framework for judging the various aspects of the article, I will discuss the draft article itself, to end with some evaluation and conclusions as to whether Art. 12B can be considered a reasonable alternative compared to the so-called Pillar I approach as included in the so-called Blueprint published by the OECD in close co-operation with the BEPS Inclusive Framework.[3]

2. Setting the scene

2.1. Relevant background regarding the UN Tax Committee

In 1963, the OECD Model Double Taxation Convention on Income and on Capital (hereafter: the OECD Model), last updated in 2017,[4] was published. It was a follow-up on previous work on the development of such a Model done in the League of Nations (the predecessor of the United Nations) and as regards the allocation of taxing rights based on a framework developed by a Committee of prominent economists which used economic allegiance theories to determine where cross border business income was generated and thus could be allocated (so-called supply theory which determines that profits are generated and thus can be allocated only to the place where the physical means of production are put to use, versus the supply and demand theory in which the availability and use of a market as such is also considered to be a source of profit generation). The OECD Model was developed to avoid double taxation between the OECD Member States which were generally speaking capital exporting countries. This Model was for several reasons strongly based on residence taxation. It included limited source country taxing rights in case of active business income, but in accordance with the supply theory, only if certain levels of physical presence in the source country were met. In case of passive income like dividends and interest (but not for royalties), a limited tax on the gross

[3] OECD, *Tax Challenges arising from Digitalization – Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris 2020.

[4] Organisation for Economic Development and Co-operation, Model Double Tax Convention on Income and on Capital (Paris: OECD 2017) hereafter referred to as the "OECD Model".

amount of such income was allocated to the source state. Such a Model was increasingly deemed unjustified in case of treaties between developed capital exporting countries and less developed capital importing countries as the budgetary balance of such allocation was clearly less favourable for developing countries. Thus, the UN developed and published in 1980 the UN Model in which Model, although also there the supply theory was generally followed, more taxing rights were granted to the source state. Although the UN acts of course in the interest of all its member States, the UN Tax Committee, consisting of 25 members nominated by governments and appointed by the Secretary General of the UN but acting in a personal capacity, focuses in particular also on the interest of developing countries and economies in transition. The latter is reflected in a stronger focus on preserving their tax base (allocation of taxing rights to the source state) and taking into account their level of development by, where possible, avoiding legislative and administrative complexity. Generally, around 15 of the 25 members of the UN Tax Committee are from non-OECD, developing countries, thus securing that focus.[5]

2.2. Problems caused by the digitalized economy, OECD G20 draft Pillar One and main problems with that approach

In the context of the so-called OECD-G20 BEPS, project 15 action points were identified in a holistic approach to tackle the various problems of tax avoidance by multinational enterprises, resulting in a package of minimum standards, recommendations, and best practises. However, no agreement could be reached with respect to the problem of the so-called digitalized economy as identified in the BEPS Action 1 Report.[6] In a nutshell, the problem relates to the fact that modern communication technology increasingly enabled enterprises resident in one country to develop models for doing business and earning income in another country without any physical presence or only very limited physical presence in that other country, whereas the rules included in tax treaties for allocating taxing rights with respect to cross border business profits are still, in accordance

[5] For more information regarding the differences between the OECD and UN Models, see: J.J.P. de Goede, *Would one Flexible Size Fit All? Toward a Single Tax Treaty Model"*, [in:] B.J. Arnold (ed.), *Tax Treaties after the BEPS Project, a Tribute to Jacques Sasseville*, Canadian Tax Foundation, Toronto, 2018, pp. 109–124.

[6] See for the BEPS project: Organisation for Economic Co-operation and Development, BEPS project, published on the OECD website – OECD, *What is BEPS?*, n.d., https://www.oecd.org/tax/beps/about/ (accessed: 10.07.2021).

with the brick-and-mortar economy of the time in which these rules were developed, based on the supply theory mentioned in the previous section, and requiring physical presence in the other country. Under the supply and demand theory, however, profit would also be considered to be generated in the country which provided the market and, in accordance with that theory, allocation of a taxing right to the so-called market jurisdiction could also be justified in the absence of physical presence. The first type of digitalized business models referred to as electronic commerce related to cross border sale of goods over the internet (see section 3.1). In view of the meanwhile much broader developed digitalized economy it was felt unsatisfactory by an increasing number of countries that non-resident enterprises could generate large profits within their jurisdiction without, due to the application of tax treaties, having to pay tax on that in the source or market country but only in the country of residence of the enterprise. In response to this dissatisfaction an increasing number of countries introduced various new types of taxes[7] (including so-called Digital Service Taxes, hereafter DST) to tax the non-resident companies on their profits from targeted digitalized business models while shaping these taxes in such a way to avoid them being considered taxes on income covered by the tax treaties. Although such DSTs are not uniform[8] they generally create a tax liability for the non-resident company based on gross revenue from sales of certain digital products and services in their country. The Office of the US Trade Representative challenged such a DST of several countries on the basis of its Trade Act[9] as constituting discriminatory taxation for US-companies providing digital services and announced trade actions through retaliatory tariffs on imports from these countries. In order to curb and avoid the disruption of international business by the introduction of such unilateral taxes which can cause new forms of double taxation,[10] it was considered desirable to try to reach an inclusive global consensus. After

[7] Such types of taxes were mentioned but not recommended in the final report on Action 1 of the OECD BEPS project to which I also refer for more details on the various relevant digitalized business models. See footnote 6 for the BEPS project.

[8] See for an analysis of types of DST's and a conceptual defense of DST: W. Cui, *The Digital Service Tax: A Conceptual Defense*, https://deliverypdf.ssrn.com/delivery.php?ID=522065105106082102096005127102066096057025068011086037123100083023122114112126006028119028004057029100116100025064068114117013111035004047048067087070126017105127046047045021098101095121002030105110029088028100069102122070079004100106006099117101002&EXT=pdf&INDEX=TRUE (accessed: 10.07.2021).

[9] See: S. Soong Johnston, *U.S. Threatens 25 Percent Tariffs Against Six Countries over DST's*, "Tax Notes International" 2021, Vol. 59, No. 3.

[10] See, however also the ongoing US discussion on a possible credit for DSTs in: D.E. Spencer, *Digital Service Taxes and Proposed U.S. Foreign Tax Credit Rules*, "Journal of International Taxation" 2021, No. 2.

discussions in the so-called OECD G20 Inclusive Framework (comprising of 139 countries) the OECD secretariat developed the so-called Pillar One approach which resulted in an extensive Blueprint. However, on these Blueprints, which besides a Pillar One also include a Pillar Two on a global minimum tax on corporate income, no agreement was yet reached at the time of submitting this article in July 2021.[11]

Basically, in Pillar One it is recognized that companies may create value in market jurisdictions without physical presence if certain digitalized business models and consumer facing business activities are operated in these jurisdictions, and a right is granted to such jurisdictions to levy a tax on income allocated to such value creation. This value creation is expressed in a part of the so-called consolidated residual profits earned by non-resident groups of companies related to such business models.

Pillar One resulted in a very complex system which includes the following elements: revenue thresholds for in scope companies, a definition of the covered business models, rules to determine the residual profits attributable to the business models targeted (problems of segmentation if also other business models are carried out in the group) on the basis of the consolidated group income, nexus thresholds to market jurisdictions and allocation rules for the residual profits to be taxed in these jurisdictions based on so-called formula apportionment, the entities having to pay the tax in the market jurisdictions, how relief of double taxation of the income can be provided, and finally binding dispute resolution to solve any possible disputes arising in the implementation of such income allocation system. Many of these elements still need to be agreed to by the countries participating in the before mentioned Inclusive Framework. The most important country not able to agree to Pillar One is the United States where most digitalized companies operating such models are established. However, recently, the new United States Biden administration made proposals to overcome its principled objection to limit the in scope companies to companies operating the defined digitalized and customer facing business models by proposing (high) monetary revenue and profitability thresholds applicable to all types of multinationals, also enabling some simplification of the Pillar One proposals as business line segmentation would no longer be required.[12] A large part of the technical complexity is, however, also caused by the fact that formula apportionment of part of the profits is introduced within

[11] See footnote 3. It is good to realise that also a second Pillar Two on a global minimum corporate tax was developed and that no agreement on Pillar One seems possible without agreement on Pillar Two.

[12] See: S. Soong Johnston, R. Finlley, *U.S. Pitch May Help Give Tax Peace a Chance, OECD Tax Chief Says*, TNTI document 2021-18553, posted 6 May 2021.

domestic corporate tax systems and tax treaties based on the so-called separate enity and at arm's length system of taxing the separate entities of multinational groups of companies. So, even if the new US proposals can effectively improve the Pillar One concept in some respects, it is yet to be seen whether this would be a sufficient basis for a truly international consensus, not only on Pillar One[13] but also on Pillar Two.[14] Even after such consensus a complex and time-consuming process of changing domestic tax laws and tax treaties needs to be followed to effectively implement it.

2.3. Work done by the UN Tax Committee on the digitalized economy which led to Art. 12B UN Model

In view of the importance of the topic, especially also for developing countries, the UN Tax Committee established in 2017 a Subcommittee on Tax Issues related to the Digitalization of the Economy[15] which, in view of the sensitive nature of the topic and ongoing work in the Inclusive Framework, was exclusively staffed with members of the UN Committee, and not with official UN member country representatives or selected relevant observers as generally customary in the work of the UN Tax Committee. Although this was disappointing, I recognize the sensitivity and great challenge of providing comments on the work done in other fora, especially in the Inclusive Framework, and of developing an alternative approach with the limited resources and tight time schedule to provide contributions at a still relevant stage of the work in this Inclusive Framework. Besides, in a few stages the non-members of the Subcommittee could take note of and provide comments on the development of Art. 12B.

[13] Reference is also made to the revised Pillar One proposals to the Inclusive Framework submitted by the African Tax Administration Forum, building on the abovementioned new US proposals see: S. Marsit, *African Tax Administration Forum Sends Revised Pillar One Proposals to Inclusive Framework. Report on 20.05.2021*, https://research.ibfd.org/#/doc?url=/data/tns/docs/html/tns_2021-05-20_ataf_1.html (accessed: 10.07.2021).

[14] See footnote 11.

[15] The Subcommittee was co-chaired by Mr. Roelofsen, a Dutch member of the UN Tax Committee and Mr. Fowler, a Nigerian member of the UN Tax Committee, who together very ably managed this sensitive topic and steered the discussions which lead to several outputs wich ultimately led to Article 12B. For a complete overview of the work done by this Subcommittee, see: Committee of Experts on International Cooperation in Tax Matters, 22nd Session 19–28 April 2021, *Tax consequences of the digitalized economy – issues of relevance for developing countries*, Co-Coordinators' Report issued on 6 April 2021, E/C.18/2021/CRP.1, https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2021-04/CITCM%2022%20CRP.1_Digitalization%206%20April%20 2021.pdf (accessed: 10.07.2021).

The Subcommittee drafted the following guiding principles for its work:

1) avoiding both double taxation and non-taxation;
2) preferring taxation on a net basis where practicable;
3) seeking simplicity and administrability.

It was tasked to report and comment on the work done in other fora, including the Inclusive Framework, giving special attention to the interests of developing countries and administrability, fairness, and certainty, and on possible alternative or modified approaches for allocation of taxing rights and nexus rules, including the use of withholding taxes.

The concerns of developing countries with respect to the OECD/G20 project were clearly expressed by the UN Tax Committee in its letter of 12 November 2019 to the OECD secretariat on the latter's Public Consultation Document with the so-called Unified Approach from 9 October 2019 (which included a version of the in section 2.2 mentioned Pillar One).

These concerns include: the need for a reliable impact analysis to base their position on, the high level of revenue threshold for in scope companies, the high country level revenue threshold for nexus to a country, the fact that only part of residual profits are re-allocated to the market jurisdiction, the inclusion of a mandatory binding arbitration procedure, the complexities of the legislation required, and the capacity to effectively implement it and participate in the new administrative processes required to reach mutual agreement on the amounts to be re-allocated. The Committee also urged to adopt a simpler approach, for instance through the use of withholding taxes.[16]

In my view, the letter clearly expresses a lack of confidence that Pillar One will generate sufficient additional revenue from corporate taxation for developing countries for which this tax is relatively more important than for developed countries (a matter of great relevance in the context of the UN Addis Ababa Agreement on SDG's[17] and the disruption of state budgets caused by measures to combat the Covid-pandemic), and the feeling that their interests are not sufficiently taken into account in the process and that the system is too complex and too burdensome for them to have a sufficient level of control over its implementation.

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[16] See: the attachment to the document published with respect to the Committee of Experts on International Cooperation in Tax Matters, 20th Virtual Session of 22 June 2020, *Tax consequences of the digitalized economy – issues of relevance for developing countries*, a Co-Coordinators' Paper issued on 30 May 2020, E/C.18/2020/CRP.25, https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-06/CICTM%2020th_CRP.25%20_%20Digitalized%20Economy.pdf (accessed: 10.07.2021) and section 2.3. hereafter.

[17] See: United Nations, *The 17 goals*, n.d., https://sdgs.un.org/goals (accessed: 10.07.2021).

3. Art. 12B UN Model

3.1. Specific background, framework to take into account, and text of Art. 12B

The text and commentaries of Art. 12B were developed in a whole process of which I now only refer to the draft included in the document discussed at the 21st session of the UN Tax Committee, which[18] also contained the comments received on it and the response to these given by the lead-drafters[19] of the Subcommittee. On the basis of that draft, the Tax Committee decided, although with a large opposing minority, to approve the inclusion of Art. 12B and related commentaries, subject to further specifications and a comprehensive inclusion of opposing views to be finally discussed and approved at the last meeting of its term. The final version of the text of article and the commentaries to it[20] were determined in the 22nd session of the Committee in April 2021.

It seems useful, when later evaluating Art. 12B and its commentaries, to in addition to the subcommittee's aims and mandate highlighted in section 2.3, also take into account the internationally agreed principles with respect to dealing with a digitalized economy as formulated in the 2003 Ottawa Taxation Framework Conditions on e-commerce as referred to in section 2.2.[21]

These principles are: neutrality, efficiency, certainty and simplicity, effectiveness and fairness, and flexibility.

[18] See: Committee of Experts on International Cooperation in Tax Matters, 20th Session 20–23 and 26–29 October 2020, *Tax consequences…*, https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-10/CRP41_Digitalization%2010102020A_0.pdf (accessed: 10.07.2021).

[19] Without intending to disregard the efforts and valuable contribution of all members of the Subcommittee, be it in favour or against an approach as included in Art. 12B, it is fair and appropriate to note Mr. Rajat Bansal as one of the most prominent lead-drafters. As one can see from the proceeding documents, and as also reflected in the text of the article and its commentaries, the Subcommittee managed, despite a strong divergence of views, to produce these documents, clearly expressing both the arguments for and those against an approach as expressed in Art. 12B.

[20] See: Committee of Experts on International Cooperation in Tax Matters, 22nd Session 19–28 April 2021, *Tax consequences*...

[21] Reference is made to section 1.2 (Ottawa Framework conditions and the fair allocation of taxing rights) where these Framework Conditions are referred to and discussed, P. Pistone, J. Nogueira, B. Andrade, *The 2019 OECD proposals for addressing the tax challenges of the digitalized economy: an assessment*, "IBFD International Tax Studies" 2019, Vol. 2, No. 2, https://www.ibfd.org/shop/journal/international-2019-oecd-proposals-addressing-tax-challenges-digitalization-economy-0 (accessed: 10.07.2021); see also: OECD, *Implementation of the Ottawa Taxation Framework Conditions*, 2003, https://web-archive.oecd.org/2012-06-15/158956-20499630.pdf (accessed: 10.07.2021).

3.2. Discussion of Art. 12B – Income from Automated Digital Services

3.2.1. General aspects and considerations

The structure of Art. 12B is identical to that of the Arts. 10, 11, 12, and especially also of Art. 12A, on fees for technical services introduced in the 2017 UN Model. We will later discuss the various paragraphs of Art. 12B.[22]

It seems useful to already point out that with respect to several aspects on which critical comments were received, alternative approaches have been included in the commentaries, thus leading to a degree of flexibility for the people negotiating an Art. 12B provision.

The general background (the ability through modern means of communication and digitalization to effectively engage in substantial business activities in the market country without a fixed place of business there, or to conclude contracts remotely with no involvement of individual employees or dependent agents) and the aim of the provision (to be able to apply domestic legislation in levying taxes on income from digital business models in a way which is relatively simple to comply with by business as well as tax administrations) are described in section A of the commentaries called "General Considerations", to which I refer.

It is also important to note that many countries have not yet introduced domestic legislation enabling them to tax the income derived from their country by non-resident enterprises via such business models, which legislation is of course a pre-condition for realizing the taxing rights allocated to the market or source country under Art. 12B.

In the same section A, under paragraphs 8 up to and including 16, the objections against introduction of Art. 12B are included as formulated by the large minority of Committee members that opposed the inclusion of Art. 12B. I will discuss the general objections here and will subsequently discuss the more specific ones at the various paragraphs of Art. 12B to which they relate.

The opposing members are of the view that an allocation of taxing rights to the market country based on mere sales as proposed is not justified as they do not agree that the market on its own generates profits such that

[22] See: the full text of Art. 12B UN Model as meanwhile included in the 2021 UN Model which was published after submission of this article: United Nations, *United Nations Model Double Taks Convention between Developed and Developing Countries, Department of Economic & Social Affairs*, New York 2021, https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2022-03/UN%20Model_2021.pdf (accessed: 10.08.2021).

allocation of taxing rights to that market country should be allocated. So, basically, they do not recognize value creation by the mere availability of the market and the use of it. I do want to point out that, besides the old allegiance theory of supply and demand mentioned in section 2.1, also in recent academic literature reference is made to theoretical underpinnings of market country taxation through the benefit principle and the use of so-called location specific benefits.[23] Thus, I think that there is a principled underpinning of market country taxation, but the subsequent fundamental questions are how broad the scope of tax liability should then become, and which profits can be attributed to mere use of an organized market. Furthermore, the international approach as expressed in the OECD Blueprint on Pillar One covers some specific business models creating value through acquisition of user data from the market country and so-called consumer facing business, whereas Art. 12B also covers the first but not the last category as that would make the proposal too complex, according to the drafters. Finally, also the Biden proposals previously mentioned in section 2.2 no longer focus on specific types of business models (to avoid definitional problems and sector discrimination) but on general revenue and profitability criteria, thus also recognizing a source taxing right for market countries without the value creation condition of generating user data or consumer facing activities. Overall, I think the increasing erosion of the tax base of market jurisdictions due to digitalization sufficiently justifies a revisit of the current allocation of taxing rights in tax treaties, and Art. 12B provides a bilateral option in that respect.

I do, however, agree that a global solution for the digitalized economy, covering also the undesirable introduction of unilateral measures like Digital Service Taxes claimed to be outside the scope of tax treaties, would be preferable due to the multilateral nature of the problem and the difficulty of effectively taxing non-resident groups of multinational companies while also avoiding double taxation, which problems also arise under Art. 12B (see hereafter in this respect also section 3.2.3).

I do regret that two suggestions I made during the discussions on a previous draft Art. 12B were not picked up.

The first one was to add a provision to Art. 12B or a suggestion in the commentaries to add such a provision in the treaty, stating that as from the moment of effectiveness of Art. 12B, the contracting parties would cease to apply any unilateral measures targeting the income covered within the scope of the provision. This would have given a strong signal that such undesirable unilateral measures would end when including

23 P. Pistone, J. Nogueira, B. Andrade, *The 2019 OECD proposals…*; W. Cui, *The Digital Service Tax…*

Art. 12B in a tax treaty, which could have added to the attractiveness of agreeing on inclusion of Art. 12B. I, by the way, understand that including such type of a provision is also part of the recent Biden administration proposal regarding Pillar One[24] and was in this context surprised by the announcement of the EU Commission to, in the context of financing the economic recovery of the EU after the coronavirus pandemic, develop a new kind of DST which would be compatible with tax treaties, as it seems to complicate the process of reaching a multilateral agreement on pillar One,[25] and threatens to take us in substance back to the situation of unilateral measures outside the scope of tax treaties which were intended to be avoided in a global consensus.

My second suggestion was to add a provision to Art. 12B or a suggestion in the commentaries to add such a provision in the treaty, stating that if the contracting parties agreed to a multilateral solution, and such a solution has become effective, the provision of Art. 12B would no longer be applicable. This would then also meet the objections voiced by the minority view that if an international consensus would be reached, the possible overlapping with Art. 12B would need to be addressed. I take the view that such a provision would also have increased the chances of Art. 12B being accepted, at least as a temporary solution until a multilateral agreement had been reached and the contracting parties to the treaty also joined that multilateral agreement.

We should also not forget the political pressure to generate additional own resources from the profits of digitalized enterprises which only increased after the pandemic, and the fact that there was no prospect at all of reaching an international consensus at the time the UN Committee decided to accept and include Art. 12B in the UN Model (October 2020). Also now, some time after the Biden proposals were made, there is no final agreement on an technically elaborated Pillar One solution yet, whereas it is also still uncertain whether such a solution would also sufficiently meet the needs of developing countries. Although certainly not perfect as we will soon see, Art. 12B seems to present a possible alternative and at least provides a strong signal that developing countries want their views to be effectively taken on board in a possible international consensus.

Article 12B Para. 1

In this provision only payments or income from automated digital services are covered and not income derived in the source country from consumer facing business which was considered too complex by the drafters. This

[24] See footnote 12.

[25] See footnotes 12 and 13.

does, however, inevitably lead to a more limited taxable income base with respect to digitalized business. Furthermore, I note the specific formulation of the paragraph compared to the formulation in similar provisions in Arts. 10, 11, 12, and 12A UN Model, which was chosen because the provision not only covers the taxation of payments, but also of income in case the taxpayer has opted for taxation of net profits as included in Para. 3 of Art. 12B.

Article 12B Para. 2

The wording of this provision follows the same structure of the other articles on passive income and has strong similarity with Art. 12A Para. 2 UN Model. However, contrary to that latter provision, Arts. 16 and 17 do not take precedence over Art. 12B, which seems justified as it is considered unlikely that the provision of automated digital services would be covered by these specific articles. The simplicity of a withholding tax system on the gross amount of payments for automated digital services is mentioned as one of the main benefits for the tax administration of developing countries, whereas also business may consider this easier than complicated net income calculations or attribution of parts of the total profits of an enterprise which have a greater chance of causing differences of opinion with the tax authorities of its country of residence. It also gives developing countries a kind of control over their tax affairs without having to acquire relevant data from outside their countries from the taxpayer or from the foreign tax authorities.

The opposing minority view expressed warns, however, that gross basis taxation may lead to an excessive burden and that tax may not be able to be relieved in the country of residence. Although such warning is generally justified and is also recognized with respect to the existing Arts. 11, 12, and 12A UN Model which, like Art. 12B, leave open the rate of tax allowed to be levied on that gross amount to the tax treaty negotiations, the commentary also extensively cautions against a high rate and recommends a moderate rate of a maximum 3 to 4%, while further listing possible factors to take into account when setting the exact level of the rate.

The minority view also pleads for introducing thresholds for payments to avoid application of Art. 12B to small taxpayers and start-ups, and to include an exception for payments by individuals receiving the services for personal use. Such possible thresholds related to the worldwide income of the beneficial owner, and the amount of revenue from automated digital services derived by that beneficial owner, are included in Para. 26 of the commentaries on Art. 12B, whereas for an exclusion of individuals for personal use reference is made to such a provision in the text of Art. 12A Para. 3 UN Model. Although the idea of such thresholds is certainly appealing, I note that such thresholds do not exist in other articles dealing with taxation of payments on a gross basis and that these would add substantial complexity to its administration. Furthermore, the introduction of thresholds and the exclusion of payments by individuals could lead to substantial losses of source country revenues, on top of the fact that compared to Pillar One, income from a digital consumer facing business is not included in Art. 12B.

Article 12B Paras. 3–4

In Art. 12B Para. 3, taxpayers who are beneficial owners of the income from automated digital services are given the possibility in the source country to opt for net taxation on qualified profits instead of gross taxation of the payments received. It is intended to meet the criticism on previous drafts of Art. 12B that gross income taxation basis may lead to double taxation, be unfair towards start-ups and more generally loss-making companies.

The provision is a compromise between simplicity and complexity, as qualified profits cannot be determined according to the regular profit determination methodology but are defined as 30% of the profitability ratio of the taxpayer's revenue from automated digital services derived from the market country in accordance with the sourcing rules in Art. 12B Paras. 9–10. If no segmental accounts are maintained by the taxpayer, the overall profitability ration of the beneficial owner of the income is used.

It goes beyond the size of this contribution to deal in detail with all criticism with respect to the 30% and the perceived unclarity of terms used to determine the profitability (with respect to which it is mentioned in the commentaries that the profitability is calculated in accordance with the rules in the country of the beneficial owner of the income, or in group situations of the country where the ultimate parent is situated).

I do, however, agree that if a provision like Art. 12B is included in a tax treaty it would be in the interest of both the two tax authorities as well as the taxpayer(s) that more detailed clarity is provided on the calculation of these ratios and on the corrections to be made to the profits shown in the commercial accounts to limit the need at audits by the source country for checks with the other country's tax authorities and to thus also provide more legal certainty.

It is further stated in Para. 3 that if the taxpayer is part of a multinational enterprise group (as defined in Para. 4 of Art. 12B), the profitability ratio of the business segment of the group needs to be applied, and if no segmental accounts exist, the overall profitability ratio of the group, but only if these are higher than the respective profitability ratio of the taxpayer in the respective period! This is intended as an anti-abuse provision aimed at neutralizing possible reduction of profitability of the taxpayer by tax driven related party transactions. Clearly this is a rather blunt anti-abuse provision, which may, as observed in the minority view, may lead to allocating profitability and thus a tax liability on a taxpayer which, in accordance with international standards, did not realize such a profit or even suffered a loss. Finally, if in the respective period no such profitability ratio is available to the source country, the option for net taxation does not apply to that period at all!

In Para. 48 of the commentaries on Art. 12B Paras. 3–4, a minority view text alternative is included which contains three elements: a. instead of the abovementioned 30% the percentage is left open for negotiations, but only the ratio's of the taxpayer are taken into account, and c. the profitability ratio is reduced by a percentage to exclude routine profits which may already have been taxed in other countries.

Although the point regarding routine profits seems justified (and is also taken into account in the Blueprint on Pillar One by only re-allocating part of the residual profits) it seems that the reasoning of the drafters is that the 30% is an approximation of the profitability which can be attributed to the sales function in a formula apportionment approach where equal weight is given to the factors sales, capital, and labour, and that routine functions are thus already rewarded as part of the 70% profitability not allocated to the source country. Furthermore, flexibility in agreeing in bilateral situations to different percentages may in my view increase the risk of overtaxation or undertaxion at the group level.

The alternative of only taking into account the ratios of the taxpayer, but then also adding a specific anti-abuse clause to be able to counter any tax driven related party transactions, seems an appealing approach, but a concrete proposal for that is unfortunately missing in the alternative text.

I also observe that, especially if the taxpayer is part of a group and the parent is not a resident of the country of the taxpayer but of a third country, it may be difficult to avail of the relevant group ratios, especially if no treaties exist between the source country or the country of the taxpayer with that third country enabling exchange of information, and no relevant country-by-country reporting is available. In this respect, it seems to me that if indeed profitability ratios of companies in third countries are involved, a multilateral solution would be preferable.

Finally, as regards Art. 12B Para. 3, I think it should not be possible for the source country to refuse granting the option for net taxation unilaterally without having at least consulted the tax authorities of the country of the taxpayer and without having a possibility for the taxpayer to appeal such a decision in the source country and having the option to invoke the mutual agreement procedure in this respect. Thus, a provision securing these elements should be included in the text or the commentaries of the Model.

In Art. 12B Para. 4, the notion of a multinational enterprise group is primarily defined from the perspective of availability of consolidated financial statements as required for financial reporting purposes, but such a group is also considered present if such consolidated statements are not required but would be required if equity interests in any of the enterprises were traded on a public stock exchange. Only limited reference is made in Para. 44 of the commentaries on Art. 12B Paras. 3–4 to the international standards on transfer pricing. I thus missed a further clarification of the group definition in relation to the text of Art. 9 of the UN Model which deals with associated enterprises and related parties' transactions which are the reason for the anti-abuse approach in Para. 3 of Art. 12B, and of the interpretation of the text of the extension of the notion of a multinational enterprise group as regards going beyond the situation where consolidated financial statements are required. I note, however, that no specific comments on the group definition were raised in the minority view.

Article 12B Paras. 5 and 6

In Art. 12B Para. 5, automated digital services are defined as any service provided over the internet or another electronic net-work requiring minimal human involvement from the service provider (which definition is further clarified in the commentaries), whereas in Art. 12B Para. 6, for the sake of providing legal certainty, a list of examples is given which will often constitute automated digital services (which examples are also clarified in the commentaries). These provisions have been taken from the Blueprint on Pillar One[26] and were I assume the fruit of careful consideration.

The examples listed are, however, contrary to the Blueprint, not conclusive, in the sense that also in those cases the conditions of Art. 12B Para. 5, must be met. This inevitably reduces the legal certainty which the list is probably aimed to provide. However, such additional test is justified in view of the rapid development of the various business models, and I would also like to point at out the definition of the notion of permanent establishment in Art. 5 Para. 1, and the list of examples of what may constitute such permanent establishment in Art. 5 Para. 2 of both the UN and the OECD Model, where identical wording is used in the text of Para. 2 ("includes especially") and the commentaries on that provision make clear that also in those cases the conditions of Para. 1 should be met. Thus, the approach taken here is consistent with the one taken with respect to the definition of permanent establishment in both Models.

[26] See footnote 3.

Article 12B Para. 7

Article 12B Para. 7 provides that Art. 12B is not applicable if the payments underlying the income from automated digital services qualify as royalties or fees for technical services dealt with in Arts. 12 and 12A of the UN Model. Thus, any possible conflicts of qualification with respect to the payments for certain services seem in theory resolved. However, such apparently in practise sometimes inevitable overlaps of different types of income included in different articles, require in practise a case-by-case qualification. Also, with respect to so-called mixed contracts, where payments may comprise of different types of income covered by different provisions in the tax treaties, the same methodology of disentangling the various elements, or qualifying for the whole payment in accordance with the dominant one is followed here, as mentioned in the commentaries to the provision. Such qualification issues occur more often when distinguishing different categories of income and should where possible be avoided with respect to already identified cases by providing relevant interpretation of the Articles with respect to these in the commentaries to the Models, but cannot in my view be a decisive element in judging the introduction of 12B which apparently is considered way to meet the needs of a majority of the UN Tax Committee members.

A more fundamental issue, also addressed in the commentaries to this provision, is the fact that Art. 12B does not exclude payments made by individuals for automated digital services for their personal use, whereas comparable payments by individuals for technical services covered by Art. 12A of the UN Model are excluded from that Article. A minority of members of the UN Tax Committee expressed that such payments should also be excluded from Art. 12B, because the imposition of withholding tax obligations on individuals for such payments would be difficult to enforce and might cause serious compliance problems. That minority also provided a text for a provision in Art. 12B Para. 7, to explicitly exclude such payments.[27] The commentaries on Art. 12B Para. 7, do however, state that although such payments are not a deductible expense in such circumstances (one of the arguments used to exclude these from Art. 12A), many multinationals derive a very significant portion of income from the provision of automated digital services to individuals for their personal use and that other collection mechanisms than withholding of tax by individuals may be required which are already in place in some countries.

I do from a budgetary perspective have understanding for the choice to include such payments by individuals, especially against the background

[27] See: Para. 66 of the Commentary to Art. 12B Para. 7, in UN Model: United Nations, *United Nations Model Double Taks Convention...*, p. 468.

of the generally supported idea of allocating more taxing rights on income from automated digital services to the market or source country (also included in the Blueprint on Pillar One) and the fact that income from consumer facing business (included in the Blueprint on Pillar One) is not included in Art. 12B. I think that at least in theory such other collection mechanisms are feasible. In the commentaries creating a liability for the non-resident service provider to withhold the tax or putting such liability on financial intermediaries like banks when settling payments by the individuals to the non-resident service provider, are mentioned. This would create additional complexities and implementation problems, but these may, as regards the imposition of an obligation to withhold tax on the non-resident service provider, become manageable if the country of residence of the service provider is prepared and able when necessary to support such implementation via the possibility of mutual administrative assistance provided for in the tax treaties based on the UN (and OECD) Model. Thus, I would be more in favour of such an approach than involving the financial intermediaries for which it seems much more difficult to distinguish the type of payments under the various business models on which a tax should be withheld.

Article 12B Para. 8

Article 12B Para. 8, contains a provision similar to those included in the Paras. 4 of Arts. 10, 11, 12, and 12A of the UN Model, which, as explained in the commentaries to Art. 12B Para. 8, generally[28] implies that Paras. 1, 2, and 3 of Art. 12B will not be applicable if the income from automated digital services is effectively connected with a permanent establishment or a fixed base through which the service provider carries out its business in the source state. This means that the source country will be relieved from the limitations imposed on its taxing rights by Art. 12B and that the income from automated digital services may be taxed in the source country in accordance with Arts. 7 or 14, which most countries interpret as taxing the net income in accordance with their domestic tax law.[29]

During the discussions in the plenary meeting of the UN Tax Committee in October 2020, the issue was raised whether the profit allocation to such permanent establishment (or fixed base) with respect

[28] I abstain here from also describing the special situation of the limited force of attraction as included in Art. 7 Para. 1, letter c, which situation is adequately described in the commentaries on Para. 8 to which I refer.

[29] If Art. 7 applies, this must however be done in accordance with Art. 24 Para. 3, of the Model – assuming such a provision is also included in the tax treaty – which prohibits discriminatory taxation of permanent establishments compared to the taxation of resident enterprises.

to automated digital services would not be problematic and a source of potential conflicts with the taxpayer, and thus would require a special rule, for instance comparable to the one included in Art. 12B Para. 3,[30] but apparently further consideration of that issue did not lead to such a special rule, and the minority view subsequently expressed did not raise that potential issue.

Article 12B Paras. 9–10

The provision in Art. 12B Para. 9 contains a so-called sourcing provision similar to those included in Arts. 11, 12, and 12A of the UN Model, which, as explained in the commentaries to this provision, implies that only payments made by residents of the source country, or payments made in respect of obligations to make the payment incurred and borne by a permanent establishment or fixed base which a non-resident maintains in the source country, will be covered by Art. 12B. As a result, under Art. 12B, a source taxing right with respect to income from automated digital services is only allocated in the case of such payments but not if only the user of the service is in the source country. This is contrary to the approach in the Blueprint of Pillar One, in which a taxing right is also allocated to the country of the user even if the user makes no payment for the service used. The commentaries explicitly also state that it cannot be argued that the voluntary or unvoluntary provision of data by users must be considered as a type of payment in consideration for the automated digital services.

Leaving aside whether this is appropriate in view of the value created for the enterprise receiving the data which might justify taxation of such value creation in the country of the user, I can only conclude that Art. 12B does not allocate a source taxing right in this respect and agree to the minority view that Art. 12B does not comprehensively address the challenges posed by the digitalized economy.

This can be illustrated by the case of the online advertising business models of social platforms, where the payor of the advertisement may very well be a resident of a third country, whereas the users of the platform (providing data to the company maintaining the platform and thus creating value for it), may be residents of the source country, in which value creation would then not be taxable in the country of the users. The minority view also mentions the risk that companies may restructure their business models in such way to avoid payments being made from

[30] In which case probably an exception would have to be made to Article 24; see: Para. 3 of the Commentary to Art. 12B in UN Model: United Nations, *United Nations Model Double Taks Convention...*, p. 435.

countries which have such source taxing rights under Art. 12B to avoid its application. I think this may be a valid point and such structuring may perhaps only be challenged in situations where an artificial construction was chosen with the main aim of avoiding the withholding tax, like in back-to-back situations.

The drafters indicated in the oral discussions on Art. 12B that they accept that its budgetary revenues may be more limited than in the more complex alternatives as internationally discussed.

The provision in Art. 12B Para. 10 contains an exception to the sourcing rule included in Para. 9, similar to such provision included in Art. 12A Para. 6, of the UN Model, which is aimed at avoiding a double source and thus possible double taxation.

Article 12B Para. 11

Article 12B Para. 11, contains the in passive income articles habitual provision (see: Para. 6 of Arts. 11 and 12, and Para. 7 of Art. 12A of the UN Model) that the provisions of this article shall only apply to the arm's length part of the amount of the payment if the payment exceeds such amount due to a special relationship between the parties and needs no further comment.

Article 12B and compatibility with EU and WTO Law

The compatibility of an EU DST with EU and WTO law has already been thoroughly analysed in academic literature.[31] However, given the normative differences, a few words on such compatibility of Art. 12B with EU law (and after that WTO law) seems warranted. Between EU countries, a levy on the gross income within the context of domestic taxation of income and tax treaties seems admissible as turnover is considered a suitable indication of ability to pay.[32] However, a withholding tax on the gross income applicable solely in the cross-border context may be considered

[31] See: J.F. Pinto Nogueira, *The Compatibility of the EU Digital Services Tax with EU and WTO Law: Requiem Aeternam Donate Nascenti Tributo*, "International Tax Studies" 2019, No. 1, https://www.ibfd.org/shop/journal/european-union-compatibility-eu-digital-services-tax-eu-and-wto-law-requiem-aeternam (accessed: 10.08.2021). See also: G. Kofler, *The Future of Digital Service Taxes*, "EC Tax Review" 2021, No. 2, https://research.ibfd.org/#/doc?url=/collections/bit/html/bit_2011_12_e2_1.html (accessed: 11.08.2021).

[32] HU: ECJ, judgment, 3 March 2020, Case C-75/18, Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, Case Law IBFD, Para. 50 et seq. See also: CFE ECJ Task Force, Opinion Statement ECJ-TF 2/2020 on the ECJ Decision of 3 March 2020 in Vodafone Magyarország Mobil Távközlési Zrt. (Case C-75/18) on Progressive Turnover Taxes, "European Taxation" 2020, Vol. 60, No. 12, Journal Articles & Opinion Pieces IBFD.

a violation of the freedom of services if no complete and effective relief is possible in the country of residence of the recipient of the payment.[33]

The net income option, included in Art. 12B Para. 3, might, in intra-EU situations raise doubts with respect to its compatibility with EU law. According to the provision, such net taxation takes place on a deemed basis, and if the service provider is part of a group, even the higher profitability of the group is to be used, by comparison to the regular taxation of a resident performing the same activities. This leads to a different taxation of comparable residents and non-residents which may be considered as incompatible with EU law.

In this context it seems useful to mention that invoking anti-abuse in such cases as justification may not lead to compatibility unless there is a wholly artificial arrangement.[34]

On WTO compatibility, and even though one could think of tensions with WTO law, if the other country accepted Art. 12B in a treaty it will not challenge its application, whereas there seems to be no way for taxpayers to challenge it.

4. Evaluation and conclusions

4.1. Evaluation of Art. 12B as regards the achievement of aims pursued and the Ottawa Taxation Framework Conditions

Although it would go beyond the scope of this contribution to elaborately discuss whether the aims of the UN Tax Committee as mentioned in the commentaries and in section 2.3, and the principles to be observed according to the so-called Ottawa Taxation Framework Conditions as mentioned in section 3.1 were met, I would like to make some global comments with respect to these.

With respect to the aims pursued with Art. 12B:

1) definite share of taxation for the source country: there is a definite share of tax on automated digital services for the market jurisdiction and

[33] NL: ECJ, judgment, 8 November 2007, Case C-379/05, *Amurta SGPS v. Inspecteur van de Belastingdienst/Amsterdam*, Case Law IBFD. See also: G.W. Kofler, *Tax Treaty "Neutralization" of Source State Discrimination under the EU Fundamental Freedoms?*, "Bulletin for International Taxation" 2011, Vol. 65, No. 12, https://research.ibfd.org/#/doc?url=/collections/et/html/et_2020_12_cfe_1.html (accessed: 11.08.2021).

[34] UK: ECJ, judgment, 12.09.2006, Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, Case Law IBFD, Paras. 51 and 55 et seq.

preservation of domestic taxing rights (once established, if not yet included in domestic law) but unfortunately no budgetary estimates have been made, so a comparison with the revenue to be expected from Pillar One (which is also not clear yet as no full agreement is reached on the various parameters) is not possible;

2) avoidance of double taxation and non-taxation: seems met when the tax is levied on the gross amount of the payment (assuming the rate applied will be sufficiently moderate to avoid excess credits), but is more questionable if the net income taxation option is applied, especially if a higher group profitability is used, as in that case the taxation in the source country may exceed the taxable income of the recipient at which level relief may then not be fully realized, whereas there is no entitlement to such relief for other members of the group; avoidance of non-taxation is achieved, at least in the case of payments (but maybe not if there are no payments from the source country but only users of non-monetized services in that country);

3) preferably taxation on a net income basis: an option for net taxation is available at the request of the taxpayer, but if it is a member of a group of enterprises the determination of such net income may, for reasons of assumed tax avoidance by the beneficial owner of the income, deviate substantially from the customary internationally agreed determination of such income;

4) simplicity and administrability: seem achieved in case of application of a withholding tax system, however keeping payments by individual customers for their personal use within scope, would require a more complex collection system to secure taxation which requires additional legislation and may be more difficult to administer; taxation on a net income basis, as may be required by the taxpayer, would certainly be less simple than taxation of gross revenue and would most likely raise challenges as regards its implementation.

With respect to the Ottawa Taxation Framework Conditions:

1) neutrality: the allocation of an additional source taxing right is clearly only covering specified digitalized services, but establishing different taxing rights under domestic law and distinguishing different types of income in tax treaties, affecting different sectors of business differently, seems not to necessarily violate neutrality compared to different business models which may already be covered by such taxing rights in income taxes and seems different from an introduction of a separate sector specific tax like a DST;

2) efficiency: a withholding tax system on gross income may be considered an efficient system from the perspective of a tax administration, but due to the absence of thresholds, businesses may find this less efficient

when small amounts of payments are concerned, whereas an alternative collection system for payments related to individual customers in a personal capacity may decrease that efficiency, and the optional net income tax system may entail substantial compliance and administration costs making it less efficient;

3) certainty and simplicity: seem well achieved in a system of taxation of gross income albeit discussions may still arise with respect to the business models covered, whereas these seem less achievable as regards the alternative collection system for payments by individuals in a personal capacity and the net income option; more generally, in many countries domestic legislation will need to be introduced enabling these to realize the taxing rights allocated by Art. 12B, whereas also the tax treaties need to be changed, which latter aspect raised the interesting issue of a UN Multilateral Instrument to achieve this speedily and efficiently;[35]

4) effectiveness: can as regards the in scope business models most likely be reasonably achieved if the alternative collection system for individuals paying for automated digital services in a personal capacity can be effectively implemented. If the aim would have been to more broadly cover value created due to digitalized business activities in a jurisdiction this would be less met as no taxing right is allocated with respect to user participation;

5) fairness: it can be considered fair that source countries (especially developing countries which generally rely more heavily on revenues from company taxation) which tend to lose taxing rights in the digitalized economy compared to the traditional brick-and-mortar economy are compensated by additional taxing rights with respect to such business models;

6) flexibility: as regards the withholding tax on a gross income basis, flexibility is achieved by leaving the establishment of the rate of tax to the negotiations on the treaty, by the option for net taxation and several other text options offered in the commentaries (including the exclusion of payments by individuals for personal use and the introduction of thresholds, and as regards the net taxation a deduction of a percentage of the profits related to routine profits and the abolition of the use of group ratios).

When viewing the various elements addressed, it can be concluded from this global evaluation that Art. 12B is a possible but certainly not perfect solution for the very complicated problem of developing taxing rules for the digitalized economy when judged from the perspective of the various aims and principles mentioned.

[35] See: R. Rawal, *Conceptualizing the U.N. MLI*, "Tax Notes International" 2021, Vol. 102, No. 10, https://www.radhakishanrawal.com/post/conceptualizing-the-u-n-mli (accessed: 11.08.2021). The possibility of developing such UN Multilateral Instrument is, by the way, meanwhile also being considered by the UN Tax Committee.

4.2. Conclusions

The taxation of the globalized economy is a very complicated issue and there seems to be a general feeling, which I share, that more fundamental long-term reforms are required to deal with the taxation of the profits of multinational enterprises in the context of increasingly flexible and less tangible business processes in a global economy. In view of the multilateral character of the issues and the aim to avoid both double taxation and non-taxation, I want to express again my preference for a multilateral solution in a truly inclusive global consensus.

Given its membership, its particular mandate to pay attention to the interest of developing countries, including also an increase of domestic resource mobilization in the context of the SDG's internationally agreed to, it is fully understandable that the UN Tax Committee in view of the discomfort of developing countries with the progress and perceived lack of adequate attention for their specific needs,[36] did not only confine itself to commenting on the work done by the OECD/G20 Inclusive Framework, but wanted to look at a possible alternative with which its members from developing countries felt more comfortable. In view of the at that time absence of such global consensus and, despite some optimism due to the Biden proposals, and lack of short term prospects for it, and the fact that such consensus would equally have had to be tested against the aims and principles mentioned, and would also require a substantial time to implement, and finally in view of the end of the term of the then existing UN Tax Committee, Art. 12B was developed and accepted in October 2020 and its text and commentaries finalized in April 2021, albeit with a large opposing minority of its members.

Against this background, it is commendable that the UN Tax Committee, with so little resources available, was able by the relentless efforts of a number of its members, to develop Art. 12B in an attempt to find an international solution within the context of tax treaties, thus also avoiding the uncoordinated introduction of unilateral types of taxation leading to forms of double taxation.

When reading the specific comments in chapter 3 and section 4.1, it is clear that Art. 12B met a lot of the aims pursued and several generally accepted principles discussed but is indeed not an ideal solution as it was as not able to meet all these aims and principles and may in the specific EU/EEAA context raise issues of compatibility with EU law.

[36] Meanwhile such feelings also seem to be recognized by the OECD, see: Nana Ama Sarfo, *The Other Pillar 3*, "Tax Notes International" 2020, Vol. 100, No. 11, in which she quotes the Director of the OECD CTPA in this respect.

Article 12B clearly carries features of a compromise solution with respect to its various aims and offers due to the various alternative text proposals included in the commentaries, also by the opposing minority view, a reasonably flexible toolkit for tax treaty negotiators.

Although the starting point of Art. 12B was a relatively simple, easily administrable withholding tax system on gross payments, complexities arose, especially due to the fact that recourse needs to be taken to alternative collection mechanisms in order to be able to capture the payments made by individuals in view of automated digital services received for their personal use. Further complexities arose from the very reasonable, but in the context of withholding tax systems in the UN Model, unprecedented option for taxpayers to be taxed on a deemed net income tax basis. Also matters of definition regarding the type of services covered and possible qualification issues which may arise in relation to Arts. 12 and 12A of the UN Model inevitably contribute to more complexity than originally aimed at. One should also realize that as in other options which were internationally considered, the Art. 12B approach would require substantial amendments to the domestic legislation of countries which did not yet such legislation and corresponding amendments of tax treaties to be able to realize such (new) taxing rights.

Important questions relate to what additional revenue may be expected from this approach and whether countries where important providers of covered automated digital services are resident, will be prepared to accept such Art. 12B in their tax treaties? As regards the first question, it is regrettable, although due to the tight time frame understandable, that no revenue estimates could be made which could have provided a better basis to judge the value of Art. 12B and be used by developing countries in the context of the ongoing discussions on a possible international consensus. As regards the second question, I cannot be very optimistic given the strong opposing minority views from in particular members from developed countries. In the absence of a global multilateral agreement, Art. 12B might in my view have gained more support if a provision would have been added providing that countries would in their bilateral situation abstain from unilaterally levying other types of taxes and levies (including also DST's) going beyond the revenues covered by Art. 12B as long as Art. 12B would be effective. Also for those who consider that the nature of the problems relating to the digitalized economy should preferably be dealt with in a multilateral preferably global and inclusive consensus, it would have been important to have a provision included stating that Art. 12B would cease to have effect once a multilateral consensus solution was signed and sealed and put into effect by the contracting parties of the respective tax treaty in which Art. 12B was included?

As there was no such global inclusive consensus yet, and may still not come, I do on balance consider it a good idea which fits its specific mandate that the UN Tax Committee (despite the large opposing minority) agreed to the inclusion of Art. 12B as a tax technically well considered and a reasonable alternative solution within the framework of the existing tax treaties aimed to provide a definite share of tax revenue to developing countries while, generally speaking, avoiding both non-taxation and double taxation. Even if Art. 12B would in practise not be a success and would be overtaken in the future by a global consensus,[37] I hope the adoption of Art. 12B provided a strong signal of the views of developing countries and may then at least have contributed to a for these countries acceptable multilateral agreement and truly global inclusive consensus.

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[37] Although published shortly before the expiration of my deadline for submitting this contribution in July 2021, I would like to mention an interesting article which may contribute to achieving a global consensus in combining elements of Pillar One, The Biden proposals and the UN SDG's, by proposing a DST like additional tax outside the scope of income taxes on the most profitable multinationals, i.e.: S. Chatel, J. Li, *Repurposing Pillar One into an Incremental Global Tax for Sustainability: A Collective Response to a Global Crisis*, "Bulletin for International Taxation" 2021, Vol. 75, No. 5, https://research.ibfd.org/#/doc?url=/collections/bit/html/bit_2021_05_o2_2.html (accessed: 15.05.2021).

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Abstract

The article deals with policy aspects related to the introduction to the new Art. 12B as to be included in the 2021 update of the 2017 UN Model Double Taxation Convention between Developed and Developing Countries dealing with the elimination of double taxation of income from automated digital services. The Author discusses the draft article itself and ends with some evaluation and conclusions as to whether Art. 12B can be considered a reasonable alternative compared to the so-called Pillar I approach as included in the so-called Blueprint published by the OECD in close co-operation with the BEPS Inclusive Framework.[38]

Keywords: income from automated digital services, the UN Model Tax Convention between Developed and Developing Countries, tax treaty policy

[38] OECD (2020), *Tax Challenges arising from Digitalization – Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris, https://doi.org/10.1787/beba0643-en (accessed:10.07.2021).