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CAN WE TALK ABOUT DIGITAL ECONOMY TAXATION WITHOUT IMPROVED ADMINISTRATIVE COOPERATION BETWEEN COUNTRIES?

***Abstract:** Finding the right rules for taxation of corporate income in digital economy has been at the centre of attention of international tax community. Three proposals have received most attention, even though it is still uncertain whether any of them would be elected as a final solution. What these proposals show us is that in order to adopt new rules for taxation of digital economy, it is necessary to provide a functional global environment where information would be readily available and where countries would provide assistance in tax collection. However, existing mutual assistance instruments fall short of that. In this paper it is argued that current political momentum around the need to reach an international consensus should be used to enhance mutual assistance mechanisms. It is argued that CRS should become main global instrument for automatic exchange of information, or at least that CRS and FATCA rules should be harmonised so that there are no differences between them. Furthermore, it is argued that all countries should start providing assistance in tax collection based on OECD MAC. And secondly, it is argued that programs for technical assistance and capacity building offered by the OECD should be expanded so that more countries have access to them and that more resources are dedicated to each country.*

Key words: digital economy taxation, automatic exchange of information, FATCA, CRS, DAC, OECD MAC, assistance in tax collection.

1. INTRODUCTION

Digital economy taxation has been at the forefront of international tax issues for a couple of years now. It is suggested that existing tax rules are not adequate for the taxation of highly digitalised companies. The story about the need for changing existing tax rules started after the 2008

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financial crisis. As many times repeated in history, financial crisis made countries look for funds in order to reduce the negative effects. The 2008 crisis brought to the light of the day practices that were used by taxpayers and tax advisers to reduce taxes. Sometimes that was done through delicate tax avoidance practices and sometimes through tax evasion. What was also uncovered was that even renowned banks do not abstain from helping their clients reduce and avoid their taxes.¹ On the other side, it became clear that the practices were international, involving at least two countries which meant that the solution would not be easily applied as national measures would not be enough. The crisis called for international cooperation and showed that there was a bigger problem with existing international tax rules. Namely, it made clear that global problems required global solutions.²

As the financial crisis had global negative effects, countries were easily swayed to support the efforts of the Organisation for Economic Co-operation and Development (OECD) and the Group of Twenty (G20) in putting a stop to the widespread tax avoidance and evasion practices. In 2015 OECD published action plans with the aim of stopping the tax Base Erosion and Profit Shifting (BEPS).³ As it was noted, all countries were affected by multinational enterprises that exploited gaps and mismatches between different countries' tax systems. The BEPS package was supposed to tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment.⁴ Fifteen actions were chosen and the work was continued within the Inclusive Framework which OECD set up in order to allow all interested countries to cooperate and participate on an equal footing.⁵ Even though the statements made by the OECD were promising "substantial renovation of international tax rules"⁶, BEPS actions proved to be more like 'patches' to the existing system rather than the complete overhaul of international tax rules.⁷ Furthermore, it proved that the Inclusive Framework was not so inclusive when it

1 Remember the UBS scandal that was exposed by a whistle blower that showed that Swiss banks helped their international clients avoid and evade their taxes, especially US citizens.

2 Avi-Yonah, R., Xu, H., 2016, Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight, *Harvard Business Law Review*, No. 2, p. 210.

3 For more see <https://www.oecd.org/tax/beps/> (26. 10. 2022).

4 OECD/G20, 2015a, Base Erosion and Profit Shifting Project, *Explanatory Statement*, Final Reports, p. 6.

5 For more see <https://www.oecd.org/ctp/beps-2015-final-reports.htm> (26. 10. 2022).

6 OECD/G20, 2015a, p. 5.

7 Avi-Yonah, R., Xu, H., 2016, p. 210.

came to choosing the new rules. Interests of developed countries prevailed and it became clear that they were the ones who will mostly benefit from the new rules.⁸

OECD highlighted that one of the biggest challenges for international tax community would be the problem of taxation of the digital economy. Identified problems that lead to BEPS are exacerbated by the digital economy according to the OECD.⁹ Highly digitalised companies organise their businesses around virtual rather than physical presence which is essential for corporate income taxation. Digital economy business models are highly dependent on intangible assets and IP rights, which are easily transferable to countries with low taxes. All this and more, allowed many companies to avoid paying their 'fair share' of taxes for years.

Problems that digital economy poses for the existing international tax system are evident. Unfortunately, solutions for these worries are not clear yet. Digital economy has put into question international tax principles and rules that were in use for almost a century. The work has started, many countries and authors provided their viewpoints and proposals.¹⁰ However, consensus has not been made yet even though the OECD put forward the Pillar One proposal.¹¹ Luckily, countries agreed that the new rules have to be accepted globally in order to enable new efficient system for taxation of the digital economy. Only a truly global solution can put a stop to BEPS problems connected to the digital economy. The road to the consensus still seems rocky, but it is the path that the global community has to take.

8 Brauner, Y., 2022, Editorial: Agreement? What Agreement? The 8 October 2021, OECD Statement in Perspective, *Intertax*, Vol. 50, No. 1, pp. 2–6; Avi-Yonah, R., 2015, Hanging Together: A Multilateral Approach to Taxing Multinationals, *Law & Economics Working Papers*, Vol. 116.

9 OECD/G20, 2015a, p. 8.

10 OECD/G20, 2021, Base Erosion and Profit Shifting Project, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* – 8 October 2021, (<https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm>, 1. 11. 2022); Auerbach, A., Devereux, M., Keen, M., Vella, J., 2017, Destination-Based Cash Flow Taxation, *Oxford Legal Studies Research Paper*, 14, Oxford University Centre for Business Taxation; Chand, V., 2019, Allocation of Taxing Rights in the Digitalized Economy: Assessment of Potential Policy Solutions and Recommendation for a Simplified Residual Profit Split Method, *Intertax*, Vol. 47, No. 12, pp. 1023–1041.

11 See OECD/G20, 2022, Base Erosion and Profit Shifting Project, *Progress Report on Amount A of Pillar One, Two Pillar Solution to the Tax Challenges of the Digitalisation of the Economy*.

This paper, however, does not contend to add onto discussion about the right way to tax digital economy. Rather, in this paper the author will focus on a prerequisite for the efficient taxation of digital economy. The author argues that the only way forward for the efficient taxation of digital economy is through improved tax cooperation between countries. To prove the point, the author will show that leading proposals for the taxation of global economy presuppose effective and efficient cooperation between tax administrations. Further, the author will show that the existing tax cooperation models need to be improved. Finally, the best solution will be laid out, but also the cases in which existing tax cooperation framework can be enhanced.

2. PROPOSALS FOR TAXATION OF DIGITAL ECONOMY AND THEIR PRESUPPOSED TAX COOPERATION

Advancement of information and communication technologies has brought about many opportunities for companies to change the ways they do their businesses. The progress has allowed companies to enhance productivity, enlarge market reach and reduce operational costs.¹² Many companies have moved from a local market to the global market. Tech progress allowed companies to spread their market reach and to offer new products and services.¹³ Companies are able to change the way in which their products and services are produced and delivered to their customers. At their disposal are global value chains that allow companies to geographically disperse production processes and take advantage of features of local markets, such as lower labour or input costs.¹⁴ Advertising of products and services has been almost completely shifted to social media platforms and the Internet. Retail has been moved from big physical stores to websites.

More importantly, technological progress has given rise to new business models. However, as argued by OECD, some of them have parallels in traditional business model but at substantially greater scale and over longer distances.¹⁵ The first of them is electronic commerce that enables the sale or purchase of goods or services, conducted over computer network.¹⁶ Then there are new payment service models that allow us to pay

12 OECD/G20, 2015b, *Addressing the Tax Challenges of the Digital Economy, Action 1 2015, Final Report*, p. 52.

13 *Ibid.*

14 *Ibid.*, p. 54.

15 *Ibid.*

16 *Ibid.*

with our phones or e-wallets instead of carrying cash. Thirdly, there are new types of shops called App stores (application stores) that act as digital distribution platform for software, *i.e.* central retail platforms, that we can access through our smartphones or other smart devices connected to the Internet and get new applications (products and services) for our devices.¹⁷ As already mentioned, new models of advertising via Internet have enabled much more precise targeting of ads and even monitoring their performance and tracking the ways in which users interact with brands.¹⁸ And finally, the completely new model of cloud computing. Cloud computing comprises the best of the virtual world. It allows the provision of online computer services which include computing, storage, software, and data management, using shared physical and virtual resources (including networks, servers, and applications).¹⁹ Cloud computing allows service providers and users to be in different geographical locations as long as they have Internet connectivity.

The progress of technology has been eagerly welcomed and accepted by businesses. Reduction of transaction and operational costs, reach into the new markets, more customers etc. incentivise companies to invest further in research and development. Companies equip themselves with best equipment and experts in the field and lead the way into the future. On the other side are countries with their administrations that are in many cases trying to apply old rules to new phenomena. In order to enact new rules, countries have a task of finding a compromise between effectively regulating the new phenomena and not interrupting the progress – task that is not always easy as evidenced in the international tax field. However, a task that has to be completed as one thing is certain when it comes to technological progress, it will not stop any time soon. So, the time has come for countries to speed up their efforts in getting more connected and using the fruits of technological progress to their benefit.

2.1. PILLAR ONE PROPOSAL

In October 2021, 137 members of Inclusive Framework accepted the OECD proposal on the two-pillar solution for taxation of digital economy.²⁰ Pillar One introduces new taxing right for market countries through the Amount A and a transfer pricing simplification for baseline marketing and distribution practices through Amount B. Amount A, the new taxing

17 *Ibid.*, p. 58.

18 *Ibid.*

19 *Ibid.* p. 59.

20 OECD/G20, 2021.

right, applies to a portion of residual profit of multinational group with more than EUR 20 billion in revenue for the benefit of market jurisdictions (jurisdictions in which goods or services are supplied or consumers are located). If a group's profit is in excess of normal 10%, then 25% of a group's profit would be allocated to the market jurisdiction. That group would then need to include Amount A in its corporate income tax base in the market jurisdiction.

The Amount A system is still not fully developed, but, some procedural questions have been addressed. According to the OECD proposal, the group would have to submit the Amount A tax return in all market jurisdictions, which would then be shared with all jurisdictions where the group operates.²¹ The market jurisdiction would then apply its existing rules for the taxation of that additional income. Problems of double taxation are likely to arise and countries would have to enable the use of credit or exemption methods for eliminating double taxation.

In this scenario, information exchange and cooperation between countries is of essential importance for the efficient functioning of the Amount A system. The OECD acknowledges the same and stipulates that an Exchange of Information and Cooperation provision would have to be implemented in the Multilateral Convention for the Amount A.²² Namely, it is essential to provide clear framework for the distribution of Amount A tax return and all other information regarding it. In the Progress Report, the OECD delineates which rules would have to be adopted for the implementation in the Multilateral Convention.²³ Most of these rules are already envisaged in the Convention on Mutual Administrative Assistance in Tax Matters (OECD MAC),²⁴ such as automatic exchange of information that will be supported by the spontaneous exchange and exchange of information on request. Furthermore, OECD predicts that simultaneous tax examinations and tax examinations abroad would have to be used for effective implementation of Amount A tax.

Implementation of Amount A tax would introduce another layer of complexities for both taxpayers and tax administrations. The use of automatic exchange of information for the sharing of information seems reasonable and most efficient, however, one must wonder whether tax administrations will actually make use of that information. One recent research showed that information shared automatically between European

21 OECD/G20, 2022.

22 *Ibid.*, p. 31.

23 *Ibid.*, pp. 32, 33.

24 <https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm> (1. 11. 2022).

Union countries have been in little use and of little help for tax administrations.²⁵ In the case of BEPS Action 13 – Country-by-Country reports (CbC), that are shared automatically, it was concluded that information received via these reports is greatly underused and not even checked if information in the reports is complete.²⁶ Namely, it was once more confirmed that even the best rules will not be able to achieve positive effects if their implementation is not good. Or in the case of tax rules, it was shown that the impact of the rules depends on the effective implementation by the tax administrations.

For named reasons, one must wonder what would be the effects of these new rules for the implementation of Amount A tax that rely on automatic exchange of information and even go further than CbC rules in that they require better cooperation for the relieving of double taxation cases that are expected to arise. Furthermore, OECD acknowledges that the capacity building and technical assistance are needed for the implementation of the Amount A tax. However, OECD already provides support to jurisdictions through the work of Global Forum on Transparency and Exchange of Information for Tax Purposes, and yet, there are problems in practice.

If the countries accept Pillar one, and there is a big if at the moment, there would be a strong need for countries to implement automatic exchange of information. For many countries that would mean work on their tax administrations' capacity building and technical resources for the system to be effective.

2.2. DESTINATION BASED CASH FLOW TAX

Another proposal for the taxation of digital economy purports to change completely the way corporate income is taxed through the destination-based cash-flow tax (DBCFT). As the authors of the proposal explain it themselves, economic impact of this tax is the same as introducing a uniform rate Value Added Tax (VAT) and making a corresponding reduction in taxes on wages and salaries.²⁷ The break with the existing system of corporate income taxation is needed according to the authors because of the problems inherent in the existing system that cannot accommodate the facts surrounding the digital economy. For that reason, they believe a

25 European Court of Auditors, 2021, *Exchanging Tax Information in the EU: Solid Foundation, Cracks in the Implementation*, p. 24.

26 *Ibid.*, pp. 37, 38.

27 Auerbach, A., Devereux, M., Keen, M., Vella, J., 2017, Destination-Based Cash Flow Taxation, Saïd Business School Research Papers, *Working Paper Series*, p. 6.

completely new system is needed. This new system would have two most important parts. First is the fact that income would be taxed in a relatively immobile location – location of users and customers of goods and services, *i.e.* at the destination.²⁸ And second, the fact that the income would be taxed on a cash flow basis, meaning that an immediate relief to all expenditure would be given as they accrue.²⁹ And in order for the system to have the best effects, the authors advocate for international acceptance of the DBCFT. International acceptance would reduce mismatches and compliance costs for taxpayers that would otherwise have to comply with different corporate taxation systems.

On the other side, this new DBCFT system of corporate income taxation would raise significant implementation problems. Countries are not used to taxing corporate income on a destination and cash-flow basis. They would have to undergo substantial changes both conceptually and in application.³⁰ Tax administrations would have to deal with many issues in order to tax corporate income with VAT-like tax. Some of the problems are inherent in the implementation of VAT, such as determining the destination for a number of digital services and products. Some new regarding the proposal are already expected, such as how to tax cross border business transactions, how to tax business to customer (B2C) transactions and how to identify foreign companies that are doing business in their country.

Authors suggest a couple of options for dealing with the problems of implementation, but their common ground is that the countries are expected to cooperate much more than they do today. Such is the main proposal to adopt the ‘one stop shop’³¹ for taxation of entities that do cross border business.³² The solution reduces compliance costs for taxpayers, but increases administrative costs for tax administrations. The ‘one stop shop’ enables a company to register in only one country even though it does business and sells its products and services in a number of countries. Then the tax authority has the obligation to apply the

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*, p. 8.

31 This proposal has been made by Devereux, M., Feria, R. de la, 2014, Defining and Implementing a Destination-Based Corporate Tax, *Oxford University Centre for Business Taxation Working Paper*, 14/07 and the Gaspar Committee, 2014, *Report of the Commission Expert Group on Taxation of the Digital Economy*, chaired by Vitor Gaspar, Brussels: European Commission.

32 Auerbach, A. *et al.*, 2017 b, p. 83.

DBCFT at the rate of the country in which the product or service has been exported (not its own rate), and then send collected revenue to the country of destination.³³ The authors go even further and suggest a clearing arrangement at the aggregate level, where payments are made between tax authorities in recognition of the appropriate recipient of the tax.³⁴

For DBCFT to function efficiently, it should be accepted internationally. Countries would have to have a functioning exchange of information mechanism which would allow for undisturbed cooperation. Furthermore, cooperation in tax collection and sharing of revenue mechanisms would have to be place and fully operational. However, assistance in tax collection is not a widespread form of administrative cooperation even though it is included in the OECD MAC, OECD Model Tax Convention on Income and Capital³⁵ and UN Model Double Taxation Convention.³⁶ In the end, for DBCFT to function, the prerequisite would be functioning mechanisms for administrative cooperation.

2.3. COMMON CONSOLIDATED CORPORATE TAX BASE AND BUSINESS IN EUROPE: FRAMEWORK FOR INCOME TAXATION

The third, but maybe the oldest proposal for taxation of multinational companies is the consolidation of income of the multinational group and its apportionment between countries based on a formula. The most famous proposal on the old continent has been the EU proposal for the introduction of the common consolidated corporate tax base (CCCTB),³⁷ which, however, has not been adopted and which has been replaced by the new initiative – Business in Europe: Framework for Income Taxation (BEFIT).³⁸ BEFIT proposal has not been finalised yet, but what is clear is that it builds on CCCTB proposal and it is likely to follow the developments of Pillar One proposal. On the new continent, the apportionment formula is already used in the USA for sharing tax proceedings from companies that operate across the USA.

33 Devereux, M., Feria, R. de la, 2014, p. 19.

34 Auerbach, A. *et al.*, 2017 b, p. 83.

35 <https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm> (1. 11. 2022).

36 https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf (1. 11. 2022).

37 https://taxation-customs.ec.europa.eu/common-consolidated-corporate-tax-base-ccctb_en (1. 11. 2022).

38 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2430 (1. 11. 2022).

The main idea behind the EU proposal is simplification of computing taxable income and filing tax returns. According to the proposal, taxpayers would file only one tax return for their EU activity through the 'one stop shop' system after which countries would share the consolidated taxable income based on an apportionment formula (assets, sales and labour factors) and apply their own tax rate. The prerequisites for this system are, however, fully functioning exchange of information system, especially automatic, and assistance in tax collection mechanisms. Without them, the system would not be able to function as countries would not be able to check the data provided by the taxpayer or share the proceedings between them.

The advocated benefits of the system are reduced compliance costs for taxpayers and reduced administrative burdens, together with reduced double taxation or non-taxation problems and tax avoidance possibilities and increased revenues for EU countries.³⁹ Taxpayers would be allowed to offset profit against losses in different EU countries. However, there are some issues with this system. The main issue is that the common consolidated tax base rule applies only to income earned on the territory of the EU, while the income earned outside the EU would still be taxed according to the existing rules. That means that taxpayers would have to apply two or more systems for their corporate income taxation, reducing expected simplification benefits. This differentiation comes due to the lack of underlying cooperation mechanisms that are essential for the implementation. Given that the system is expected to increase tax revenue for EU countries,⁴⁰ the system also sends strong incentive to companies to shift their profit out of the EU and use existing tax planning strategies, thus reducing its impact.

So, to use the benefits of the common consolidated tax base, the countries, and not just EU countries, would have to adopt it. That would mean that countries would have to agree on the definitions, standards and other rules. Otherwise, its implementation would be rendered impossible due to the differences in applying the rules.⁴¹ As noted, the proposal has not been adopted even in the EU because of the required unanimity.

39 https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_3488 (1. 11. 2022).

40 Although its positive effects through increased revenue are debatable. See Cobham, A., Janský, P., Jones, C., Temourid, Y., 2021, An evaluation of the effects of the European Commission's proposals for the Common Consolidated Corporate Tax Base, *Transnational Corporations*, Vol. 28, No. 1.

41 Roin, J., 2002, Taxation without Coordination, *University of Chicago Public Law and Legal Theory Working Papers*, No. 20, p. 27.

Member states do not want to transfer sovereignty in the area of direct taxation to the EU.

3. CURRENT STATE OF AFFAIRS IN ADMINISTRATIVE COOPERATION AMONG COUNTRIES IN TAX MATTERS

The first and most used model of administrative cooperation among countries has been the exchange of information on request. Possibility for exchanging information has been included in the bilateral treaties for prevention of double taxation since the first draft of the OECD Model Treaty in 1963. Due to differences in national taxation rules and the fear of losing fiscal sovereignty, countries prefer bilateral over multinational conventions when regulating tax policies. Double tax treaties make countries feel at ease because they are able to negotiate every detail and accept anything they like or refuse anything they dislike. Expectedly, preferred method of cooperation between countries has been the exchange of information on request.

Globalization and technological progress have, however, changed the way companies and people live, work and do business. Advanced technological progress at the beginning of the 21th century further changed the way companies operate which led to the conclusion that double taxation treaties were insufficient for taxation of digital economy and multinational businesses.⁴² They have become outdated and unable to fight tax secrecy. Businesses cannot be restrained to two countries and as a consequence they started using off-shore locations and tax havens in order to hide the money.

Countries had to react and they realised that the only way forward is through multinational agreements.⁴³ They started working on multilateral conventions for enhancing administrative cooperation and transparency in tax matters. The USA persuaded more than 100 countries to sign the FATCA, while the OECD reinforced the OECD MAC in 2010 and introduced CRS in 2014. EU followed which led to adoption of Directive on Administrative Cooperation. Later, under the auspices of OECD, Inclusive Framework signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) in order to put a stop to tax evasion and avoidance practices and enhance tax transparency. These treaties represent a big step forward to accepting multilateral solutions for

42 Thuronyi, V., 2001, *International Tax Cooperation and a Multilateral Treat*, *Brooklyn Journal of International Law*, Vol. 26, Issue 4, pp. 1651–1653.

43 *Ibid.*, p. 1667.

international tax regulation. Even though they have not been accepted by all countries, they provide a positive change in the area of tax regulations.

3.1. AUTOMATIC EXCHANGE OF INFORMATION

Changed circumstances in the way companies do business and people are able to move their money globally influenced the move towards automatic exchange of information. Automatic exchange of information is the newest form of cooperation among countries. It was first introduced at the level of the EU for exchange of information on the interest paid on savings to residents of those other member states in 2005.⁴⁴ However, only since the 2008 financial crisis countries have been further incentivised to develop better automatic exchange of information mechanisms.

At the level of the EU, automatic exchange of information was introduced for information on interest income that was earned through accounts in EU member states in 2003. A large number of information was left out of the scope, which led to the adoption of a new directive in 2011, which included automatic exchange of information for five more types of non-financial income. Only in 2014 was automatic exchange introduced for information on financial accounts, influenced by developments in the USA.⁴⁵ After that, DAC was amended four more times, allowing for automatic exchange of information on advanced pricing arrangements and rulings, country-by-country reports and cross border arrangements for tax planning.⁴⁶ It is evident that there is an understanding at the level of the EU that exchange of information is necessary for efficient taxation. However, the reach of EU directives does not go beyond the EU borders.

On the other side of the world, after the scandal that had uncovered tax evasion practices by United States citizens abroad, USA introduced the Foreign Account Tax Compliance Act (FATCA)⁴⁷ in 2010.⁴⁸ Given the

44 Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments.

45 Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 359, 16 December 2014.

46 See more at: https://taxation-customs.ec.europa.eu/taxation-1/tax-co-operation-and-control/general-overview/enhanced-administrative-cooperation-field-direct-taxation_en (1. 11. 2022).

47 See more at: <https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca> (1. 11. 2022).

48 Emmenegger, P., 2017, Swiss Banking Secrecy and the Problem of International Cooperation in Tax Matters: A Nut Too Hard to Crack? *Regulation and Governance*, Vol. 11, No. 17.

amount of lost revenue, the USA was incentivised to find a solution for the future. The economic and political power and influence that the USA has in 21st century are not without benefits. Threatening with 30% withholding tax on all payments made by American financial institutions as well as by downgrading political relations with countries, the USA paved the path for automatic exchange of information globally. However, countries were not happy with the USA trying to enforce its rules on their territories. The bigger influence was achieved only after the USA agreed to sign treaties for information exchange with countries rather than enforcing extraterritorial application of FATCA.⁴⁹ Countries started to sign the corresponding agreements, which lead to FATCA being implemented in more than 110 countries.⁵⁰

FATCA has its clear benefits for the USA, but when considering it as a global multinational instrument for automatic exchange of information, it has its downsides. The main drawback since its adoption has been the fact that FATCA is not a true multilateral treaty that can gain true multilateral adoption. It is actually a bilateral treaty that the USA signs with other countries individually. Secondly, one must not forget that many countries that have signed FATCA actually do not receive equivalent information from the USA about their tax residents. Even though USA is very efficient when it comes to requesting and getting data on its taxpayers, it is very much on the opposite side when it comes to sharing information about foreigners with assets or accounts in the USA. This had to change after the USA agreed to sign treaties for information exchange, however, many countries opted for the non-reciprocal model, where they agreed only on sending information and not receiving it.⁵¹ Funnily enough, a country can be seen as an eager one in fighting tax evasion and as a tax haven at the same time.⁵² Thirdly, the effects at the level of the USA are downgraded as it applies only to US residents and citizens. This incentivises taxpayers to move their assets into a bank that has no US assets in a country that

49 For more see Gadžo, S., Klemenčić, I., 2017, Effective International Information Exchange as a Key Element of Modern Tax Systems: Promises and Pitfalls of the OECD's Common Reporting Standard, *Public Sector Economics*, Vol. 41, No. 2, pp. 207–226; Grinberg, I., 2013, Taxing Capital Income in Emerging Countries: Will FATCA Open the Door?, *World Tax Journal*, Vol. 5, No. 3, pp. 319–322; Oberson, X., 2015, *International Exchange of Information in Tax Matters: Towards Global Transparency*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing.

50 <https://worldpopulationreview.com/country-rankings/fatca-countries> (1. 11. 2022).

51 For more see Ivanov, I., 2019, Automatska razmena obaveštenja u poreskoj materiji i pozicija Republike Srbije, *Pravni život*, 7–8.

52 Gravelle, J. G., 2022, Tax Havens: International Tax Avoidance and Evasion, *Congressional Research Service Report*, p. 37.

does not comply with FATCA or OECD MAC.⁵³ For that reason, positive effects of FATCA in strengthening tax transparency at the global level can be mostly seen in the fact that it influenced other countries in designing a similar treaty rather than being a global uniform treaty for automatic information exchange.

Influenced by the USA the pressure on OECD countries to put a stop at tax evasion practices at the time of recession was increasing which led to introduction of the Common reporting standard (CRS) in 2014.⁵⁴ As other countries were not getting much out of FATCA, the OECD started working on a similar treaty that would actually be a true multilateral treaty. It entails automatic exchange of financial information on an annual basis. However, unlike FATCA, CRS is designed as a reciprocal multilateral instrument that provides a working solution for fighting tax secrecy. At the moment, almost fifty countries have adopted it, with one notable exception, the USA, which focuses on spreading the reach of FATCA.

These mechanisms for automatic exchange of information have helped the fight against tax evasion. According to the research done in 2020, it was shown that FATCA and CRS were successful in reducing tax evasion and avoidance. The result obtained was that tax havens are 67% lower than where they would have been without the two treaties.⁵⁵ However, the effects of FATCA are, as argued, not as grand as expected.⁵⁶ In another research it was concluded that CRS and OECD MAC led to increase of average tax rate on dividends for 4.5% in 2017.⁵⁷

On the other side, there is space for improvements. Firstly, existence of parallel mechanisms such as DAC, FATCA and CRS for automatic exchange of financial information increases administrative costs for tax administrations and financial institutions. Even though CRS has been developed as a parallel to FATCA, there are differences between them that make their application harder for tax administrations and financial institutions.⁵⁸ They

53 Avi Yonah, R., Xu, H., 2016, p. 200.

54 <https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/> (1. 11. 2022).

55 See Ahrens, L., Bothner, F., 2020, The Big Bang: Tax Evasion after Automatic Exchange of Information under FATCA and CRS, *New Political Economy*, Vol. 25, No. 6.

56 Beer, S., Coelho, M., Leduc, S., 2019, Hidden Treasures: The Impact of Automatic Exchange of Information on Cross-Border Tax Evasion, *IMF Working Paper*, WP/19/286, p. 10.

57 Ahrens, L., Bothner, F., Hakelberg, L., Rixen, T., Capital Taxation and International Cooperation: The Causes and Consequences of Automatic Exchange of Information, in: Unger, B., Rossel, L., Ferwerda, J. (eds.), 2021, *Combating Fiscal Fraud and Empowering Regulators: Bringing Tax Money back into the COFFERS*, Oxford, Oxford University Press.

58 Gadžo, S., Klemenčić, I., 2017, pp. 219–220.

have to make sure to follow correct procedural rules for their application, otherwise their efforts can be in vain. For countries that already struggle with administrative capacities, this represents a considerable issue. Most importantly, for developing countries that are supposed to implement automatic exchange of information, this will represent a considerable cost. Namely, it will be much better if there is one instrument to be applied globally.

3.2. ASSISTANCE IN TAX COLLECTION

Assistance in tax collection, unlike the sharing of information, has never been widespread.⁵⁹ It was always followed by major obstacles, the main one being the prohibition of extraterritorial intrusion.⁶⁰ However, the importance of assistance in tax collection every day becomes more evident for the taxation of digital economy.⁶¹ As already mentioned, multinationals are doing their business in a world without borders, people are becoming ‘nomads’,⁶² having their assets spread across the world, leaving tax administrations powerless when it comes to collecting their due tax if not for administrative assistance.

These reasons have led to the inclusion of the assistance in tax collection provision in the model tax treaties at the beginning of 2000s, OECD MAC and EU Directive, but even now, twenty years later, nothing much has changed at the global level.⁶³ Inclusion or acceptance of assistance in tax collection is still elective, and given that most of the double tax treaties have been signed much before the OECD proposed the new article, assistance is not included in many of them. However, many countries ratified the OECD MAC after 2010, which led to the slow increase in numbers of countries that provided it. However, the USA is a notable exception as it has not ratified the OECD MAC. Also, the USA has included provision for assistance only in a small number of treaties that they signed or amended after the 2003,⁶⁴ leaving only a few cases when the USA provides assistance in collection of taxes.

59 Picciotto, S., 2013, *International Business Taxation, A Study in the Internationalization of Business Regulation*, Cambridge University Press, pp. 300–304.

60 Jestin, K., 2008, Mutual Legal Assistance in Tax Matters Recent Trends and Challenge Ahead, p. 3, (<http://visar.csustan.edu/aaba/Jestin2008.pdf>); Avi-Yonah, R., Savir, G., 2014, IGAs vs. MAATM: Has Tax Bilateralism Outlived Its Usefulness?, *Law & Economics Working Papers*, 95, p. 7.

61 *Ibid.*, p. 14.

62 Kostić, S., 2019, In Search of the Digital Nomad – Rethinking the Taxation of Employment Income under Tax Treaties, *World Tax Journal*, Vol. 11, No. 2, pp. 189–225.

63 Avi Yonah, R., Xu, H., 2016, p. 201.

64 *Ibid.*, p. 205.

From all the mentioned instruments for assistance in tax collection, the most advanced one is the EU Directive.⁶⁵ This comes as no surprise given the prerequisites for its provision. Countries require a special degree of trust when given the assistance in tax collection. Also, it is advisable for countries to be at a similar level of development and have compatible administrative structures, as well as similar level of cooperation.⁶⁶ Having these conditions in mind, it is clear that the EU is the right place to increase cooperation initiatives.

The experience in providing assistance at the level of EU led to some conclusions. Most importantly, the prerequisite for an efficient system is the efficient exchange of information and access to all the data necessary for tax collection.⁶⁷ Secondly, in order to have an efficient system for providing assistance in tax collection, countries need to have sufficient resources and be willing to cooperate.⁶⁸ At the level of the EU, Member states are encouraged to invest in such assistance in order to enable proper functioning of the internal market.⁶⁹ However, even at the level of the EU, member states noted that assistance in tax collection is not performed without burden.⁷⁰ What we would not usually expect from EU member states is the complaint about the lack of national resources to fulfil the requests as well as about the lack of focus of some of them on providing assistance.⁷¹

Furthermore, countries should simplify national rules for tax collection and eliminate potential hurdles in practice as they can minimise the efficiency of multinational recovery system.⁷² And finally, issues are to be expected when EU member states start to provide assistance to third countries.⁷³

If we take these lessons and try and apply them at the global level, we come to some conclusions. There is still a long way for establishing an

65 Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, *OJ L* 84, 31 March 2010.

66 Jestin, K., 2008, p. 6.

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

70 European Commission, Report from the Commission to the European Parliament and the Council on the operation of the arrangements established by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, Brussels, 18 December 2017 COM(2017) 778 final, p. 6.

71 *Ibid.*

72 *Ibid.*, p. 7.

73 *Ibid.*, p. 11.

efficient global system for providing assistance in recovering tax claims. However, given that companies and people have become global rather than local players, there is certainly a need for countries to come together and work towards a functional international system. If not, countries will struggle to recover their due revenue and taxation of digital economy will continue to be out of reach.

4. PROPOSAL

To tax digital economy efficiently, uncoordinated national tax rules should be replaced by global solutions that would be equally applicable in both developed and developing countries. New rules should be supported by efficient multilateral cooperation instruments that would allow for effective information exchange mechanism together with administrative assistance in tax collection. The existing treaty network for information exchange characterised by non-reciprocity, coupled with countries interested in attracting the offshore money, cannot be the way forward.⁷⁴ Namely, in order to retain control over their tax systems and receive their due tax revenues, countries have to turn to mutual assistance.⁷⁵

The best-case scenario according to the author is making all countries agree on one instrument for international cooperation in tax matters that would be reciprocally applied. Many instruments lead to administrative burden for tax administrations that reduces the effectiveness of their functioning. If the system is harmonised, countries are incentivised to cooperate, tax administration staff is trained to apply one set of rules, information sharing is done smoothly as well as providing assistance in collection of taxes. It is more efficient to choose one legal basis for providing assistance that would be equally applied throughout the countries.⁷⁶ In that scenario, taxation of digital economy becomes a reachable goal. If not, existing chaos is likely to continue and taxation of digital economy will remain a reference for future.

However, to achieve enhanced cooperation in tax matters, one must not forget the elephant in the room, and that is, the low capacity of many tax administrations globally. The USA's tax administration, the Internal Revenue Service (IRS), is one of the most developed tax administrations

74 Avi-Yonah, R., Xu, H., 2016, p. 196.

75 See Dagan, T., 2002, *The Costs of International Tax Cooperation*, *Public Law and Legal Theory Research Paper*, 13.

76 Baker, P., Czakert, E., Eijdsden, A., Grau Ruiz, M. A., Kana, L., 2011, *International Assistance in the Collection of Taxes*, *Bulletin for International Taxation*, April/May, p. 287.

in the world. It does not come as a surprise that the IRS can deal with the big data that is incoming through FATCA. The OECD countries are equipped to deal with various exchange of information mechanisms, even though there have been some issues for them as well as noted previously. Conversely, a large number of countries that are required to send the information through automatic exchange systems, are not equipped to use the data they receive, especially developing countries.⁷⁷ They receive large amounts of data that remain unused as they do not know how to use it. As noted, exchange of information would be much easier if countries knew that they are comparing apples to apples, and not oranges and apples.⁷⁸ As a consequence, benefits from exchange of information mechanisms for developing countries can be much lower.⁷⁹ For these reasons, there is a need for international community to find a solution for ensuring efficient application of mutual assistance mechanisms. The evident way would be for most developed countries to provide help through capacity building and technical resources.

But, why would developed countries spend time and resources on other countries' tax administration capacities and resources, and equally, why would developing countries agree to share information or collect taxes for developed countries? Firstly, given that developed countries are main market countries, and that most of the proposals for taxation of digital economy are giving more taxing rights to market economies, it seems that they will gain mostly from these rules. Developed countries should see this form of assistance as a way of investing in future increased tax revenues that would be coming from information or assistance in tax collection from other countries. Revenues from taxation of digital economy are already measured in hundreds of millions of dollars, so it seems that developed countries do not have much to lose.

On the other side, developing countries might be willing to accept increased administrative assistance as long as they get some benefit from the new rules for taxation of digital economy. It seems that unitary taxation and formulary apportionment can be of interest for developing countries as long as labour and tangible assets factors are included. Developing countries are characterised by a high number of people working for multinational companies that hire them due to the lower labour costs. This becomes even more important in digital economy realm where people are

77 Keen, M., Slemrod, J., 2021, *Rebellion, Rascals, and Revenue, Tax Follies and Wisdom through the Ages*, Princeton University Press, p. 265.

78 Roin, J., 2002, p. 4.

79 Valderrama Mosquera, I. J., 2015, Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism, *World Tax Journal*, Vol. 7, No. 3, Section 5.1.

able to work from any place in the world as long as they have Internet connection and a laptop.⁸⁰ On the other side, remains of existing brick and mortar economy are important when it comes to locating tangible assets, mostly in developing countries, due to various tax incentives offered in return. Furthermore, revenue sharing has already been advocated by some authors as an incentive for developing countries to provide more administrative assistance.⁸¹ However, one must not forget the role of political pressure exerted on developing countries. The best example can be seen in worldwide acceptance of FATCA, as well as the influence by the EU on countries to start accepting tax transparency standards and BEPS minimum standards.⁸² It seems that even if developing countries would not necessarily want to adopt new rules and use their scarce resources on providing more mutual assistance, it is realistic to expect political pressure from developed countries.

For these reasons, the author believes that there is a need to advocate for uniform adoption of CRS standard and OECD MAC mechanism for providing assistance in tax collection and for the abolition of other parallel instruments. If there is a consensus on a rule for taxation of digital economy, it will become necessary to establish a multilateral solution for sharing tax revenue by countries. In that case, OECD MAC article on administrative assistance in collection of taxes seems like a logical choice as it is a multilateral solution that is open to everyone. On the other side, more problems are to be expected with adopting CRS at the global level because of the low chances of USA adopting the standard and refuting FATCA. However, as the USA has been the first one to introduce automatic exchange of information through FATCA and reap the benefits from incoming information, together with the fact that it represents one of the biggest markets in the world, it seems that this is the unique time when the USA could be nudged to a working compromise. If accepting CRS is out of the question, the USA and OECD should be able to harmonise the rules of FATCA and CRS so as to make their application identical from the point of view of tax administrations. Harmonisation would lead to reduced administrative costs, reduction in procedural issues and it would be

80 These facts influenced the new proposal: Kostić, S.V., 2021, A Plea for a Workforce Presence PE Concept in a Post-Covid Digitalized World, *Intertax*, Vol. 49, No. 10, pp. 758–770.

81 See Turina, A., 2013, *Information-based Administrative Tax-Cooperation, Consolidating Standards, Emerging Actors and Evolutionary Perspectives*, Doctoral Thesis, Bocconi University, Italy.

82 Remember the EU list of non-cooperative jurisdictions for tax purposes, available at: <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/> (1. 11. 2022).

an incentive for countries that do not apply these standards yet to adopt them. Rather than complying with multiple systems, they would have to comply with only one.

Second point would be to broaden existing programs for providing technical assistance and capacity building, through the work of OECD, *i.e.*, Global forum or the United Nations. These programs are of great help for countries, especially developing countries, but they should not be limited only to them. They should be open to all countries that need help in applying tax transparency standards. Bottom line, it is argued that existing fund for these programs should be increased, mostly through increased contributions by most developed countries that are likely to receive greatest benefits from the new rules and new systems.

5. CONCLUSION

Even though the main argument for enhancing tax cooperation among countries for years have been administrative advantages, today we believe that reason falls down to the second place. Inability of countries to efficiently tax global corporates has become the problem no. 1 for the global community. Further technological progress is imminent and all countries, and especially market countries, will want to get their share of new revenue.

Digital companies are using the possibilities offered by the Internet and IT progress. Even though it is not reasonable to assume that governments can go hand in hand with businesses in using the technological progress, in order to efficiently tax digital companies, it is essential for countries to work together on finding a global solution that would be efficiently applied throughout countries. Current proposals for taxation of digital economy presuppose that countries have fully functioning systems for information exchange and assistance in tax collection. Only with up-to-date information can countries understand how multinationals function and in turn, tax them accordingly. Given that multinationals operate in many countries, it is not enough for tax administrations of the most developed countries to be efficient, there is a need for all tax administrations to efficiently apply existing rules and provide administrative assistance in tax collection. It seems that the world is at the point where benefits for better cooperation among countries outweigh its costs.

For these reasons, it is proposed in this paper that the CRS standard and OECD MAC mechanism for providing administrative assistance in tax collection should be applied globally while the rest of automatic

exchange of information standards should be abandoned. If this is not accepted, then, as a second-best solution should stand the harmonisation of FATCA and CRS rules in order to have only one set of rules guiding exchange of financial information. Furthermore, developed countries need to provide further help to other countries in strengthening their tax administration capacities and resources. The reason more is the fact that even the EU countries struggle to use automatic exchange of information effectively as shown in the research. That could be done through deepening existing initiatives by the Global Forum that should be increased in both numbers, human resources and equipment provided to countries in need of help. Or, it could be done through setting up new initiatives under the auspices of the United Nations.

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MOŽEMO LI GOVORITI O OPOREZIVANJU DIGITALNE EKONOMIJE BEZ POBOLJŠANE SARADNJE U PORESKOJ MATERIJU IZMEĐU DRŽAVA?

Iva Ivanov

APSTRAKT

Pronalaženje pravila za oporezivanje prihoda kompanija u digitalnoj ekonomiji i dalje je u centru pažnje. Tri predloga su privukla najveću pažnju, iako je još uvek neizvesno da li će neki od njih biti izabran kao konačno rešenje. Ono što nam pokazuju ovi predlozi jeste to da je za primenu novih pravila za oporezivanje digitalne ekonomije neophodno obezbediti funkcionalno globalno okruženje u kome bi informacije bile lako dostupne i gde bi zemlje pružale pomoć u naplati poreza. Međutim, postojeći instrumenti administrativne saradnje to ne obezbeđuju na adekvatnom nivou. U ovom radu se tvrdi da trenutni politički dogovor oko potrebe postizanja međunarodnog konsenzusa treba iskoristiti za unapređenje mehanizama međusobne pomoći. U radu se tvrdi da CRS treba da postane glavni globalni instrument za automatsku razmenu finansijskih informacija, ili barem da CRS i FATCA pravila treba uskladiti tako da ne postoje razlike između njih. Nadalje, tvrdi se da bi tre-

balo da sve zemlje počnu da pružaju pomoć u naplati poreza na osnovu OECD MAC-a. I na kraju, tvrdi se da bi trebalo proširiti programe za tehničku pomoć i izgradnju kapaciteta koje pruža OECD tako da više zemalja ima pristup i da se više resursa posveti svakoj zemlji.

Ključne reči: oporezivanje digitalne ekonomije, automatska razmena podataka, FATCA, CRS, DAC, OECD MAC, pomoć u naplati poreza.

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