Università
Ca'Foscari
Venezia

Single Cycle Degree Programme

Global Development and Entrepreneurship

Final Thesis

Global Minimum Tax: Global Response to the Issue of Double Non-Taxation?

Supervisor
Chiar.mo Prof. Claudio Di Gregorio

Graduand
Alice Gasparetto
882481

Academic Year
2022 / 2023

Ironically, just at the time that inequality
has being growing,
the ability to redistribute income through taxation
has been reduced enormously.

Joseph Stiglitz

Acknowledgements

I would firstly like to thank my family: my parents, my brother, my grandmother and aunts, for their support and encouragement, for allowing me to focus on my academic studies and on this thesis.

To Filippo, for his kind and encouraging presence, for helping me in infinite ways and through every challenge. I am incredibly thankful for your love and your friendship, and for everything we do together.

To my friends, with whom I have been sharing my life since primary school, for all the fun, the long conversations and the invaluable advice.

A final thanks goes to Professor Claudio Di Gregorio, for his guidance and expertise throughout this thesis.

Global Minimum Tax: Global Response to the Issue of Double Non-Taxation?

Abstract

Globalization and digitalization have profoundly changed and shaped the international tax law and the rapid changes of the last decades have often jeopardized its effectiveness and competitiveness.

Double non-taxation has become an increasingly topical issue since the beginning of the 21st century: large multinational enterprises have exploited loopholes in the corporate tax regimes in order to lower their tax burden, while undermining fair competition between countries.

Over the years, international organizations updated the models and conventions in order to adjust the international tax regime to this new scenario. To date, more than 140 countries, as part of the OECD/G20 Inclusive Framework on BEPS Project, agreed on adopting the Global Anti-Base Erosion Rules (GloBE), which consist of a two-Pillar scheme aimed at ensuring that multinational enterprises are subject to a minimum tax rate in each country they operate in.

This work aims at outlining a broad picture on the topic of corporate taxation, with the view to understand if the new "Global Minimum Tax" may also represent a solution to the old issue of double non-taxation and to the harmful tax competition between jurisdictions.

CONTENTS

INTRODUCTION………………………………………………………………….. p. 3
CHAPTER 1: THE ISSUE OF DOUBLE NON-TAXATION…………………………… 5
1.1. Historical and Conceptual Background……………………………………………….. 5
1.1.1. International Taxation: The Fundamental Principles, from the League of Nations to the Regional Economic Organizations……………………………………... 5
1.1.2. International Taxation in the time of Digitalization and Globalization…………………………………………………………….. 9
1.2. Residence Taxation and Source Taxation……………………………………………. 11
1.2.1. Foreword…………………………………………………………………….. 11
1.2.2. Benefits Principle and Source (Single Tax) Principle ……………………………… 14
1.3. Double Taxation or Double Non-Taxation? ………………………………………… 16
1.4. The Model Double Taxation Conventions…………………………………………… 25
1.5. Addressing the Issue of Double Non-Taxation………………………………………. 30
CHAPTER 2: CORPORATIONS AND CORPORATE TAX.. 37
2.1. Corporation and Corporate Tax Residence …………………………………………... 37
2.2. The concept of Corporation in Double Taxation Treaties……………………………… 43
2.3. Globalization, Digitalization and the Impact on Countries' Corporate Income Tax Regimes……………………………………………………………………………… 47
2.4. Case Studies………………………………………………………………………… . 53
2.4.1. The Apple Case……………………………………………………………………...53
2.4.2. The Pepsi Co. Case………………………………………………………………… 55
2.4.3. Google vs Italian Revenue Agency …………………………………………………… 56
2.4.4. The Huawei Case…………………………………………………………………… 59
2.4.5. The Gazprom Case………………………………………………………………... 61
2.5. The OECD Action Plans to counter MNEs Harmful Tax Practices ……………………63
CHAPTER 3: GLOBAL MINIMUM TAX……………………………………………... 69
3.1. Towards an International Corporate Tax Reform……………………………………... 69
3.2. The basic principles of the Global Minimum Tax in the OECD – G20 Inclusive Framework on BEPS………………………………………………………………………… 74
3.3. First Assessment on the International Corporate Tax Reform………………………….. 79
3.4. Spillover Effects on the Foreign Direct Investments…………………………………… 85

3.5. The EU Directive on ensuring a Global Minimum Level of Taxation for Multinational Enterprise Groups. Basic Principles………………………………………………... 90

CONCLUSION…………………………………………………………………………... 97

REFERENCES…………………………………………………………………………. 103

APPENDIX ………………………………………………………………………….. 113

Table 1 - List of OECD Member countries - Ratification of the Convention on the OECD .

……………………………………………………………………………………………113

Table 2 - Members of the OECD/G20 Inclusive Framework on BEPS…………………..…114

Table 3 - Signatories and Parties to the OECD Multilateral Convention to implement Tax Treaty related measures to prevent Base Erosion and Profit Shifting status as of 10 November 2022…………………………………...…………………………….…………… 115

Table 4 - List of Members of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes – Last Update May 2023……………………………………. 117

Table 5 – Profitability in Tax Havens ………………………………………………………. 119

Figure 1 – Corporate Tax Revenue in Tax Havens…………………………………………..121

Figure 2 – Average statutory corporate income tax rates by region from 2000 to 2022 …….122

Figure 3 – Complex Ownership of MNE foreign affiliates …………………………………123

Figure 4 – Using Offshore Affiliates to Avoid U.S. Taxes (Apple Case)……………………124

Figure 5 – From Italy to Bermuda (Google Case) ….……………………………………….125

Figure 6 – The Impact of Pillar 2 on Profit shifting gains and losses……………………….127

Figure 7 – Pre- and post- Pillar Two profit shifting shares (Percentage)……………………128

INTRODUCTION

The rapid diffusion of globalization first, and digitalization later, has not been followed by an equally rapid evolution of the legislative environment. Indeed, the international tax framework consists of a set of principles and legal policies that were mainly developed in the first years of the twentieth century. Those principles, however, have proven to be insufficient for the current economic relationships between countries, individuals and businesses.

Moreover, the significant loopholes that the international tax framework has not been capable to address, have allowed multinational enterprises (MNEs) to engage in aggressive tax planning practices, aimed at reducing taxation on their international profits. The phenomenon of double non-taxation of corporate profits has therefore grown exponentially, overall reducing the fairness and efficiency of the tax regimes and international taxation, as a whole. This situation, combined with the need of governments to increase their tax revenues in the aftermath of the financial crisis and the COVID-19 pandemic, prompted numerous domestic and international authorities to take action.

In this context, the question arises whether the introduction of a Global Minimum Tax of 15% on multinationals' profits may represent a solution to the issue of double-non taxation, by reducing profit shifting and tax competition between countries. The present work wishes to answer this question.

To this aim, Chapter 1 introduces the topic by providing the historical background and the fundamental principles of the international taxation, born with the 1920s compromise reached within the framework of the League of Nations.

The principles of residence and source taxation are still embedded in the Model Conventions of the Organization for Economic Cooperation and Development (OECD) and the United Nations (UN). The structure, the contents and the differences between these Models are also discussed in the chapter. The issues of double taxation and double non-taxation are then presented, underlying how the two concepts are strictly connected. Throughout the twentieth century, the main goal of bilateral treaties and Model Conventions was to avoid the double taxation of income coming from cross-border transactions, while little attention was given to the eventuality of under taxation of multinationals' profits, which increasingly became an issue towards the beginning of the twenty-first century. The general public became more sensitive to the topics of tax fairness

and began showing dissatisfaction with the low amount of taxes paid by multinationals, prompting international organizations to look for solutions to address the issue of double non-taxation.

Chapter 2 pays special attention to the concepts of *corporation* and *corporate tax residence*, both in double taxation treaties and in the domestic tax law. The overview continues by explaining how the lack of a universal and generally accepted definition of corporate residence is one of the main causes of double non-taxation.

A number “grey areas” or loopholes within the international tax system have been identified: these have allowed large MNEs to lower their tax burden or completely evade taxation in their designated jurisdictions, through aggressive tax planning and profit shifting.

Globalization and digitalization magnified this phenomenon, and it was estimated that MNEs shift about 40% of the profits generated each year to tax havens: the losses for non-haven countries’ corporate tax revenues are therefore significant (Tørsløv et al, 2020)[1].

The mentioned case studies give an interesting insight into how these companies manage to escape taxation and how tax authorities and governments tried to hinder and sanction this phenomenon. At the international level instead, the Action 5 of the BEPS project is designed to counter these harmful tax practices.

In Chapter 3, after presenting the process that led to the development of the Two-Pillar solution promoted by the OECD-G20, and nowadays agreed upon by more than 140 members of the Inclusive Framework, the basic principles of the Global Minimum Tax are explained.

The rules are the first real attempt made by international organizations to reform the century-old system. The peculiar mechanisms of Pillar Two redistribute the taxing rights to either residence or source-countries, in order to ensure that multinational enterprises are taxed at the minimum agreed global rate of 15% on global revenue, no matter of the jurisdiction they operate. The chapter then provides evidence from numerous papers about the economic impact of the corporate tax reform, identifying the effects that the introduction of the minimum tax will have on countries’ tax revenues, on foreign direct investments and on businesses.

---

[1] TØRSLØV T., WIER L. S., ZUCMAN G., *The Missing Profits of Nations*, in NBER WP Series, 2020, Cambridge, MA, U.S.A., p. 3-4. The data refers to the year 2015, where it was estimated that between $ 616 and $ 646 billion profits were shifted to tax havens globally.

CHAPTER 1
THE ISSUE OF DOUBLE NON-TAXATION

1.1. Historical and Conceptual Background.

1.1.1. International Taxation: The Fundamental Principles, from the League of Nations to the Regional Economic Organizations.

When countries, individuals, and businesses started engaging in cross-border trade, globalization meant that national tax systems, each with its own different evolution path, had to start interfacing with one another. An international taxation regime needed to be built, to solve new emerging problems. The set of policies and legal instruments that were discussed and generally agreed upon in the 1920s are still the foundation of all the model conventions and international treaties that followed thereafter.

Naturally, over the course of the last century, the scenario has evolved and the current international tax system is a complex network of more than 3000 bilateral treaties (Avi-Yonah, 2015)[2]. Nevertheless, most countries draw their main features from two models, namely the OECD Model Tax Convention on Income and on Capital and the UN Model Double Taxation Convention between Developed and Developing Countries. In turn, these trace their origins back to the first draft of the 1927 League of Nations Model Tax Convention.

Between the end of the nineteenth century and early in the twentieth century, economic activity started to grow significantly and businesses started engaging more often into cross border transactions. Along with the phenomenon of globalization, the issue of taxation of international transactions became a concern (Tinhaga, 2016) [3]. Wealth was generated beyond the frontiers of one single country, and soon the same income became the point of contention between two (or more) States: each of them sought to tax the economic activity carried on within its borders, and the income of its citizens as well. Therefore, countries wanted to target all kinds of income, and it was clear that double taxation would happen in this scenario.

---

[2] AVI-YONAH R. S., *Who Invented the Single Tax Principle? An Essay on the History of US Treaty Policy*, in N. Y. Law School Law Review 59, no. 2, (2015), p. 310.

[3] TINHAGA P. Z., *From Avoiding 'Double Taxation' Yesterday to Avoiding 'Double Non-Taxation' Today: The Urgent Need for an International Tax Regime Based on Unitary Tax Principles*, Ann Arbour – Michigan, U.S.A., 2016, p. 43.

Apparently, the crucial question of international taxation seems to be the attribution of sovereign taxing powers between countries. Solving the "*competing claims of residence and source nations*" became imperative (Tinhaga, 2016)[4], and the issue came to the fore especially in the years following World War I.
In the complex aftermath of the war, a wave of protectionism spread and many countries started turning away from globalization, with limits on immigration and new tariffs being implemented[5]. Companies and taxpayers were concerned about the generally higher tax rates (put in place to finance the war effort and to fix the state's budget), and the risk of double taxation posed clear limits to international trade and investment. Moreover, potential disputes over taxation matters were a threat to cooperation between countries.
The newly created League of Nations was entrusted to find a solution to the double taxation issue, with the goal of promoting economic cooperation between countries. In the early 1920s, a Committee - composed of four eminent economists - was established and after intensive debate, a report was issued in 1923.
The choice of the four economists was not coincidental[6]. To give a comprehensive representation of the views and interests of different countries, two economists were chosen from capital importing countries: Italy and The Netherlands. These countries were seeing an increase in economic activity coming from abroad, and they therefore supported the idea of a source-based taxation, following the logic that the connection between the income created and earned within their borders was giving that source-country the exclusive taxing power, as well as the ability to levy the tax more effectively (Avi-Yonah, 2019)[7]. The third economist was from the United Kingdom, which was traditionally a major exporting country and thought that taxing rights had to be granted to the residence-country, to ensure that the investments of the resident businesses could generate a tax return for the country even if the economic activities were carried out abroad. The economist from the US was instead well positioned to moderate between the others: the country had historically been an importer of capital, but it had recently become the world's largest capital exporter country, and it had therefore experienced both sides of the

[4] TINHAGA P. Z., *From Avoiding 'Double Taxation' Yesterday…*, quoted above, p. 44.
[5] AVI-YONAH R.S., *Advanced Introduction to International Tax Law*, Northampton, MA, U.S.A., 2019, p. 3.
[6] The economists were Professor Luigi Einaudi, Professor G.W.J. Bruins, Sir Josiah Stamp and Professor E. Seligman.
[7] AVI-YONAH R.S., *Advanced Introduction…*, quoted above, p. 4.

taxation debate. Moreover, it was the first country to introduce a foreign tax credit in 1918, giving jurisdiction to tax to the source-country (Rixen, 2011; Jogaraian, 2018) [8].
Essentially, the debate came down to balancing opposite interests between rich and poor countries. Nowadays, academics and international institutions use the words developed and developing countries when referring to this debate, but the issue is unchanged: different governments do not have the same political interests, and the differences between States in terms of needs and goals, in both economic and social terms, make it very difficult to negotiate. Moreover, each country has its own fiscal sovereignty and independence, and wishes to adopt specific tax rules that are beneficial to them, having at the same time the obligation to conform to the international standards they signed [9].
The starting point of the discussion for the four economists, as it can be read in the Expert's Report of the Financial Committee of 1923[10], was the principle of economic allegiance. According to Oats (2021) [11], the aim of the principle is to establish where the economic interests of the taxpayer are, and where the economic activity is actually taking place (often called the "nexus"). Three things must be considered when evaluating this economic allegiance (League of Nations, 1923): where wealth is produced, where it is possessed, and where it is disposed of[12].
Bearing in mind this concept of economic allegiance, the goal of the Committee was to decide who had to be assigned the jurisdiction to tax, and which remedies could be more effective to relieve the problem of double taxation. Four possible alternatives were appointed and thoroughly examined.
The outcome of this discussion is the so-called "1920s Compromise" (Nersesyan, 2021) [13], and it identified two major solutions. The first is the recognition that the taxing rights

---

[8] RIXEN T., *From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance*, in Review of International Political Economy, Vol. 18, May 2011, p. 205; for an in-depth analysis about the influence of the first Model Convention on the OECD MTC see also JOGARAJAN S., *Double Taxation and the League of Nations,* Cambridge, 2018, p. 98 – 166; 243 – 266.
[9] PEDROSA – LOPEZ J. C., *An Overview of Double Non-Taxation, Cross-Border Transactions and Tax Implications*, in Party Autonomy in European Private (and) International Law, Tome II, 2015, General Principles. 109.
[10] LEAGUE OF NATIONS, Financial Committee, *Experts' Report on Double Taxation: Document E.F.S.73.F.19*; Geneva, April 5, 1923, Excerpt from the University of Sidney Library, in *https://adc.library.usyd.edu.au/view?docId=split/law/xml-main-texts/brulegi-source-bibl-1.xml;chunk.id=item-1;toc.depth=1;toc.id=item-1;database=;collection=;brand=default.*p. 9, where three different classes of taxation were identified.
[11] OATS L., *Principles of International Taxation*, London, 2021, p. 32.
[12] Referred in the LEAGUE OF NATIONS, *Experts' Report on Double Taxation: Document E.F.S.73.F.19* as: production of wealth, possession of wealth, disposition of wealth.
[13] NERSESYAN N., *The Current International Tax Architecture: A Short Primer*, in *Corporate Income Taxes Under Pressure. Why Reform Is Needed and How It Could Be Designed – Chapter 3*, IMF Library, Washington D.C., 2021, p. 23.

of the source-country shall prevail, because “since the income arises within the source-country, then the residence-country cannot prevent the source country from taxing that income” (Avi Yonah, 2019)[14].

To answer the question on how to prevent double taxation in this context, the economists agreed that the residence-country had to refrain from taxing that income through the exemption method, or by allowing a reduction in the form of a foreign tax credit.

The second and most important contribution is the introduction of the *benefits principle*, according to which income must be divided into two categories, namely active and passive income. The former is income deriving from business activities, including wages and salaries, the latter are earnings that a person receives from investments, dividends, interest, royalties. According to the benefits principle, active income should be taxed at source, while the residence-country has the right to tax passive income of its residents. The reasoning behind this principle is quite intuitive and it also respects the principle of inter-nation equity (OECD, 2014)[15].

As a theory, according to the OECD the allocation of tax revenues from international transactions must be equitable between the countries involved in such transactions. If on one hand the resident-country has the right to tax income from return of capital invested by its residents, on the other hand the source-country is involved in the process of generation of income, as it provides public goods (such as infrastructures and other services) to the businesses Rixen (2011)[16]. Indeed “*taxes are the price for the public goods used to produce private profit*”. A more detailed discussion on residence and source taxation will follow in the next paragraph.

The first model treaty was drafted a few years later in 1927 by the League of Nations Committee of Technical Experts, embedding the two principles already mentioned. The Compromise and this first draft of the Model International Tax Treaty are still considered as the foundation of the entire contemporary international tax regime, serving as a basis for tax treaties and other soft law instruments that followed thereafter[17].

[14] AVI-YONAH R.S., *Advanced Introduction …*, already quoted, p. 4.

[15] OECD, *Addressing the Tax Challenges of the Digital Economy, OECD/G20 Base Erosion and Profit Shifting Project,* OECD Publishing, Paris, 2014, p. 31.

[16] See RIXEN T., *From Double Tax Avoidance to Tax Competition*, already quoted, p. 208.

[17] Ex multis, see JOGARAIAN S., *Double Taxation and the League of Nations*, quoted above, p. 167 – 181.

1.1.2. International Taxation in the time of Digitalization and Globalization.

When the League of Nations was replaced by the Organization for Economic Cooperation and Development (OECD), the former versions of the Model Tax Conventions were integrated and institutionalized as the basis for new editions of non-binding conventions and bilateral tax treaties between countries. The benefits principle was working efficiently in that historical, political, and economic environment: active income was taxed at source, since it was less mobile and since controlled foreign corporation (CFC) rules assured that the residence-country could tax the mobile income that was not taxed at source. Moreover, off-shores investments were difficult and residence jurisdictions were capable of levying efficiently taxes on passive income.

The advent of globalization in the 1980s, and later that of digitalization in the '90s, showed the limits of the existing tax regime, that ceased to function as intended (Avi-Yonah, 2023)[18].

Most countries relaxed their rules on capital controls, allowing capital to become more mobile and intangible, thanks to the development of the internet and the digital economy. Multinational enterprises (MNEs) grew in number, from 35,000 in 1990 to 53,607 in 1998 (Rixen, 2011)[19], and their increased mobility led countries to change some of their rules on taxation to attract more of these MNEs. Source jurisdictions offered tax holidays, some of them even becoming real tax havens, and residence-countries relaxed their CFC rules in the fear of tax competition between countries for the location of MNEs' headquarters. The outcome was that both the residence jurisdiction of the corporation and the jurisdiction where production took place, very often did not impose taxes on the income generated. So MNEs were able to generate substantial income from market jurisdictions, and nevertheless managed to "escape" taxation.

Moreover, in the late 1990s, the so-called "Check-the-box Election" regulations were introduced in the US, enabling multinationals based there to shift profits more easily between foreign branches and affiliates in low-tax jurisdictions (Ketema, 1998; Field, 2009)[20].

---

[18] AVI-YONAH R. S., *International Taxation, Globalization, and the Economic Digital Divide*, in Journal of International Economic Law, 2023, No 26, p. 101.

[19] See RIXEN T., *From Double Tax Avoidance to Tax Competition*, already quoted, p. 211.

[20] For an in-depth analysis of the scheme see KETEMA P., *Did the Federal Check-the-Box Regulations Open up at State Tax Pandora's Box? A Reflection on State Conformity to the New Federal Classification Scheme of Single-Member LLCs*, 1998, in Minnesota Law Review, p. 1659 – 1694, and, more recently, FIELD H.M., *Checking in on Check the Box*, in Loyola of Los Angeles Law Review, 2009, p. 451.

It is estimated that $3 trillion in profits had been shifted offshore by 2017 (Avi-Yonah, 2000)[21], and countries such as Luxemburg and Ireland were intentionally granting low tax rates to attract business investments. On the individual income side, after the revocation of withholding taxes on interest, $14 trillion have been redirected to tax havens, escaping obligations to declare it to residence authorities.

As it can be imagined, this caused a decline in tax revenues, and when the financial crisis of 2008 burst, governments were forced to make cuts in the public spending and pursue an austerity policy. In the time of need, there was a renewed interest towards the fairness and efficiency of taxation. Political attention on tax matters grew in most countries, especially in Europe, and this led to a series of necessary developments in the international tax regime.

It was clear that the “20s Compromise” was no longer suited for the current economic scenario. The diffusion of big multinational companies and digital businesses enhanced the issue of how to deal with international taxation, and the focus shifted from avoiding double taxation to ensuring that these businesses were indeed paying their fair amount of taxes. Up until the 1960s the main goal of Model Conventions and bilateral tax treaties was setting rules and standards on how to avoid double taxation. After that issue had been solved, the problem of double non-taxation, or under-taxation, became relevant (Rixen, 2011)[22]. The last decade saw therefore powerful developments, and new instruments were discussed and published.

The OECD Base Erosion and Profit Shifting (BEPS) project, started in 2013, was the first real attempt to reform the original tax regime. It consisted of fifteen actions intended to contrast the harmful practices of shifting profits and erosion of the tax base carried out by taxpayers, through harmonizing international corporate tax laws. Good practices such as the exchange of financial information between jurisdictions and the requirement of strict CFC rules are an example of the actions included in the BEPS (Avi-Yonah, 2023)[23].

Nevertheless, the BEPS project had some limits and political pressure to find a more effective solution never softened. The recent proposal finalized in October 2021 of the BEPS 2.0 was the result of a shared effort between both the OECD and G20.

A deeper analysis of the two pillars take the last part of this work, but it briefly consists of two pillars that define new rules on the taxation of big MNEs and of the digital

[21] See AVI-YONAH R.S., *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State',* Harvard Law Review, 2000, Vol. 113, p. 1573.
[22] RIXEN T., *From Double Tax Avoidance to Tax Competition*, already quoted, p. 214 – 215.
[23] See AVI-YONAH R.S., *International Taxation,* quoted above, p. 102.

economy. In order to analyze the framework and the implications of the BEPS 2.0 and of the Global Minimum Tax in particular, addressing the concepts of benefits principle and single tax principle is crucial, since they are the premises on which the two pillars rest.

1.2. Residence Taxation and Source Taxation.

1.2.1 Foreword.

As already seen, the two concepts that regulate international taxation are the benefits principle and the single tax principle. While the single tax principle is related more closely to the issue of double non-taxation, the benefits principle can be interpreted as the trade-off between two opposite sides of a medal: a discussion on the functioning of residence and source taxation is needed.

In academic literature, different terms can be found when relating to these concepts.

The residence principle is often called "worldwide taxation" and it establishes that the residents (individuals or companies) of a particular country must be taxed in relation to their whole world-wide income, indicating either the one generated in their residence-country or active foreign-earned income. Non-resident citizens or companies may instead be taxed only on income originated in their territory (Mason, 2020)[24].

The exclusive adoption of world-wide taxation will obviously create a double taxation on the income earned abroad. This is where tax treaties come into force, requiring the resident country to exempt the income taxed at the source, or to grant a foreign tax credit (Nersesyan, 2021) [25].

Paragraph 1 of the Article 7 of the OECD Model Tax Convention reads as follows:

« Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions of paragraph 2 may be taxed in that other State. » (OECD, 2017) [26].

---

[24] MASON R., *The Transformation of International Tax*, in American Journal of International Law, Volume 114, Issue 3, July 2020, p. 355.

[25] NERSESYAN N., *The Current International Tax Architecture: A Short Primer*, in *Corporate Income Taxes Under Pressure. Why Reform Is Needed and How It Could Be Designed – Chapter 3*, IMF Library, Washington D.C., 2021, p. 28.

[26] OECD, Model Tax Convention on Income and on Capital 2017 (Full Version), OECD Publishing, Paris-Cedex, 2019, Article 7.

The Article revolves around the concept of "Permanent establishment"[27], meaning that a physical presence, being it a place of management and control or a place of production, is required to understand where that company shall be taxed[28].

The Article then proceeds to mention the two methods appointed by the OECD to eliminate double taxation: the Article 23A states that the resident State can "*exempt such income or capital from tax*" [29] or opt for the method suggested in the Article 23B, so giving a credit for the tax already paid to the other State[30].

There is some critique surrounding the concept of residence principle, mainly due to the extreme difficulty of defining where a present-day company has its residence. Multinational companies trace this name back to the fact that they carry out business around the world in multiple countries at once, having perhaps more than one residence and more than one permanent establishment. When the enterprise residence concept was developed in the early 1920s, the business with a fixed headquarter was the norm. Such kind of business does not exist anymore, and criteria to establish nowadays what "corporate tax residence" means became more elaborate, nevertheless leaving some loopholes open for MNEs to avoid taxation altogether or minimize their tax liability.

Eminent scholars[31] consider the concept of "Corporate Residence" not very meaningful, and residence taxation can only be applied efficiently to passive income earned by individuals, since it is easier to define where they reside.

The source principle instead, also called "territorial taxation", establishes that tax authority of the source State applies to all subjects, residents and non-residents, with exclusive regard to the income produced in its territory[32].

As already seen, in the Article 7, the OECD MTC actually puts two limits on territorial taxation of company profits (Mason, 2020)[33]:

---

[27] For an extensive definition of Permanent Establishment (PE), see the Article 5 of the OECD Model Tax Convention on Income and on Capital 2017.

[28] OECD, Model Tax Convention on Income and on Capital 2017 (Full Version), OECD Publishing, Paris-Cedex, 2019, Article 4.

[29] OECD, Model Tax Convention on Income and on Capital 2017 (Full Version), OECD Publishing, Paris-Cedex, 2019, Article 23 A.

[30] OECD, Commentary on the Article 7, p 181.

[31] See, ex multis, AVI-YONAH R.S., *International Tax Avoidance – Introduction*, in Accounting, Economics, and Law: A Convivium, vol. 7, no. 1, 2017, available at *https://doi.org/10.1515/ael-2016-0071*; BIONDI Y., *The Firm as an Enterprise Entity and the Tax Avoidance Conundrum: Perspectives from Accounting Theory and Policy*, in Accounting, Economics and Law: A Convivium, 2017, vol. 7, no. 1, available at *https://doi.org/10.1515/ael-2017-0001*.

[32] BEER S., MICHIELSE G., *Strengthening Source-Based Taxation* in 'Corporate Tax under Pressure, Why Reform Is Needed and How It Could be Designed', IMF Library, 2021, Washington D.C., p. 231.

[33] MASON R., *The Transformation of International Tax*, quoted above, p. 356 – 359.

- the source State can tax a non-resident company only when such company has a PE in the country;
- the taxable income is only the one that is "attributable" to the physical presence in that State.

The method therefore relies mostly on connecting income to its geographic location of origin, which is actually very difficult to do (Kane, 2015) [34]: this brings scholars, policy makers and negotiators right back to the problems arisen with globalization and the digital economy, where income is generated everywhere and nowhere at the same time (e.g.: the Internet).

Multinationals also learned how to shift profits to low-tax jurisdictions, making it look like income was sourced there and not in other countries where their tax liability would have been way higher (Zubimendi, 2019)[35].

Others (Nersesyan, 2021)[36] give a simple yet powerful example of how difficult it can be to connect profit to its source. Nowadays commercialization of services is as common as that of physical goods, but where are they sourced? The location where they are performed or where the provider has its residence can be different: this dilemma strains the concept of the source of income, leading scholars to question whether source-based taxation still has logical normative foundations in the twenty-first century. Nevertheless, it is believed that the source State can better levy taxation of cross border income (Avi-Yonah, 2019)[37].

In fact, it is quite rare for any country to strictly adhere to either a purely territorial or worldwide model of taxation: clearly, as discussed above, the exclusive adoption of one of the two has faults and weak points. Instead, there exists a wide range of variations that fall between these two extremes; once again, Model Conventions and bilateral tax treaties define the rules and sphere of application of these variations. However, it must be noted that, when it comes to classification, it is calculated that most developed countries adopt tax regimes based, primarily, on territorial elements (31 out of 36 OECD members, as of June 2019)[38].

---

[34] KANE M., *A Defense of Source Rules in International Taxation*, in Yale Journal of Regulation, 2015, Vol. 32, p. 311 – 361.

[35] ZUBIMENDI A., *The Single Tax Principle as a Limit to Double Non-Taxation? A Broad Perspective*, in Revista Internacional Consinter de Direito, 2019, Vol. 5, No 8, p. 392 – 393; in the same sense, see also MEROLA A., *International Double Taxation and Double non-taxation*, in ITAXA Blog, Roma, 2022, available in *https://www.itaxa.it/blog/en/international-double-taxation-double-non-taxation/*, para. 2.

[36] NERSESYAN N., *The Current International Tax Architecture…*, quoted above, p. 29 – 30.

[37] AVI – YONAH R. S., *Advanced Introduction…,* already quoted, p. 5.

[38] See Box 3.1, again in NERSESYAN N., *The Current International Tax Architecture…* quoted above, p. 29.

1.2.2. Benefits Principle and Source (Single Tax) Principle.

To resume, jurisdiction to tax international profits is governed by a compromise between residence and source-based taxation (Rosenweg, 2015)[39].
This agreement takes indeed the name of benefits principle (BP) (Avi-Yonah, 2022)[40].
As already mentioned, the concept was established by the Committee of the League of Nations in 1923, as the best solution to rule out the issue of double taxation and the potential disruption of international income flows caused by both countries asserting the right to tax the same income. The BP affirms that the source country has jurisdiction to tax active business income, while passive income should be levied in the country of residence. The latter has the responsibility to alleviate double taxation, either by granting a foreign tax credit or through the method of exemption.
The economists believed that this was the best option and the most likely to be accepted by the international community, since it limited the unfairness of giving the full priority to tax to the source country. The underlying logic of the BP was that the source country provided benefits such as education, infrastructure and legal provisions that contributed to the generation of business income. On the other hand, passive income coming from investments was a return on capital accumulated in the residence state. In other words, people and corporations shall pay taxes depending on where and how much they benefit from public goods they took advantage of (Weinzierl, 2014) [41].
The benefits principle gained international acceptance and worked reasonably well for many years (Avi – Yonah R.S., 2015)[42].
One factor contributing to the success is to be found in the fact that corporations predominantly earn active income, whereas individuals earn most passive income.
The BP has served as the cornerstone of the international tax regime ever since the 1920s and continues to be reflected in tax treaties and model conventions. Nevertheless, contemporary academics have started to debate its suitability in the modern economy,

[39] ROSENZWEIG A. H., *Source as a Solution to Residence*, Florida Tax Review, Vol. 17, No. 6, 2015, Washington University in St. Louis Legal Studies Research Paper No. 15-06-01, p. 482 – 488.
[40] AVI-YONAH R. S., *The Benefits Principle*, June 2, 2022, University of Michigan Public Law Research Paper No. 22-027, Available at *https://ssrn.com/abstract=4126198.*
[41] WEINZIERL M., *Revisiting the Classical View of Benefit-Based Taxation*, in NBER WP Series, 2014, Cambridge, MA, U.S.A., No 20735, p. 2.
[42] AVI-YONAH, R S., *The International Tax Regime: A Centennial Reconsideration,* University of Michigan Public Law Research Paper, 2015, p. 27 – 30.

with some even stating that "*both the residence principle and the source principle are deeply broken*" (Kane, 2015) [43].

Others (Avi-Yonah, 2015)[44] suggest a full re-evaluation of the principle, and an actually opposite solution: taxing passive income at source and active income at residence, to avoid at the same time double taxation and more importantly double non taxation.

The idea lies on two assumptions.

The first regarding passive income: since portfolio investments mostly flow through Japan, the EU and the US, the source jurisdiction that would have to coordinate are only these three. If they decided to impose a withholding tax on these payments they could solve the issue of taxing dividends, royalties and interest.

The second assumption concerns us more closely, because it is thought to prevent corporate double non taxation. Ninety per cent of MNEs have their headquarter in G20 countries, and with coordination between them and restrictions on the ability of the corporations to move, tax on active business income will be fully levied. The idea is however quite subversive, and it does not consider developing countries, where multinationals actually generate their income. Taxing active income at residence would mean stripping tax revenues away from these countries, fully disregarding the principle of inter-nation equity.

The single tax principle (hereinafter STP) is the second concept that regulates the international tax regime. The STP states that cross border income should be fully taxed only once. Full taxation means applying the residence country tax rate for individuals, and an average tax rate of the major economies for corporations (Avi-Yonah, 2022) [45]. Moreover, the STP is aimed at disapproving of both double taxation and double non taxation. If the country that has the primary jurisdiction to tax, according to the benefits principle, refrains from taxing that income or imposes an excessively low tax rate, the other jurisdiction should impose additional taxes to ensure complete taxation (Mason, 2020)[46].

[43] KANE M., *A Defense of Source Rules in International Taxation*, in Yale Journal of Regulation, 2015, Vol. 32, p. 314.

[44] AVI-YONAH, R S., *The International Tax Regime: A Centennial Reconsideration,* University of Michigan Public Law Research Paper, 2015. p. 29.

[45] AVI-YONAH R. S., *The Single Tax Principle*, University of Michigan May 27, 2022, Public Law Research Paper No. 22-024.

[46] MASON R., *The Transformation of International Tax*, in American Journal of International Law, Volume 114, Issue 3, July 2020, p. 353 – 402.

Even if the principle was firstly acknowledged by the League of Nations in 1927, it actually took many years before it became a widely adopted concept (Avi Yonah, 2019)[47]. In the first paragraph it was explained how up to the 1980s the main goal of international taxation was to avoid double taxation, and the absence of provisions assigning value to the STP somehow proves it, since the principle mostly aims at avoiding the opposite situation.

In the US tax policy for example, the single tax principle became an essential component only near 1981 (Avi-Yonah, 2020) [48].

Since then, as consequence of under taxation problems created by globalization, the STP gained more attention, and it was definitely coordinated in the OECD/G20 BEPS project. All BEPS fifteen actions are consistent with the principle and many other recent acts and provisions wish to reach its implementation (Avi-Yonah, 2022)[49]. Pillar Two of BEPS 2.0, which will be the topic of Chapter 3, represents the most extensive realization of the STP. The provision of a global minimum corporate tax and the implementation of other two rules included in the Pillar are specifically designed to facilitate full taxation when one of the two jurisdictions fails to do so.

1.3. Double Taxation or Double Non-Taxation?

Although double taxation depends on various elements that give rise to it, it is not so difficult to identify the moment when it comes up. However, the concept of double taxation – as well as the one of double non-taxation – have been subject, over the years, to different approach and interpretations. This phenomenon occurs when the jurisdiction to tax of different countries overlaps, resulting in the same wealth being subject to tax two or more times. In other words, the causes are mainly to be found in the difficulty of assigning taxing rights to the countries involved in cross border transactions[50]. Double taxation can be of two types.

Juridical double taxation happens when the same person is taxed on the same income by two different states. The OECD Model Tax Convention reads as follows:

---

[47] AVI-YONAH R. S., *Advanced Introduction to International Tax Law*, Northampton, MA, U.S.A., 2019, p. 3 – 12.

[48] AVI-YONAH R. S., *Who Invented the Single Tax Principle? An Essay on the History of US Treaty Policy*, already quoted, p. 315.

[49] AVI-YONAH R. S., *The Benefits Principle*, June 2, 2022, University of Michigan Public Law Research Paper No. 22-027, Available at SSRN: *https://ssrn.com/abstract=4126198*.

[50] VAN DE VIJVER A., *International double (non-)taxation: comparative guidance from European legal principles*, in EC Tax Review, 2015, No 5, p. 240.

« International juridical double taxation can be generally defined as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods. » (OECD, 2017)[51].

Economic double taxation occurs instead when the same income attributable to different individuals is taxed multiple times to each of the individuals[52]. This happens for example when the profits of a company are considered as a tax base both for the corporate tax imposed on the company, and the same profits are taxed once again when they are distributed as dividends to the shareholders, becoming a taxable passive income (Parada, 2018)[53].

Doctrine and OECD Commentary[54] have formulated some hypotheses regarding the elements that must be present for international double taxation to occur; in any case, it mainly depends on whether the tax burden on the cross-border income is the same as the one that would have been imposed on a comparable domestic situation in the individual Member States involved (Marchgraber, 2018)[55].

The issue of double taxation has been interestingly reframed by some researchers under a more "economic" framework, by applying game theory and imagining the issue as a sequential game happening in two steps (Rixen, 2011)[56].

The first consists in the onset moment of double taxation, whilst the second step shows how this can quickly result in a double non-taxation issue.

According to the afore mentioned researchers, strategic interactions among governments lie on two assumptions, quite intuitive and reasonable.

All governments, then, build their international tax approach with the purpose of maximizing tax revenues to support national welfare expenditure. Political support of domestic society (mainly individuals and businesses), which is imperative to ensure a successful enforcement and execution of those policies, must be seen as a constraint when

---

[51] OECD, Model Tax Convention on Income and on Capital 2017 (Full Version), OECD Publishing, Paris-Cedex, 2019, Introduction.

[52] OECD, *Manual on Effective Mutual Agreement Procedures (MEMAP),* Paris-Cedex, 2007 version. See also MARCHGRABER C., *Double Non-Taxation: Not only a Policy but also a Legal Problem,* in Kluver International Tax Blog, Amsterdam, January 5, 2018, p. 1.

[53] In this sense, see PARADA L., *Double Non-Taxation and the Use of Hybrid Entities: An Alternative Approach in the New Era of BEPS*, in Series on International Taxation Vol. 66, Alphen aan den Rijn, the Netherlands, 2018, p. 8.

[54] VAN DE VIJVER A., *International double (non-)taxation: comparative guidance from European legal principles*, in EC Tax Review, 2015, No 5, p. 250.

[55] MARCHGRABER C., *Double Non-Taxation: Not only a Policy but also a Legal Problem,* in Kluver International Tax Blog, Amsterdam, January 5, 2018, p. 2.

[56] RIXEN T., *The Political Economy of International Tax Governance,* Basingstoke: Palgrave/Macmillan, Springer, 2008, p. 32-41.

developing the tax regime. Secondly, the distinction between large and small countries must be taken into account: they have different needs and outsets, and to improve national welfare they may need a very different set of policies.
In the initial stage, due to the full exercise of the right to tax by each country, international investments are subject to double taxation. Providing double tax relief becomes a coordination game, and both countries have interest in doing so, as it will be explained further. In the second stage, taxpayers fully realize that international investment is unrestricted, and they can engage in the so-called "treaty shopping"[57]: they can shift profits or choose to locate their residence in the jurisdiction with the lowest tax rate. In turn, countries try to attract foreign capital by cutting down their taxes, to derive an individual benefit. This results in a harmful tax competition, "*a race to the bottom in taxes*" (Zubimendi, 2019)[58].
Large countries may experience a decline in national welfare because they do not attract much foreign tax base.
Small countries on the other hand, by applying lower taxes can attract more foreign investments and compensating the potential welfare loss of the lower tax rate levied. The positions they take in the argument are therefore opposite: governments of large countries will push to reach a cooperative agreement to contrast tax competition, while small countries governments will oppose any cooperation that restricts their ability to attract capitals.
In practice, overcoming this "*asymmetric prisoner's dilemma*"[59] is challenging because of the conflicting interests and individual incentives to walk out on the solution that is suboptimal for one party.
Over the years, the main objective of international taxation has always been the avoidance of double taxation. This can be found in the very introduction of the Experts' Report on Double Taxation of the League of Nations and is obviously the purpose of the whole work. The concept was referenced in the title of both the 1963 Draft Convention, the 1977 Model Convention and the 2017 OECD Model Convention, where it is stated that "*for*

---

[57] ZUCKMAN G., *Taxing across borders: Tracking personal wealth and corporate profits.* Journal of economic perspectives, 2014, Volume 28, Number 4, p. 121-148.- Also in MEROLA A., *International Double Taxation and Double non-taxation*, in ITAXA Blog, Roma, 2022.
[58] ZUBIMENDI A., *The Single Tax Principle as a Limit to Double Non-Taxation? A Broad Perspective*, in Revista Internacional Consinter de Direito, 2019, Vol. 5, No 8, p. 391.
[59] See RIXEN T., *From Double Tax Avoidance to Tax Competition*, already quoted, p. 202.

the purpose of eliminating double taxation, the Convention establishes two categories of rules" [60].

The list of places where the mentioning concept can be found would be very long, but what is more interesting is why there is so much attention to avoiding double taxation.

Firstly, it is inequitable, since individuals or entities that operate and generate wealth in multiple states face double taxation, while those operating solely within national borders do not (Tosi, Baggio, 2022)[61]. It can be interpreted as if it was favouring domestic investments over international ones [62].

Secondly, it leads to evident distortions on the economical level, as it imposes the risk of higher and unjust taxation on cross-border economic activities. It might discourage engaging in business activities in multiple states, thus limiting international trade and free movement, which is actually one of the main purposes of economic international organizations.

In the United Nations *Model Double Taxation Convention between Developed and Developing Countries*, it is stated that the principal scope of the model is promoting free movement of capital and persons, as well as promoting exchange of goods and services. The same statement of purpose can be found in the first lines of the Introduction to the OECD Model Tax Convention [63].

Furthermore, the European Union considers double taxation to be a "*severe obstacle for free movement*" (Marchgraber, 2018)[64], since the free movement of goods, capitals, services and people is one of the fundamental principles of the Treaty on the functioning of the European Union (TFEU)[65], not preventing double taxation would be incompatible with the Internal market. That is why European Court of Justice even considered to incorporate the elimination of double taxation among the goals of the European Law (Erdos, Kiss; 2019)[66].

---

[60] OECD, *Model Tax Convention on Income and on Capital 2017* (Full Version), OECD Publishing, Paris-Cedex, 2019, *Title of the Model Convention*

[61] TOSI L., BAGGIO R., *Lineamenti di diritto tributario internazionale,* Padova, 2022, p. 9 - 16.

[62] MUSGRAVE P.B., *Combining Fiscal Sovereignty and Coordination. National Taxation in a Globalizing World,* in I. Kaul and P. Conceicao (eds) The New Public Finance. Responding to Global Challenges, Oxford: Oxford University Press, 2006, pp. 167–93.

[63] OECD, *Model Tax Convention on Income and on Capital 2017,* Introduction.

[64] MARCHGRABER C., *Double Non-Taxation: Not only a Policy but also a Legal Problem,* quoted above, p. 3.

[65] EUROPEAN UNION, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/0, Article 26.

[66] ERDOS E., KISS, L. N., *Double Taxation and Double Non-Taxation as the New Tendencies of EU e-Tax Law*, in Multi Science - XXXIII. Micro CAD International Multidisciplinary Scientific Conference University of Miskolc, 23-24, 2019, p. 4.

Double taxation has always received a lot of attention by international organizations and countries governments. However, the other side of the medal has remained in the shadows for many decades, even if the possible issue of double non-taxation was already known at the time of the League of Nations. According to the Report of 1923, avoiding double non-taxation is as imperative as avoiding double taxation, and income should be taxed once and once only [67].

The phenomenon started to gain consideration only near the end of the last century (Van De Vijver, 2015)[68], and since then literature on the double non-taxation issue has increased exponentially, especially since BEPS project focused the attention on it, as being the first real attempt to address the challenges of globalization and digitalization.

The avoidance of double non-taxation can be considered as a supranational goal, that requires an international cooperation typical of modern tax law (Zubimendi, 2019) [69]. It is also a way to enhance fair competition between countries, reducing distortions caused by phenomena such as tax avoidance, and a way to promote the free flow of people and capitals (Scapa, Henie; 2005)[70]. In fact, this is clearly the same objective of the avoidance of double taxation, and it proves that the two apparently opposite situations are both to be prevented, as they cause the same negative outcomes, and their avoidance leads to reaching the same objectives.

Beside what academic scholars write, this perception has also proven to be true among businesses, as an interesting survey carried out by the European Commission proves [71].

In 2012, the EU Commission started a public consultation in order to find evidence of cases of double non-taxation or extremely low taxation withing the EU, to increase awareness of the real problem and to estimate its financial impact. The stakeholders interviewed were multinational enterprises, medium or small sized enterprises, non-governmental organizations as well as tax advisors or tax practitioners. Questions concerned a variety of situations where double non taxation could occur, such as mismatches of entities, transfer pricing and wrongful application of double tax treaties.

---

[67] LEAGUE OF NATIONS, Financial Committee, *Experts' Report on Double Taxation,* already quoted, p. 11 – 12.

[68] VAN DE VIJVER A., *International double (non-)taxation: comparative guidance from European legal principles*, in EC Tax Review, 2015, No 5, p. 240.

[69] ZUBIMENDI A., *The Single Tax Principle as a Limit to Double Non-Taxation? A Broad Perspective*, in Revista Internacional Consinter de Direito, 2019, Vol. 5, No 8, p. 410.

[70] SCAPA A., HENIE L. A., *Avoidance of Double Non-Taxation under the OECD Model Tax Convention*, in Intertax, Amsterdam, 2005, volume 33, Issue 6/7, p. 269.

[71] EUROPEAN COMMISSION - Directorate-General Taxation and Customs Union, *The internal market: factual examples of double non-taxation cases*, 2012, p. 1 – 15.

The *Summary report* that followed [72] highlighted how there is a general concern about this issue and the consequences that measures to contrast it could have on economic competitiveness. Even though the responses were limited in number, there was a general consensus that the two issues of double taxation and double non-taxation should be addressed jointly. According to the observers and professionals (PwC) *«Both phenomena – double taxation and double non-taxation – are two sides of the same coin. One should not be addressed without the other. »* (European Commission, 2012).

According to the EU Commission the causes of the phenomena reside in the failed attempt of harmonizing the corporate income tax rules within EU Member States[73]. As academic literature confirms, the main reason behind the issue is the unresolved tax gaps that originated while countries were trying to cooperate to eliminate tax overlaps (Mason, 2020)[74].

When focusing on the real implications of double non-taxation, some authors (Parada, 2018)[75] pinpointed various shades of the term.

First, the occurrence of double non-taxation is the exact opposite of situations involving double taxation. While double taxation refers to income being taxed multiple times across different countries, double non-taxation occurs when cross border transactions are not taxed at all. In other words, a taxpayer will be subject to no taxation, as the countries involved do not exercise their right to tax.

For example, this situation can arise when, according to a tax treaty in force, two or more jurisdictions could levy the tax on a particular individual or business, but neither does so because "*each of them is of the view that another (or a superior) jurisdiction has the right to impose that tax*" (Millar, 2009)[76]. In this instance, double non-taxation is mostly "unintended", meaning that it was not the outcome that States and international organizations aimed for when building the international tax rules (Parada, 2018)[77].

---

[72] EUROPEAN COMMISSION - Directorate-General Taxation and Customs Union *Summary report of the responses received on the public consultation on factual examples and possible ways to tackle double non-taxation cases,* Brussels, 5 July 2012.
[73] European Commission, *Ibidem.*
[74] MASON R., *The Transformation of International Tax*, in American Journal of International Law, Volume 114, Issue 3, July 2020, p. 364.
[75] PARADA L., *Double Non-Taxation and the Use of Hybrid Entities: An Alternative Approach in the New Era of BEPS*, already quoted, p. 6.
[76] MILLAR R., *Intentional and unintentional double non-taxation issues in VAT*. Sydney Law School Research Paper, 2009, p. 424.
[77] PARADA L., *Double Non-Taxation…*, already quoted., p. 7.

Others (Marchgraber, 2018)[78] bring the example of the taxation of a German citizen who wins in the Austrian lottery: since neither Germany nor Austria impose taxation on lottery winnings, the income will go untaxed. According to the author, this is not problematic per see, but it could be if the two jurisdictions "overlap in a manner that the cross-border situation bears a lesser tax burden than a comparable domestic situation would have to face" [79]. As a matter of fact, here double non taxation has a "legal" explanation.
Secondly, in the case when different tax jurisdictions exercise their taxing powers independently, each country will apply their own criteria to establish the tax base and tax rate. The residence country could, for example, exempt foreign source income (based on the benefits principle), and the source country could also decide not to tax that income (Parada, 2018).
Some academics have also included in the concept of double non-taxation the cases of low taxation or under taxation. However, it should be considered a distinction between "legitimate" under taxation and the unlawful one. When low taxation arises from differences and gaps in the domestic law of two countries, it is often considered to be acceptable. It is the case of the concept of corporate tax residence for example: according to the US tax law, incorporation is necessary to define residence, while in Ireland, residency follows the place of effective management and control. Some cases demonstrate how a low taxation is very often actually the result of a tax planning and can be perceived as "legitimate".

On the contrary, when under taxation occurs through practices such as profit shifting or the use of hybrid entities, it is considered unlawful.
The phenomenon has been called "*Stateless income*". It refers to situations where MNEs move taxable income between the various companies of the group from high-tax to low-tax jurisdictions, with the ultimate goal of avoiding or at least reducing their tax duties. The term "stateless" derives from the fact that the location of residency, of production or of location of the customers are different, and usually even the country where the income is finally taxed is different (Kleinbard, 2011)[80].
When looking at the causes and effects of double non-taxation, it can be stated that many of them were actually born with the spread of globalization and digitalization. The incidence of these phenomena has put pressure on governments, that changed their tax

[78] MARCHGRABER, *Double Non-Taxation…*, already quoted, p. 3
[79] MARCHGRABER, *Ibidem*.
[80] KLEINBARD E.D., *Stateless income*. Fla. Tax Rev., 2011, Vol.11, p. 699 – 774.

regimes to attract more investment and businesses, and often led them to having a permissive behaviour toward tax avoidance. However, as easily predictable, this resulted in tax competition between countries, and overall corporate tax rates fell.

Moreover, national systems of tax law are fragmented and tax rates are not harmonized: so multinational enterprises may choose where to declare their profits, based on where they can minimize their tax burden, leading to low taxation or even no taxation at all (Pedrosa, Lopez; 2015)[81]. The existence of tax havens amplifies this occurrence as well.

Furthermore, the obsolescence of technical provisions (Mason, 2020)[82], such as the need of a physical presence in a State to establish the nexus for tax duties, leads to double non-taxation[83]. This provision was well suited for a bricks-and-mortar economy, but digital economy and a complex supply chain, typical of big MNEs as well as of medium sized enterprises, makes corporate income "*Stateless*" and deprives it of the connection with the source-country that has, according to the Model Tax Conventions, the right to levy taxation on it.

Tax avoidance, that results in the issue of double non-taxation, is to be considered as the consequence of aggressive tax planning techniques. Transfer pricing, profit shifting and the use of hybrid instruments are some of the most common techniques.

Not by chance, one of the turning points in eliminating double taxation (Pedrosa Lopez, 2015)[84] is the OECD report "*Hybrid Mismatch Arrangements: Tax Policy and Compliance issues*" published in 2012, and the issue was later included as one of the Actions of the BEPS Project. The report defines what hybrid mismatch arrangements are, addressing the policy issues and options to contrast their negative effects, also reporting what rules have already been adopted by some OECD countries. Paragraph A of Chapter 1 reads as follows:

« Hybrid mismatch arrangements generally use one or more of the following underlying elements:

- *Hybrid entities: Entities that are treated as transparent for tax purposes in one country and as non-transparent in another country.*
- *Dual residence entities: Entities that are resident in two different countries for tax purposes.*

[81] PEDROSA LOPEZ J. C., *An Overview of Double Non-Taxation, Cross-Border Transactions and Tax Implications*, in Party Autonomy in European Private (and) International Law, Tome II, 2015, p. 105.
[82] MASON R., *The Transformation…*, already quoted, p. 357.
[83] Often referred to as the "permanent establishment limitation": according to the Model Tax Conventions, when the company does not have a physical presence in a certain State, that State cannot tax active income.
[84] PEDROSA LOPEZ J. C., *An Overview of Double Non-Taxation*, quoted above, p. 106.

- *Hybrid instruments: Instruments which are treated differently for tax purposes in the countries involved, most prominently as debt in one country and as equity in another country. »* (OECD, 2012)[85].

The report proceeds to list the effects of these arrangements and gives clear examples of how they work. They are seen as a problem to tackle because they reduce the overall tax burden for taxpayers as they leverage differences in tax systems of two or more States, that "*lead to double non-taxation that may not be intended by either country or may alternatively lead to a tax deferral which if maintained over several years is economically similar to double non-taxation*" (OECD, 2012) [86].

According to others (Merola, 2022)[87], there is another cause of double non-taxation, which is surprisingly to be found in the presence of numerous bilateral tax treaties between different States. Unfortunately, these conventions created the opportunity for taxpayers (both individuals and businesses) to exploit them in order to evade taxes through international double non-taxation [88].

Commonly known as "*treaty abuse*" or "*treaty shopping*", it is the practice that occurs when a taxpayer engages in transactions with the primary objective of obtaining a tax advantage, going against the intended purpose of the bilateral treaty.

The 2014 report "*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6*" was issued indeed to introduce anti-abuse clauses to the OECD Model Tax Convention, to implement Action 6 of the BEPS[89], which previously highlighted the need to address these issues (Merola, 2022)[90].

Accordingly, tackling treaty shopping can be done if States include in the treaties they are going to sign specific provisions aimed at preventing treaty abuse. There is a "*minimum level of protection that should be implemented*" (OECD/G20, 2014)[91], and section A of the report includes different recommendations to do so.

---

[85] OECD, *Hybrid Mismatch Arrangements. Tax Policy and Compliance Issues*, Paris-Cedex, 2012, Paragraph A, Chapter 1.

[86] OECD, *Hybrid Mismatch Arrangements*, already quoted, Introduction.

[87] MEROLA A, *International Double Taxation and Double non-taxation*, already quoted, p. 2 – 3.

[88] MEROLA A., *Ibidem.*

[89] See OECD, *Action Plan on Base Erosion and Profit Shifting*, Paris-Cedex, 2013. *Action 6 – Prevent treaty abuse* reads as follows: "*Develop model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances. Work will also be done to clarify that tax treaties are not intended to be used to generate double non-taxation and to identify the tax policy considerations that, in general, countries should consider before deciding to sign a tax treaty with another country. The work will be co-ordinated with the work on hybrids*."

[90] MEROLA A., *International Double Taxation…*, already quoted, p. 3.

[91] OECD – G20, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, Paris-Cedex, 2014, p. 1 – 112.

Section B, instead, wanted to clarify that tax treaties should not create opportunities for non-taxation. It proposed, therefore, some changes to the title of the Model Convention and introduced a Preamble that well clarifies this aspect. The new preamble of the Convention should state as follows:

« (State A) and (State B), […]

Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States)» (OECD/G20, 2012)[92].

1.4. The Model Double Taxation Conventions.

As already seen, international tax treaties, based on the existing "Model Double Taxation Conventions", are the main sources of reference for the taxation of cross-border income. The OECD and the UN Model Conventions are conceived and entered into force as suitable instruments for ensuring coordination between the taxing powers of different States.

Signatory countries and supranational bodies have agreed on a set of instruments and dispositions for the purpose of both eliminating double taxation and preventing tax evasion by promoting cooperation between tax administrations, through the information exchange process (OECD, 2017)[93].

There is an academic debate on whether these model conventions can be considered as hard or soft law instruments, and whether they are legally binding for the States that adopt them. Among scholars, the dominant point of view is that they are not legally binding "*ex se*", and in their website the OECD itself classifies its Guidelines and Principles as "*soft law*" [94].

However, given their importance and common use, they can become binding at least for the OECD Member States that adopt the MTC provisions in their tax treaties (BAS, 2022)[95].

[92] OECD – G20, already quoted, Section B, p. 99.
[93] OECD, *Model Tax Convention on Income and on Capital 2017,* Introduction.
[94] See *https://t4.oecd.org/gov/regulatory-policy/irc10.htm,* Soft law.
[95] BAS J., *Clash of the Titans: OECD vs. UN Model Treaty*, archipeltaxadvice.nl, November 2022, available at https://www.archipeltaxadvice.nl/insights/oecd-vs-un-model-treaty/

The United Nations Model Convention specifically addresses the question of whether its provisions are legally binding. In the Introduction it is stated that it is "*not intended to be prescriptive*" and that the provisions are not enforceable and binding "*ex se*". Rather, the Convention is intended to "*facilitate the negotiation, interpretation and practical application of bilateral tax treaties based upon its provisions*" (UN, 2017)[96].

It is rightful to address what are the main differences between the OECD and the UN models. Broadly speaking, the UN model is preferably adopted by developing countries, while the OECD model is more used by larger economies. According to some (Scapa, Henie, 2005; Avi-Yonah, 2009)[97], the UN model was crafted because the OECD one was not well suited to deal with the relationship between developing and developed countries, as they are not always on the same level of reciprocity.

The OECD model limits the taxing jurisdiction of the capital importing country (source country) to tax the income of a non-resident. Therefore, if the two countries have comparable international trade structure and industrialization level, they can afford the rebalancing of taxing rights imposed by the treaty: they will end up in the same situation, since they are both capital exporting and importing countries at the same time and at about the same share.

The OECD model was therefore meant to be used among OECD members with similar foreign investment flows.

Instead, income flows between "developed" and "developing" countries are, by definition, not balanced, and the adoption of the OECD MTC in this situation could create inequalities and difficulties for developing countries.

The developing countries are characterized by a higher share of capital import; entering an OECD-based-model treaty with a capital-exporting-country would therefore mean, on one hand, that MNEs' tax revenues will be shifted to the developed countries and, on the other hand, that the larger countries will impact with their tax regime on capital, producing – in the medium – long run, a lower level of foreign investment in the smaller economies (Daurer, Krever, 2014)[98].

---

[96] UNITED NATIONS, Department of Economic & Social Affairs, *Model Double Taxation Convention,* already quoted, Introduction, p. vii.

[97] SCAPA A., HENIE L. A., *Avoidance of Double Non-Taxation under the OECD Model Tax Convention*, already quoted, p. 270. See also AVI-YONAH R.S., *Double Tax Treaties: An Introduction…*, in The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows, edited by K. P. Sauvant and L. E. Sachs. Oxford: Oxford Univ. Press, 2009, p. 99-106.

[98] DAURER V., KREVER R., *Choosing between the UN and OECD tax policy models: An African case study*. African Journal of International and Comparative Law, 2014, p. 7.

Nevertheless, developing countries often signed these treaties, both with the view of gaining other social or economic benefits, such as boosting the image of the nation as a reliable investment location, and due to less bargaining power than developed countries[99]. It is worth mentioning to note that the two international organizations differ in the number of countries they can reach or influence. While nowadays the OECD counts 38 Member States, the United Nations may profit of a larger arena and propose a multilateral approach, counting 193 members. It is therefore in the UN interest to develop an alternative Model Convention with the view of reaching that would be more beneficial and equitable to developing countries.

The UN Model Convention, published in 1980, is the result of a more balanced confrontation between the interests of developed and developing countries (for example, the commission of experts that was appointed to elaborate the alternative model included ten members from developed countries and ten from developing ones). The model tends to side with the weaker state, paying more attention to the flow of foreign investments and wealth to less developed countries, and assigning more taxing rights to the source country. Using the words of the UN, it favors the "taxation rights of the host country of investment" (UN, 2017).

Substantial differences can be found especially in the provisions that decide who has jurisdiction to tax business income. The threshold for defining the concept of permanent establishment is set higher in the OECD model, while in the UN one the range is wider. It can be seen for example in Article 7 of the UN model, that amplifies indeed the jurisdiction to tax of the source country, extending it to the income of activities that are not generated through a permanent establishment, but still however trace back to the country: "*permits the enterprise [...] to be taxed on some business profits in that country arising from transactions by the enterprise in the source country, but not through the permanent establishment*" (UN, 2021)[100]. Another evident divergence is in the case of a building site or construction project. Both the conventions consider it to be a permanent establishment, but there is a clear difference in the length of time that the activity has to continue for: in the OECD model it must last for more than twelve months, while in the

[99] DAURER V., KREVER R, *Choosing between the UN and OECD ...*, already quoted, p. 21.

[100] See the Article 7 Commentary, para. 4, in UNITED NATIONS, Department of Economic & Social Affairs, *Model Double Taxation Convention between Developed and Developing Countries – Commentary*, New York – U.S.A., 2021.

UN model six months are sufficient for the source country to have right to tax the activity profits (Daurer, Krever, 2014; Avi-Yonah, 2009)[101].

Nonetheless, the two model conventions have a shared history and they overlap in many ways, referencing and sourcing from each other, especially in the Commentaries. However, the OECD model is the one that gained more widespread acceptance throughout history. The first five articles of the OECD Model Convention are devoted to setting the sphere of action of the convention and providing useful definitions that will be used throughout the articles (such as the definition of resident and the concept of permanent establishment)[102]. The central part of the MTC deals specifically with the rules concerning the attribution of the taxing power to the Contracting States with respect to the taxation of various categories of income. While many of these articles are actively aimed at avoiding the phenomenon of double taxation, as they precisely assign the jurisdiction to tax to one of the Contracting States, some authors (Scapa, Henie; 2005)[103] argue that none of them is planned to tackle double non-taxation as well. As a matter of fact, it is only in the Commentary of these articles that one can find alternative rules that should be adopted if one wishes to avoid this distorted occurrence.

The Commentaries are to be considered of vital importance and have nowadays a recognition and fame of global dimensions as an interpretative tool. The wording "Model Convention *as interpreted* by the Commentaries" in the Introduction of the MTC, shows indeed that these reservations are fundamental to the understanding of the provisions, and it has been observed by countries, financial administrations and taxpayers, which make extensive use of this instrument (OECD, 2017)[104].

The latest update of the OECD model in 2017 follows the signing of the *Multilateral Convention to implement Tax Treaty related measures to prevent base erosion and profit shifting.*

The Multilateral Instrument (MLI) can be seen as a precursor to the 2017 Model Convention, as it is an instrument that efficiently "*modifies all Covered Tax Agreements*" [105], implementing BEPS treaty-related measures.

---

[101] DAURER V., KREVER R., *Choosing between the UN and OECD…*, already quoted, p. 8 – 9; AVI-YONAH R.S., *The International Tax Regime: A Centennial Reconsideration…*, already quoted, p. 30.

[102] OECD, *Model Tax Convention on Income and on Capital 2017,* see the Articles 1 through 5.

[103] SCAPA A., HENIE L. A., *Avoidance of Double Non-Taxation under the OECD Model Tax Convention*, already quoted, p. 272.

[104] OECD Model Tax Convention, Introduction, para. 3

[105] OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, Paris-Cedex, November 24, 2016 Updated. Article 1

Unlike an amending requirement to an existing tax treaty, the MLI operates together with already existing bilateral tax treaties, adjusting their application to incorporate the BEPS measures. By doing so, it simplifies the ratification process, as countries only need to undergo one parliamentary ratification procedure to modify their entire treaty network, instead of performing separate changes to each bilateral tax treaty (Valente, 2017)[106].

By such means, it provides a quick and brilliant way to eliminate loopholes and mismatches among tax treaties, with the aim of tackling both double taxation and double non-taxation, as well as the new challenges included in the BEPS project, such as aggressive tax planning, treaty abuse, the use of hybrid entities.

The MLI has proven to be a very successful instrument: a hundred nations have joined the project, while the actual member states of the OECD are way less[107]. This proves that it might be time to switch to a broader use of multilateral instruments, as opposed to the old structure of bilateral treaties (Avi-Yonah, 2009)[108]. While bilateral treaties rely too much on the level of investment flows between two specific nations and have difficulties in dealing with cases where a third country is involved, multilateral instruments have recently gained strength and overall approval, precisely thanks to their ability to adapt to a wider multitude of situations[109].

New instruments such as the MLI convention and the BEPS project also introduced the concept of tax compliance, intended to reduce the phenomenon of tax avoidance and double non taxation. Scholars (Dumiter, 2023) [110] argue that these concepts help to understand if there is a correlation between the quality of the tax treaties and the level of tax compliance that they help to reach.

The provided papers and surveys analysed a sample of sixteen OECD countries between the period 2001-2020, testing if there are connections between Model Double Taxation Convention, tax compliance and/or the level of tax evasion, using an econometric approach.

First, they find that tax treaties are a powerful instrument that can strengthen the fiscal system; the existence of a tax treaty network has some positive effects on the elements

[106] VALENTE P., *BEPS Action 15: Release of Multilateral Instrument*, in Intertax, 2017, Vol. 45, Issue 3, p. 219 – 228.

[107] See, for the complete list, the Table 3 in the Appendix.

[108] AVI-YONAH R.S., *Double Tax Treaties: An Introduction…*, already quoted, p. 106.

[109] See the Tables 1 to 3 in the Appendix.

[110] DUMITER, *Tax Compliance, and Tax Evasion. Empirical Evidence from OECD Countries,* Vilnius Gediminas Technical University, 2023, Technological and Economic Development of Economy, Vol. 29 Issue 3, p. 903.

named above: the more robust tax conventions are, the more taxpayers show a higher degree of tax compliance, leading to a reduction in tax evasion[111].

Some positive direct effects can also be acknowledged on some economic variables such as the amount of foreign direct investment and tax revenues for capital-exporting countries.

Secondly, tackling tax evasion requires some additional features that concern more closely individual characteristics of the taxpayer, for example a good financial education, trust in tax authorities and willingness to pay their tax duties. These elements can be reinforced and "*built*" with the implementation of some common tools that are usually well appreciated by taxpayers: clear and structured tax laws, an efficient legal authority, along with predictable fiscal policies that do not surprise and cause shocks in the economic environment.

In conclusion, the results confirm that an "*efficient and effective structure of the double taxation conventions network*" can have positive effects in reducing the magnitude of the issues of double non-taxation, tax avoidance and tax competition. The taxation system is sensitive to a multitude of elements, but strengthening the effectiveness of the tax regime and improving cooperation between countries' tax authorities can result in an improved economic environment where negative distortions are reduced[112].

1.5. Addressing the Issue of Double Non-Taxation.

The issue of double non-taxation is a complex phenomenon that can arise in various forms, as the international tax system is fertile ground on which misalignments and mismatches can proliferate. Fiscal power is an integral part of State sovereignty, but the unilateral measures that have been introduced over the years did little in the face of a phenomenon that, by its very nature, is transnational.

Up until the recent past, this issue was not much known to the general public. When numerous cases of tax avoidance and aggressive strategies with the view of double non-taxation started making news headlines, people became more sensitive to the topics of tax fairness and began showing dissatisfaction with the low amount of taxes paid by multinationals.

[111] See Figure 1 in DUMITER F.C., *The Correlation Between Double Taxation Conventions*, quoted above.

[112] See DUMITER F.C., *Ibidem.*

However, some scholars (Ault et al, 2014; De Mooji et al, 2021)[113] argue that multinational enterprises have possibly existed for over a century, and therefore they do not represent a news in the economic scenario. What is anew, is the way in which they operate and how they became global over the years, through parents, subsidiaries, and permanent establishments: a complex supply chain availing of tax streams ingenuously spread out in various countries (developed and developing as well).

Overall, it is believed that the ability of taxpayers (individuals and multinational enterprises), in shifting profits from a jurisdiction to another is one of the major causes of double non-taxation, since it gives them the opportunity to organize their cross-border activities so as to minimize their tax burden.

Furthermore, others (Tørsløv et al, 2020)[114] focus their attention on the role of tax havens in making profit shifting profitable and therefore fuelling tax competition between countries. Some samples of the harmful tax competition can be seen in the decline of corporate income tax rates in the last forty years: the rate halved, going from 49% in 1985 to 24% in 2018 (Tørsløv et al, 2020)[115]. The reasoning behind this decline is straightforward: by applying lower corporate tax rates, countries can attract more capital, foreign direct investment (FDI) and foreign businesses. The afore mentioned survey analysed the true extent of profit shifting, to understand how much each country loses or attracts in terms of tax revenues. By relying on a more comprehensive database, it was found out that MNEs have transferred about 40% of the profits generated each year to tax havens (in 2015 this means $600 – 650 billion).

Since the new millennium Malta, Ireland, Luxemburg and Cyprus (all EU countries) seem to be the preferred profit shifting destinations, followed by Singapore, Hong Kong and Caribbean tax havens (Di Gregorio et al, 2005)[116].

---

[113] OECD, *Action Plan on Base Erosion and Profit Shifting*, Paris-Cedex, 2013. Chapter 1 – Introduction. See also AULT H. J., SCHON W., SHAY S., *Base Erosion and Profit Shifting: A Roadmap for Reform*, in Bulletin for International Taxation, 2014, No 68, p. 276; DE MOOJI R., KLEMM A., PERRY V., *Corporate Income Tax under pressure. Why Reform is Needed and How It Could Be Designed*, IMF, Washington D.C., 2021, p. 35.

[114] TØRSLØV T., WIER L. S., ZUCMAN G., *The Missing Profits of Nations*, in NBER WP Series, 2020, Cambridge, MA, U.S.A., p. 1 – 56, and, more in depth, Table 5 in the Appendix.

[115] TØRSLØV T., WIER L. S., ZUCMAN G., *The Missing Profits …*, already quoted, p. 27 - 28. See, more in depth, the Figure 1, in the Appendix.

[116] DI GREGORIO C. et al, in the volume *L'imposta sulle società nell'Unione Europea,* Milan, p. 357 onwards, had observed the existence of grey areas within the European Union, in terms of corporate income taxation, which distorted the conditions of fair competition between companies, before the extension of the Union tax framework to the Countries of Eastern Europe, with a level of tax rates considerably lower than the so called "advanced economies". See, in this regards, Tables and figures therein p. 327 - 330 and 334.

EU non-tax havens are the major corporate tax revenue losers, with an average decrease of around 20% (higher in high tax countries such as Italy and France, and lower in Eastern European countries). What it is striking, is that in the event of perfect corporate tax harmonization, revenue would increase by 20% for EU countries and by 10% in the United States, while it would decrease by 60% in what are now considered tax havens. A real earthquake that gives further evidence of the imbalance we are witnessing today. To put it briefly, tax havens are the winners of tax competition, while big countries are the losers (Rixen, 2011)[117].

Moreover, the volatile nature of services and digital products (Nersesyan, 2021)[118] provided through the internet makes it difficult to link value creation to the source country. The concrete possibility of offering a service to the customer by exploiting digital infrastructure, without the need for large investments in tangible assets and fixed locations has showed that "*it may be necessary to adapt the current rules in order to take into account the specific features of that industry*" (OECD, 2013)[119].

The evidence on the magnitude of profit shifting confirms that countering double non-taxation is one of the major challenges that needs to be addressed. Towards this direction goes the coordinated intervention realised in September 2013 in Saint Petersburg (Ault et al, 2014)[120], when OECD and G20 countries endorsed the OECD *Base Erosion and Profit Shifting* project. The action plan consists of fifteen points that identify, set the deadlines, "*the resources needed and the methodology to implement these actions*" (OECD, 2013)[121], to prevent the risk of double non-taxation of business income, with the objective of ensuring that profits are taxed where the companies actually carry on their business. At the same time, it is imperative to avoid that States act on their own initiative and in an uncoordinated manner, thus generating even more uncertainty and unpredictability.

Numerous academics have criticized the BEPS project as a "*mere technical project to close tax loopholes*" (Mason, 2020)[122].

---

[117] See RIXEN T., *From Double Tax Avoidance to Tax Competition*, already quoted, p. 219.

[118] NERSESYAN N., *The Current International Tax Architecture: A Short Primer*, in *Corporate Income Taxes Under Pressure. Why Reform Is Needed and How It Could Be Designed – Chapter 3*, IMF Library, Washington D.C., 2021, p. 23 – 31.

[119] OECD, *Action Plan on Base Erosion and Profit Shifting*, Paris-Cedex, 2013. Chapter 2 – Background. See also in DE MOOJI R., KLEMM A., PERRY V., already quoted, p. 45.

[120] AULT H. J., SCHON W., SHAY S., *Base Erosion and Profit Shifting: A Roadmap for Reform*, in Bulletin for International Taxation, 2014, No 68, p. 275.

[121] OECD, *Action Plan on Base Erosion and Profit Shifting*, Paris-Cedex, 2013. Chapter 2 – Background.

[122] MASON R., *The Transformation of International Tax…*, already quoted, p. 353.

Others (Oats, 2021)[123] drew their attention on the difficulties of implementing the project in developing countries, particularly due to the scarcity of resources in these countries or the capacity to collect and analyse all the data required to implement Actions 11 through 15. Moreover, weak governments and institutions make it harder for BEPS provisions to be effective in these countries.

Eminent scholars (Avi-Yonah, 2019)[124] argue that one of the main weaknesses of the actions of governments, in the attempt to counter the double non-taxation, consists in the claim, made by the "advanced economies" (especially the countries in the G7), of the "benefits principle", which is at the basis of the BEPS Project, instead of the "single tax" principle, supported mostly by developing countries and BRICS.

According to this thesis, the benefits principle, as a theoretical approach to countering double non-taxation, should be reconsidered, first because it requires the cooperation of too many countries, including low-income ones.

On the other hand, the reliance on "source-based taxation" for the active income perceived by multinationals finds its justification either in the fact that they do not have a fixed and easily identifiable residence, or in the reluctance of the countries of origin to tax the big companies of these countries on global income, in order not to create them a competitive disadvantage.

The result is that most multinationals are not taxed at all, neither according to the benefits principle, nor according to the "single-tax" (or source) principle.

Conclusively, the benefits principle, which is at the base of the BEPS project, should be reconsidered in the light of the globalization process, limiting its application to only active income leaving to the "source principle" the taxation of passive income (interest, royalties etc.).

This would allow larger economies to better address the countermeasures to both evasion and aggressive tax planning of MNEs.

The fact is that, from the early years of the new millennium, along with the entry into the WTO of China first (2001) and Russia later (2012), the main issues of international tax law are increasingly linked to the issues of international trade and global geo-political structures (Draghi, 2023)[125]. The solutions proposed by the bilateral Model Conventions

[123] OATS L., *Principles of International Taxation*, London, 2021, p. 602.
[124] AVI – YONAH R. S., *Advanced Introduction to International Tax Law*, Northampton, MA – USA, 2019, p. 67 – 85.
[125] DRAGHI M., *Miriam Pozen Lecture*, Cambridge, MA - U.S.A., 2023, in Sole 24 Ore, 8 June 2023, and Il Foglio, 9 June 2023, p. 3.

approved by the OECD or the United Nations are thus insufficient. And this is not only because in those contexts (OECD) China and the other BRICS have at most the role of "key partners", and therefore do not enter the Committee on Fiscal Affairs, responsible for drafting amendments to the Model Tax Convention, but also because it is in the multilateral or even supranational fora (e.g. European Union) that the measures adopted have undeniably demonstrated greater effectiveness of reaction and containment in the face of global events and crises (e.g. : COVID-19 pandemic and Russian - Ukraine War)[126] .

On the other hand, in the same period, also the major international Business Centers and Stock Exchanges (New York, London, Tokyo, Hong Kong), have been largely integrated, if not completely replaced, by those of the so called "emerging" countries of the Middle and Far East (Dubai, Shanghai, Singapore).

Finally, the financial chronicles have begun to take an interest not only in the tax audits initiated against the MNEs of the so called "GAFAM" Group[127], but also the giants of Eastern Europe and the Far East (Huawei, Gazprom)[128] .

This is the scenario, masterfully prefigured already at the beginning of the second decade of this Millennium, by those who has wittily complained that "*With mobile capital from one jurisdiction to another, if you try to impose stronger taxation on capital, capital simply moves out. Ironically, just as inequality is growing - and has grown enormously in the last twenty-five years - the ability to redistribute income through capital taxation has been reduced enormously*" (Stiglitz, 2011)[129].

This same scenario has led the OECD to change its approach, launching several initiatives, all aimed at simultaneously involving as many States as possible, in order to prevent and, where possible, combat the phenomenon of double non-taxation[130].

---

[126] See again DRAGHI M., *Ibidem*. Consider, moreover, that, within the United Nations, China sits, as a permanent member, in the Committee of Experts in International Cooperation in Fiscal Matters, while the Russian Federation has signed and ratified the "OECD Multilateral Convention to implement Tax Treaty related measures to prevent Base Erosion and Profit Shifting" promoted by the OECD, as it is shown in the Table 3 of the Appendix of this work.

[127] Acronym for Google, Apple, Facebook, Amazon, Microsoft.

[128] See Civil Action No. 4:19-CV-159 United States District Court Eastern District of Texas Sherman Division Huawei Techs. USA, Inc. v. United States, 440 F. Supp. 3d 607 (E.D. Tex. 2020) decided on February 18, 2020; Case AT. 39816, Gazprom Export LLC vs European Commission, and Case T-616/18 February 2, 2022, Gazprom PJSC and Gazprom Export LLC vs Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland and Slovakia.

[129] STIGLITZ J., *Globalization and the economic role of the state in the new millennium*, in Industrial and Corporate Change, Oxford University Press, 2003, Volume 12, Number 1, p. 3–26.

[130] BEPS Project, Inclusive Framework, Multilateral Instruments, Global Forum etc. See for the latter Table 4 in the Appendix.

In 2016 indeed, the OECD/G20 Inclusive Framework was established and it currently involves more than 135 countries from all geographic regions. The contribution of developing countries is increasingly important in influencing decision making, and equal participation is said to be one of the core values of the BEPS project. Each year the OECD/G20 Inclusive Framework publishes a report, describing and monitoring the progress on the implementation of the BEPS project[131]. The 2021 report states indeed that even though the execution of the BEPS package "*has dramatically changed the international tax landscape and improved the fairness of tax systems*", key issues such as the taxation of the digital economy are still unsolved, and more effort is needed[132]. And it is in this context that has matured the approach, widely shared internationally, aimed at curbing the action of "profit shifting" of multinationals through the imposition of a "Global Minimum Tax" based on common set rules.

This is not because of the preference given to one or the other of the principles that have hither to support the models of international conventions against double taxation, but for the concrete experience gained in the field of international tax law and its most relevant issues (Tørslov et al, 2020)[133].

The reasons why these projects and global efforts are important are always the same: the favourable tax treatment that digital firms and MNEs have and are still receiving, is a serious violation of free market and free competition principles. Namely, critical issues for all parties (OECD, 2013) are:

- *Governments are harmed*, in terms of tax revenues (as Tørsløv et al, 2020, confirmed in their study) and the overall tax integrity of their system is undermined;

- *Individual taxpayers are harmed,* as they will have to bear a greater share of the tax burden, if businesses continue to reduce the taxes they pay.

- *Businesses are harmed,* as enterprises operating only within domestic borders cannot compete with MNEs, when fair competition is distorted by base erosion and profit shifting [134].

---

[131] OECD – G20, *Inclusive Framework on BEPS. Progress report July 2020 – September 2021*, Paris-Cedex, 2021.
[132] OECD – G20, *Ibidem,* p. 2.
[133] TØRSLØV T., WIER L. S., ZUCMAN G., *The Missing Profits of Nations*, in NBER WP Series, 2020, Cambridge, MA, U.S.A., p. 1 – 56.
[134] OECD, *Action Plan on Base Erosion and Profit Shifting*, Paris-Cedex, 2013. Chapter 1 – Introduction.

CHAPTER 2
CORPORATIONS AND CORPORATE TAX

2.1. Corporation and Corporate Tax Residence.

A corporation is a particular type of company that is legally established by individuals, more specifically called "*stockholders*" or "*shareholders*". The act of incorporation, which is the official document aimed at establishing a corporation in a country, is of crucial importance: the pertinent jurisdiction will determine by that the set of privileges and obligations that the new entity will have to comply with, including the tax regime applied and the consequent tax liabilities[135].

As a single legal entity, the corporation has the same rights and duties of individuals, meaning it has the power to conclude contracts, to avail of its own assets and the ability to pay taxes, as well as to initiate or face lawsuits. However, the act of incorporation grants the business a special characteristic, which is the limited legal liability, often called the "*corporate veil*".

This means that shareholders cannot be personally liable in case of legal disputes, bankruptcy or for business obligations, but their responsibility is limited to the capital they have invested into the business.

This safeguard is particularly important, as it almost completely separates the business entity from its stockholders, enabling the company to take on more risks and to grow without fearing direct legal consequences for its owners. Not by chance, all large and successful businesses are corporations. Moreover, in numerous jurisdictions corporations are granted a more beneficial tax treatment, in the form of deductions and a lower tax rate than the one applied to personal income[136].

For-profit corporations also issue stock shares and will remunerate the shareholders based on the percentage of company shares they own, in the form of dividends. Another peculiarity of the corporation is that it usually has a more complex business and

[135] See *https://www.investopedia.com/terms/i/incorporate.asp*, under "Incorporation". For U.S. Corporate Regulations see, more in depth, HIRST S., *The Case for Investor Ordering*, Discussion Paper No. 2017-13, p. 2 – 61, August 2017, updated March 2018 Harvard Law School Cambridge, MA 02138, USA, in Harvard Business Law Review available at *https://scholarship.law.bu.edu/faculty_scholarship/343*. In British English and in the Commonwealth countries, the term "*company*" is more widely used to describe the same sort of entity while the word "*corporation*" encompasses all incorporated entities.

[136] See *https://corporatefinanceinstitute.com/resources/accounting/what-is-corporation-overview/*, under "Corporation".

organizational structure, and requires the shareholders to elect a board of directors, that will supervise the management of the company.

The terms "*company*" and "*corporation*" are often seen as synonyms, but they entail in fact different features, established by the domestic civil and business law of the country where the business takes place.

Indeed, the term "company" refers more generally to any type of organized business, and operated by one or more individuals that engage together in commercial activities. The most common business structures that a company can be are a partnership, a corporation, or a Limited Liability Company (LLC).

A partnership is a business that is owned and controlled by two or more people, who have unlimited liability, as the business is not treated as a separate legal entity from its partners (as opposed to the corporation). The other main difference concerns the tax liability: a partnership is considered as a "*pass-through entity*", meaning that it will not be taxed directly on the business income. Instead, the owners share the profits and losses of the business and report them on their own personal tax returns, personally paying the taxes owed.

Corporations are instead subject to the corporate income tax, levied on the company's taxable income, and profits will also be taxed at the personal level when they are distributed as dividends to their shareholders. Although this might translate in a double taxation situation, corporations usually experience tax savings and can deduct many expenses, lowering their taxable base.

A Limited Liability Company is a widespread business structure in the United States, that combines positive aspects from both corporations and partnerships. Likely to a corporation, its owners and shareholders have limited personal liability, but it is not a taxable entity and its income will be reported on the tax return of the partners, as in a partnership. However, the LLC can decide to be taxed as a corporation, to benefit from deductions and tax savings reserved to that business structure [137].

Another commonly used term is the limited company, or LTD, which is a business structure commonly used in the UK and other Commonwealth countries. In these countries it can be equated to an American LLC, while a limited company in the US is simply a type of corporation.

---

[137] See *https://www.sba.gov/business-guide/launch-your-business/choose-business-structure*, under "Choose a business structure".

In brief: each jurisdiction determines the definition, the legal status and the set of rights and obligations of the business entities that are incorporated and operate under their domestic law. When a company (meaning both a partnership or a corporation for example) operates in more than one country, it is possible that the domestic rules of those two countries differ in the definition of what is considered as a corporation or as a partnership. Consequently, one jurisdiction may treat a business as a taxable corporation, while the other might see it as a partnership that will be taxed through the personal income reported by its owners. This loophole created by the differing domestic civil laws can generate a double non-taxation situation (Herzfeld, 2020; Marian, 2014)[138].

In the United States for example, the "check the box" regulations, introduced in 1997, allow U.S. entities to freely choose how to be classified for tax purposes, so whether their foreign affiliates would be treated as an actual taxable foreign company, or as a non-taxable partnership or branch (Avi-Yonah, 2019; Herzfeld, 2020)[139]. The ability given to U.S. businesses to choose how they want to be treated for tax purposes increases the possibility to take advantage of legislation loopholes.

Therefore, two factors are crucial in determining the tax regime that will be applied to a business structure, and both these factors are established by the domestic civil law of each jurisdiction: the legal form of the company and its residence, including tax residence.

In a recent study (Francois, Vicard, 2023)[140], the degree of complexity of a corporation was determined by the number of links between the parent company and the ultimate affiliate, and the more vertical is the firm's structure, the more complex is its chain of ownership.

Only 1% of corporations have more than one hundred affiliates, but what is striking is that this small portion accounts for almost 60% of the global MNE added value (UNCTAD, 2016)[141].

---

[138] HERZFELD M., *International Taxation in a nutshell*, St. Paul, MN, 2020, p. 17 – 31, provides a clear example: "Suppose entity E is formed in country X by individual residents of the United States. Is the income earned by E, income earned by a non-resident corporation or is the income earned by a transparent partnership in which case the individuals, US residents, will be taxable?". MARIAN O., *Function of Corporate Tax-Residence in Territorial Systems.* Chapman Law Review, 2014, p. 157-184, gives an extensive explanation of the function of corporate tax residence in territorial tax systems, questioning its validity in the current economic environment.

[139] AVI-YONAH R.S., *Advanced Introduction to International Tax Law*, Northampton, MA, U.S.A., 2019, p. 11. HERZFELD M., *International Taxation ...*, already quoted, p. 24 – 25.

[140] FRANCOIS M., VICARD V., *Tax Avoidance and the Complexity of Multinational Enterprises*, in Centre d'Etudes Prospectives et d'Informations Internationales - CEPII Working Paper, - Research and Expertise on the World Economy, Paris-Cedex, No 2033 – 04 February, p. 32 – 34.

[141] UNCTAD, *World Investment Report 2016: Investor Nationality: Policy Challenges*, Geneva, 2016, p. 125. See also the Figure 3, in the Appendix.

It seems like the more successful companies in terms of productivity and profitability are the more complex ones. The afore mentioned study suggests that this might also be a consequence of the lower tax rate that the complex MNEs are subject to, and of the fact that they are more likely to declare zero profit in affiliates in high tax countries, as compared to less complex businesses in the same industry and country. All these elements confirm indeed the assumption that a complex organizational and ownership structure allows to shift profits to low-tax affiliates, taking advantage of tax avoidance mechanisms that decrease overall tax duties.

The concept of tax residence has a central role in corporate income taxation: nearly every jurisdiction worldwide views residence as the fundamental criterion to determine whether a corporation shall be subject to pay its tax liabilities in that State (Traversa, 2019)[142]. Residence is therefore the nexus, established by law, that connects a company to a specific jurisdiction. However, it is an ambiguous concept that lacks a worldwide accepted definition. Rather, "residence" can have multiple interpretations based on the jurisdiction, since each country adopts its own distinct definition of corporate residence (Rizzo, 2019)[143].

Countries generally rely on two common doctrines to determine corporate tax residence: the place of incorporation theory and the real seat theory, more often called "*Place of effective management*" (POEM) (Traversa, 2019; Ribes, 2012)[144].

According to the "place of incorporation" theory, a corporation is a resident of the State where it has been formally registered or, better, incorporated. The simplicity of this doctrine is one of the major advantages: the act of registration determines, beyond any doubt and with legal certainty, both the residence and the applicable law that the company will be subject to. On one hand, this provides great freedom to company owners, since they can choose where the company will be considered as a resident (among the jurisdictions adopting this doctrine). On the other hand, the model allows to register companies where tax rates and laws are more convenient, for the purpose of reducing overall tax liabilities. Relying on this doctrine often means that the concept of residence

---

[142] TRAVERSA E., *Corporate Tax Residence and Mobility*, IBFD, Amsterdam, 2019, p. 110.

[143] RIZZO A., *The Role of Corporate Residence in Tax Matters and its Relationship with the Provision of Dividend Relief: A Comparative Analysis between the UK and the US Tax Systems*, in International Journal of Accounting and Taxation June 2019, Vol. 7, No. 1, p. 35-39.

[144] TRAVERSA E., *Corporate Tax Residence…*, *supra*, p. 112. In this sense, see also RIBES A., *Tax residence and the mobility of companies in the European Union: the desirable harmonization of the tax connecting factors*, Intertax, 2012, Volume 40, Issue 11, p. 607.

will be manipulated and very likely separated from the real place where the company is conducting its business.

The United States is one of the main countries adopting this theory, along with Finland, Ukraine and Sweden (Traversa, 2019)[145].

The majority of developed countries adopts instead a less formal definition of corporate residence, embracing both doctrines and hence taking into account both the place of incorporation as well as the real seat of the company. The doctrine, originated in the UK, defines corporations to be resident of the country where they are controlled and managed, having located there their centre of interests and business activities (Rizzo, 2019)[146]. The main issue concerning this doctrine revolves around the interpretation of the term "real seat": there is no unique definition of it, nor at the global level, nor even in multilateral organizations. In the EU for example, there is no harmonization of the concept, and to allocate taxing powers each Member State employs diverse criteria, called tax connecting factors, to determine the actual circumstances that imply the presence of a real seat. While some scholars equate it with the location of central management, others view it as the primary centre of business activities (Ribes, 2012)[147].

Some countries, such as the United Kingdom, Belgium and Czech Republic, refer to the POEM simply as to the location of central management and control, that generally coincides with the place where the board of directors or administrators meet. On the other hand, countries like Austria and Germany give more importance to the place where operational management is executed, so where day-to-day management happens, and not where decisions are taken (Traversa, 2019)[148].

Some EU Member States (e.g.: France, Germany and Spain) additionally require that a company's State of incorporation and the State where the central management and control happens coincide, further consolidating the economic connection with the specific territory.

In Italy, residency is determined when one of three criteria is met: the company has its legal seat, the substantial business activity of the company, or the place of management in the territory of the Republic[149]. Moreover, the company must carry out its business in

---

[145] TRAVERSA E., *Corporate Tax Residence…*, quoted, p. 112.
[146] RIZZO A., *The Role of Corporate Residence…,* quoted, p. 36.
[147] RIBES A. R., *Tax residence and the mobility of companies in the European Union: the desirable harmonization of the tax connecting factors*, Intertax, 2012, Volume 40, Issue 11, p. 607.
[148] TRAVERSA E., *Corporate Tax Residence …*, already quoted, p. 47 – 50.
[149] See the Article 73, para. 3, first period of the Income Consolidated Tax Act (ICTA) D.P.R. 917/1986, as it was amended by the Article 12 of the Legislative Decree 4 March, 2014, No. 44

Italy for the majority (183 days) of the taxable year, in order to be considered there as a tax resident entity (Ribes, 2012)[150]. It is quite common for the countries to rely on past Court cases to define the elements of POEM, and in Austria and the UK for example, eventual disputes will be judged on a case-by-case basis (Traversa, 2019)[151].

This scenario of different interpretations of facts and concepts, the absence of a unique and widely accepted definition of the "*place of management*" can lead to the result of corporations legally residing nowhere (Avi-Yonah, 2019) [152], and therefore not liable to tax: a typical double non-taxation issue.

On the opposite side, dual residence situations can happen as well, namely when a corporation is considered as a resident in more than one country and might be therefore subject to double taxation in both States. To prevent this situation, tax treaties between countries and Model Tax Conventions often include rules on tie-breaker tests, to resolve dual residency cases.

In the last decades many authors have expressed criticism towards the concept of corporate residence in general, with some (Rizzo, 2019; Traversa, 2019)[153] stating that it is a legal fiction, inapplicable to corporations, in the era of globalization.

Residence is mostly significant when individuals are concerned, but since corporations are not individual sentient beings, they cannot be resident of any jurisdiction (Elkins, 2017)[154]. On the same note, international tax law uses the criterion of personal connections to determine whether an individual is a resident of a certain State (OECD, 2017)[155].

However, corporations have no personal connections, but purely economic ones, that are not sufficient "*to invoke the rights and obligations of distributive justice that underlie ability-to-pay taxation*" (Elkins, 2017)[156]. Unlike individuals, who can only be in one place at the time, corporations are not physically present in a specific unique territory, since they can be simultaneously in all the places where they have economic relationships,

---

[150] RIBES A., already quoted, p. 610.

[151] TRAVERSA E., *Corporate Tax Residence…*, already quoted, p. 169 – 171; 670 – 675.

[152] AVI-YONAH R.S., *Advanced Introduction to International Tax Law*, Northampton, MA, U.S.A., 2019, p. 11.

[153] RIZZO A., *The Role of Corporate Residence…,* already quoted, p. 36 – 39; TRAVERSA E., *Corporate Tax Residence …*, already quoted, p. 130 - 135.

[154] ELKINS D., *The Myth of Corporate Tax Residence*, in Columbia Journal of Tax Law, 9 (1), p. 5–43.

[155] OECD, *Model Tax Convention on Income and on Capital 2017. (Full Version),* OECD Publishing, Paris-Cedex, 2019, available at *http://dx.doi.org/10.1787/g2g972ee-en*. Article 4 states that a person "shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests)"

[156] ELKINS D., *The Myth of Corporate Tax Residence…*, quoted, p. 42.

such as their headquarters, their production plants, stores, offices and so on. To summarise, because of its nature, a corporation does not reside anywhere, deeming the concept of corporate tax residence to be a myth.

The corporate tax system faces a tremendous dilemma in the global context. Residence still plays a crucial role in domestic tax law and in international taxation, but at the same time applying the concept to corporations is a forced legal connection, conceptually and practically inoperable.

2.2. The concept of Corporation in Double Taxation Treaties.

The main objective of the Model Tax Conventions and double taxation treaties between countries, as far as corporations are concerned, seems to be the attribution of taxing rights on corporate income, preventing double taxation.

However, the most well-known cases of tax disputes involving multinationals seem to highlight the rise and indeed the worsening of the opposite phenomenon: that of double non-taxation. This may find indeed a reason in the lack of a unique and widely accepted definition either of "corporation" or "corporate residence" for tax purposes at global level. For instance, it is easy to note that both in the OECD Model Tax Convention and in the UN Model Taxation Convention the term "corporation" represents, if anything, a specification of the term "company", rather than an autonomous type of legal entity.

Both in the Article 3 of the OECD MTC and in the Article 3 of the UN model, is rather the term company that includes "*anybody corporate or any entity that is treated as a body corporate for tax purposes*"[157].

In particular, the OECD MTC also includes the term "enterprise" which *"applies to the carrying on of any business"*[158]. There are no additional details in the Article, and indeed the Commentary to the Article 3, specifies that:

« The question whether an activity is performed within an enterprise or is deemed to constitute in itself an enterprise has always been interpreted according to the provisions

[157] OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version),* already quoted, Article 3.
UNITED NATIONS, Department of Economic & Social Affairs, *Model Double Taxation Convention,* already quoted, Article 3.
[158] OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version),* already quoted, Article 3.

of the domestic laws of the Contracting States. No exhaustive definition of the term "enterprise" has therefore been attempted in this Article» (OECD, 2017)[159].

However, it is also stated that the term "business" includes *"the performance of professional services and of other activities of an independent character"* (OECD, 2017)[160], meaning that every performance, as defined above, is to be considered as an enterprise. Nevertheless, the more detailed interpretation of the term is left to each domestic law, opened up the eventuality of conflicting views on the term.

The Model Conventions are instead more focused on discussing the topic of residence and corporate residence, as it is the main criterion that determines indeed the taxing rights of the Contracting States. Firstly, the provisions and benefits granted by tax treaties apply only to the residents of the Contracting States[161], and understanding which is the State of residence is crucial to not incur in double taxation.

The Article 4 of the OECD Model Convention begins by stating that:

« the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature » (OECD, 2017)[162].

The Model Convention does not define company tax residence (Oats, 2021)[163], but refers to the domestic law of individual States for its definition, leaving them full autonomy and exclusive competence in the development of this concept.

According to the Commentary, the Article does not set any specific standards that domestic law has to satisfy in order to be accepted by other States[164]. In fact, the elements indicated in paragraph 1 of the Article 4 are to be considered merely illustrative, and allow each State to introduce other criteria valid for demonstrating linkage with that State, provided they are of a similar nature. In doing so, the OECD MTC recognizes the principle of territorial sovereignty that each State has within its territory (Traversa, 2019)[165].

---

[159] OECD Commentary on the Article 3, p. 94.

[160] OECD Commentary, *Ibidem*.

[161] Article 1 of the OECD Model Convention states that "This Convention shall apply to persons who are residents of one or both of the Contracting States".

[162] OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version),* already quoted, Article 4.

[163] OATS L., *Principles of International Taxation*, London, 2021, p. 80 – 83.

[164] OECD Commentary on Article 4, p. 105 states as follows: "They do not lay down standards which the provisions of the domestic laws on "residence" have to fulfil in order that claims for full tax liability can be accepted between the Contracting States".

[165] TRAVERSA E., *Corporate Tax Residence and Mobility …*, already quoted, p. 8 – 11.

The UN Model Double Taxation Convention considers the "place of incorporation" as an essential element to determine be residence for tax purposes (UN DTMC, 2017)[166], in a better way than the OECD MTC in the Art. 4 does. This depends on the very nature of the UN Model, which tends to adopt a more inclusive approach, and in this case acknowledges also those jurisdictions that rely mostly on the place of incorporation theory used in their domestic law.

As already said, as a result of the application of the domestic rules, a corporation may turn out to be a tax resident in two jurisdictions, with the occurrence of the phenomenon of dual residence. To face properly this issue, some "tie-breaker" rules are established to decide which of the two Contracting States should be considered as the residence-country (Oats, 2021)[167].

Up until the 2014 version of the Model Convention, the OECD used the "place of effective management" (POEM) as a tie-breaker test, making it the only criterion to which one must refer to in order to resolve situations of dual residence between two States. The meaning of the POEM was better explained in the Commentary, where it was defined as *"the place where key management and commercial decisions, that are necessary for the conduct of the entity's business as a whole, are in substance made. All relevant facts and circumstances must be examined to determine the place of effective management"* (Traversa, 2019; Oats, 2021)[168].

It should be noted that this definition acknowledges only the place where decisions are made, without mentioning, for example, the place where the decisions are materially executed or where the company's activity is carried out. This created some problems, given that many domestic rules (e. g. Italian ICTA) consider equivalent both these criteria alongside to define corporate residence.

The criterion of POEM is central in numerous double tax treaties, and case law evolution is dense of examples where it was used by courts and judges as a tie-breaker, when dealing with dual residence cases. A frequently quoted one is the *De Beers Consolidated Mines vs Howe, Surveyor of Taxes* case, concerning a company incorporated in South Africa but

[166] UNITED NATIONS, *Model Double Taxation Convention,* already quoted, Article 4: "the term 'resident of a Contracting State' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, *place of incorporation*, place of management or any other criterion of a similar nature".
[167] OATS L., *Principles of International Taxation*, *Company Residence and DTTs*, London, 2021, p 80 - 84.
[168] TRAVERSA E., *Corporate Tax Residence and Mobility* …, p. 62. OATS L., Principles …, p. 83.

managed both in South Africa and in the UK[169]. The Court inspected that the most important meetings, the ones where the real control was exercised, were held in London, and therefore held that the company was a UK resident. In that case, the place of effective management was determined by where the highest level of decision making was executed, so where strategic commercial decisions vital for the company's business have been taken (Du Plessis, 2020; Zucman, 2014)[170]. Often this location corresponds to where the board of directors meet.

The interpretation of the place of effective management has been revised many times by the OECD. Nevertheless, the lack of clarity meant that States were often left to define what the notion meant, making such criterion unsuitable to function as an international tie-breaker rule.

Dual residency cases were often exploited by corporations to avoid taxation, and management decisions began to be taken through videoconferences, making it even more difficult to spot the real place of management. Acknowledging all these problems, the BEPS project proposed to eliminate the POEM as the only tie-breaker included in the Model Convention.

The revised and current version of the Model drastically changed the third paragraph of the Article 4, that now states as follows:

« the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention » (OECD, 2017)[171].

The innovation brought on by the BEPS project is therefore the introduction of a mutual agreement procedure between the States involved, that shall resolve dual residence issues on a case-by case approach. The ratio behind this is that the Committee on Fiscal Affairs

---

[169] It is an historical (1907) case. The appellant Company was registered in the Cape Colony and its business was mining for diamonds in mines which it possessed in South Africa, and selling the diamonds there under annual contracts to a syndicate for delivery there. The Head Office was in South Africa, and general meetings were always held there. Some of the directors resided in South Africa and weekly meetings of the directors were held there. But the most of the directors resided in England, and the meetings in London were the meetings at which the real control was exercised in all the important business of the company, except the actual mining operations. The sales of the Diamonds were controlled by the London board. Held: The company was resident in the United Kingdom for the purposes of income tax. A foreign corporation may reside in this country for the purposes of income tax. See, more in depth, UKHL 626/1907 on 30 July 1907, AC 455, recently discussed by JONES J., HATTING J., *De Beers Consolidated Mines Ltd v Howe (1906): Corporate Residence: An Early Attempt at European Harmonization* in Landmark Cases in Revenue Law, May 2021, Cape Town, p. 1 – 38.

[170] DU PLESSIS I., *Place of Effective Management: Finding Guidelines in Case Law*, in Intertax, 2020, Vol. 48, Issue 2, p. 195 – 217; In the same sense ZUCMAN G., *Taxing across Borders: Tracking Personal Wealth and Corporate Profits*, in Journal of Economic Perspectives, Volume 28, Number 4 - Fall 2014, p. 121–148.

[171] OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version),* Article 4.

recognized that cases in which a dual residency situation arises are quite rare, and therefore justify a case-by-case approach.
With this updated provision, the OECD enhances the importance of cooperation between States, and also gives a more detailed list of factors that should be taken into account by tax authorities: *"where the meetings of the person's board of directors or equivalent body are usually held, where the chief executive officer and other senior executives usually carry on their activities, where the senior day-to-day management of the person is carried on, where the person's headquarters are located, which country's laws govern the legal status of the person, where its accounting records are kept"* (OECD, 2017)[172].
Nonetheless, the Model merely lists a few of them, without defining a hierarchy among them, thus leaving to individual States the freedom of which ones to value first.
Ultimately, the update of the OECD Tax Model is to be seen as positive, as it identifies additional criteria that can serve as a tie-breaker rule, and pushes toward friendly procedures of cooperation and exchange of information between the concerned States.

2.3. Globalization, Digitalization and the Impact on Countries' Corporate Income Tax Regimes.

The corporate income tax has been the subject of extensive discussions since its introduction, and nowadays opinions are more conflicting than ever. Corporate taxation works well in an ideally closed economic model: company's revenues and costs can all be imputed within the borders of the country, without external entities getting involved in the transactions. The weaknesses of this model arise when the company operates worldwide.
Globalization and digitalization have affected industries in all sectors of the economy, and the new business modalities have put under strain the traditional mechanisms for taxing transnational corporate income (Devereux, Vella, 2017)[173].
Digital companies totally escape the "*brick-and-mortar*" model, and generate profits without relying on a permanent establishment, totally outdating the concept. Multinational companies instead set their operations and their management in a vast geographical space, relying on many affiliated legal entities, making inadequate and

[172] OECD Commentary… on the Article 4, p. 112.
[173] DEVEREUX M. P., VELLA J., *Implications of digitalization for international corporate tax reform*, Oxford University Centre for Business Taxation, 2017, WP 17/07, p. 93.

questionable definitions such as "*place of effective management*". Globalization and digitalization magnified the dispute on the concept of tax residence[174].

When a corporation develops a network of affiliate offices and branches in different countries, it sets up different legal entities whose profits will be taxed by the country where they have been established. Over the years, these multinational companies have evolved in more complex structures, by organizing their business in a chain of subsidiaries and intermediaries that makes it extremely difficult for tax administrations to connect them to each other or all together with a parent company.

To simply illustrate how this network flows, suppose that a parent company in country P manufactures its products in a subsidiary in country M, which in turn pays royalties on the intangible assets (such as intellectual property) owned by another subsidiary, set in country L. Usually, the subsidiaries where IPs are located are established in low-tax jurisdiction, and by having to pay royalty in country L, profits get shifted from country M to L and taxed there at a lower rate. To complicate the scenario, suppose that goods are sold in another country: the sales profits made here will be taxed mainly depending on whether the company has a permanent establishment in that country (Devereux, Vella, 2017)[175].

It is easy to imagine how by establishing foreign holding subsidiaries in countries with a beneficial tax regime or even in tax havens, MNEs only increase the complexity of their ownership structure, without setting up subsidiaries that carry out real business activities. The peculiar design of the corporate chain enables harmful or aggressive practices such as tax treaty shopping and profit shifting, minimizing the overall tax burden by re-directing real profits to affiliates.

Both digital and multinational companies have learnt how to shift their tax residence where it is most convenient, engaging in the phenomenon of corporate inversion: simple paperwork can convert a resident company in a foreign corporation not liable to taxation (Elkins, 2017)[176]. Inversions are particularly alarming, because by exploiting this corporate mobility firms freely choose the laws and the tax regime that they will be subject to, blurring the economic connection that real business activity have with the territory where they are performed. Globalization has made it easier and relatively

[174] See again Figure 3, in the Appendix.
[175] DEVEREUX M. P., VELLA J., *Implications…*, already quoted, p. 94.
[176] ELKINS D., *The Myth of Corporate* quoted, p. 42.

unexpensive for companies to engage in this phenomenon (Rosenblum, 2019; Beer et al, 2018)[177].

The advent of digitalization has acted and continues to act as a significant amplifier of the problems caused by globalization on the international tax regime. Digitalization increased once more the complexity of global supply chains, by allowing businesses to be managed and to carry out economic activities in multiple locations simultaneously (Devereux, Vella, 2017)[178].

It is worth-mentioning to briefly consider some cases of digital companies that might be particularly hard to tax, according to the current corporate income tax.

E-commerce activities allow firms to sell their products worldwide, with very little or no physical presence in the countries where the final customers are located. Lacking a permanent establishment, MNEs will not be taxed in all the jurisdictions where they make sales profits.

Two-sided platforms are companies such as "eBay", "Booking.com" and "Amazon", which connect two economic agents (sellers and buyers) for various goods and services.

The particularity of these companies is that they do not need to be a multinational enterprise to distribute their services to a global audience: they might set up their activities in a single country or, thanks to digitalization, locate resources across different States, with programmers, researchers, and marketers in separate locations. The question is where this business shall be taxed, since the countries where the users of the platform, or corporate residence or the place of management of the company have been located claim some rights in levying taxation on the income produced.

A similar problem arises with digital companies such as "Facebook" or "Google", that offer free services to users but generates profits through advertising and selling users' data to third parties. As in the previous case, the international reach of these companies is vast, and this raises questions about how such companies' profits should be allocated across the countries where they operate.

One option is to give taxing rights to the advertiser's country of residence, but it could also be argued that the service is performed in the user's country and the related profits should be taxed there.

---

[177] ROSENBLUM D., *The Futility of Walls: How Traveling Corporations Threaten State Sovereignty*, in Tulan Tax Review, 2019, p. 659. See also BEER S., DE MOOIJ R., LIU L., *International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots*, IMF Working Paper, Washington D.C., 2018, p. 1 – 45, where the authors classify corporate inversion as one of the main channels of international tax avoidance.

[178] DEVEREUX M.P., VELLA J., *Implications of digitalization …*, quoted, p. 95.

The allocation of taxing rights currently relies mainly on the location of employees selling the services, following existing permanent establishment rules. However, since the sales process is digital, defining a PE becomes complex (Devereux, Vella, 2017)[179].

In a nutshell, digital companies using unconventional revenue models make it complicated for the traditional tax regime to establish beyond any doubt which country has the right to levy taxation.

All these phenomena had a major impact on countries' corporate income tax regimes.

The first effect is the increased tax competition between countries: with money being so easily transferred across jurisdictions, countries soon became rivals in the field of corporate taxation (Nicodeme, 2006)[180].

Each jurisdiction has a strong incentive to decrease its effective corporate tax rates and tax bases, with the purpose of attracting more investments and business that could lead to economic and social growth. Evidence showed that when a country reduces its taxes, it encourages a greater inflow of capital and foreign investments (Dumiter, 2023; Tørsløv et al, 2020)[181], which are beneficial not only for the state treasury, but also for economic growth and employment.

Each country establishes its statutory corporate tax rate, in a range from 35% in Malta and Colombia for example, to less than 10% in Hungary (OECD, 2022)[182].

It was observed that the average statutory corporate tax rate has significantly declined in the last twenty years, from 28% in 2000 to an average 20% in 2022 [183], showing the impact of the race to the bottom of tax competition between countries (Lazarov, 2022; Bernardo et al, 2021)[184].

---

[179] DEVEREUX M.P., VELLA J., *Implications of digitalization …*, p. 95-96.

[180] NICODEME G., *Corporate Tax Competition and Coordination in the European Union: What do we know? Where do we stand?* MPRA Paper No. 107, 2006, European Commission Directorate-General for Economic and Financial Affairs Publications, No. 250, p. 1 – 46, *http://europa.eu.int/comm/economy_finance*.

[181] DUMITER F.C., *The Correlation Between Double Taxation Conventions, Tax Compliance, and Tax Evasion. Empirical Evidence from OECD Countries,* Vilnius Gediminas Technical University, 2023, Technological and Economic Development of Economy, Vol. 29 Issue 3. TØRSLØV T., WIER L. S., ZUCMAN G., *The Missing Profits of Nations*, in NBER WP Series, 2020, Cambridge, MA, U.S.A., p. 1 – 56.

[182] OECD, *Corporate Tax Statistics*, Paris-Cedex, 2022, p. 10.

[183]OECD, *Corporate Tax Statistics*, already quoted, p. 10. See also Figure 2 in the Appendix.

[184] LAZAROV I., *Anti-Tax-Avoidance in Corporate Taxation under EU Law*, Amsterdam, 2022, p. 33 – 90. In this sense, see also BERNARDO J.G., JANSKÝ P., TØRSLØV T., *Multinational corporations and tax havens: evidence from country-by-country reporting*, in International Tax and Public Finance, 2021, Vol. 28, p. 1519–1561, where the authors study the correlation between low effective tax rates and MNEs misaligned profits with economic activity.

Others (Nicodeme, 2006)[185] confirm this decline in corporate tax rates in EU Member States, but at the same time observe that the collected corporate tax, as a percentage of GDP, conserves an average percentage of 3%. This finding could be explained by the fact that while competition lowers the tax rate, it also allows States to attract a wider tax base, thus keeping the total tax income stable.

Tax competition finds its extreme representation in the existence of tax havens.

Since the latter half of the twentieth century, they have become widely used by MNEs, offering them tax planning solutions for minimizing their global tax burden.

Some (Oats, 2021)[186] link their growth directly to the emergence of multinational corporations, which, in turn, was supported by the rapid progress of globalization and digitalization.

By imposing extremely low or zero corporate tax rates, tax haven countries enter the tax competition to attract business and capital, and they have often developed a stronger legal and political governance system than similar non-haven countries. This model has proven to be extremely beneficial to these countries, since they are the world's largest tax collectors, despite applying very low tax rates (Wier, 2020)[187].

Towards the 1990s, tax authorities acknowledged that tax havens were becoming more influential than ever, and when tax scandals came to the surface after 2008, governments and academics began looking more deeply into the phenomenon and its consequences on countries' tax revenues (Oats, 2021)[188].

In 2019 researchers found that $200 billion dollars were lost in corporate tax revenues worldwide, an average 10% of the overall tax return (Wier, 2020)[189]. There is however a great heterogeneity in the data across countries. Italy, for instance, loses 18% of its corporate tax revenues, approximately $7 billion, to tax havens, the majority of which are European countries[190].

---

[185] NICODEME G., *Corporate Tax Competition and Coordination…,* quoted, p. 20.

[186] OATS L., *Principles of International Taxation*, London, 2021, p. 262 – 279.

[187] WIER L., *Tax havens cost governments $200 billion a year. It is time to change the way global tax works*, Publication of the World Economic Forum, February 27 2020, p. 1 – 6, *https://www.weforum.org/agenda/2020/02/how-do-corporate-tax-havens-work/,* brings the example of countries like Ireland, Luxembourg and Puerto Rico, that apply effective tax rates of less than 5% but manage to attract such large artificial profits that they end up collecting more tax revenue than any other country.

[188] OATS L., *Principles of…*, quoted, p. 269.

[189] WIER L., *Tax havens cost governments $200 billion a year …,* quoted, p. 3, WIER L., ZUCMAN G., *New global estimates on profits in tax havens suggest the tax loss continues to rise*, 4 dec. 2022, available in https://cepr.org/voxeu/columns/new-global-estimates-profits-tax-havens-suggest-tax-loss-continues-rise, and Table 5 in the Appendix.

[190] See https://missingprofits.world/; the website offers an interactive map with data on how much countries attract or lose in tax profits.

Other studies regarding the Italian corporate tax regime (Sallusti, 2022)[191] confirm these data, adding that the total amount of shifted profits is estimated to be € 25.9 billion. These profits are shifted by almost 60% of Italian MNEs, that have been classified as tax avoiding by calculating the discrepancy between the profits that they should have declared (to be classified as non-tax avoiding) and the ones that they actually declared. The fact that many Italian MNEs engage in tax avoidance practices is also supported by the fact that they have a lower degree of profitability, as compared to domestic businesses: they tend to report higher costs to lower their operative margins and profits, and therefore reduce their tax base (Sallusti, 2022)[192].

The major impact that the existence of tax havens has on countries' corporate income tax regimes suggests that action is needed on this front, in order to ensure a fair and efficient tax collection.

Both the OECD and the EU attempted to create a blacklist of tax havens, hoping it would be a strong tool for addressing tax avoidance. However, the criteria to assess countries have been reported to be too weak, focusing only on factors such as tax transparency and on whether or not they generally commit to the BEPS minimum standards (Oats, 2021; Oxfam, 2017)[193].

As a consequence, very few countries are actually reported in the last EU blacklist, and some of the major pass-through economies are totally left out (such as Ireland, the Netherlands and Singapore)[194]. At the current state, the blacklist has not proven to be an efficient tool, and it risks *"becoming a means of whitewashing tax havens"* (Oxfam, 2017)[195].

To conclude, globalization and digitalization emphasized the already existing problems in the international tax regime, as highlighted in the previous paragraphs. While the impact of these phenomena has tangible economic effects (first and foremost the lost tax revenues), it also made it clear that reforms are needed and it pushed governments to look for effective multilateral solutions.

The two major projects in this sense are the OECD BEPS Project and the Global Anti-Base Erosion Rules, that by providing a number of anti-tax avoidance actions and by

---

[191] SALLUSTI F., *Measuring profit shifting by MNEs in Italy*, November 17, 2022 in www.imf.org/Files/News/Seminars.

[192] SALLUSTI F., *Measuring profit shifting…*, quoted, p. 13.

[193] OATS L., *Principles of…*, quoted, p. 274. OXFAM, *Off the Hook. How the EU is about to whitewash the world's worst tax havens*, Oxford, 2017.

[194] See *https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/#countries* for the EU list of non-cooperative jurisdictions for tax purposes adopted by the Council on 2023.

[195] OXFAM, *Off the Hook…,* quoted, p. 8.

attempting to reform the structure of the international tax regime, are an undeniable step forward in the fight against double non-taxation of MNEs profits.

2.4. Case Studies.

2.4.1. The Apple Case.

The *"Apple Case"* is one of the most well-known double non-taxation issues.
In 2013, the US Senate held a hearing to examine how and to what extent Apple Inc. was involved in profit shifting activities between 2009 and 2012[196].
The double non-taxation scheme implemented by Apple is quite complex, as it combines various tax avoidance loopholes, such as taking advantage of inefficiencies in the CFC rules and the "Check-the-box" regime in the US, the abuse of transfer pricing rules, the use of *"offshore entities, arrangements, and transactions to transfer its assets and profits offshore"* (U.S. Senate, 2013)[197], that allowed the company to avoid taxation on $44 billion of taxable offshore income in the time span of four years.
Since 1980 Apple Inc., which has its head office and its place of management and control, has three major subsidiaries incorporated in Ireland: Apple Operations International (AOI), Apple Operations Europe (AOE) and Apple Sales International (ASI).
With a well-structured multi-tier organization[198], these three affiliates have no tax residence in any country, as they all take advantage of the same unique opportunity created by the conflicting tax legislation of Ireland and the United States: the complementary definition of corporate tax residence (Ting, 2014)[199]. Under Irish law, the place of management and control is what determines the tax residence of the company, while under US law this is determined solely by the place of incorporation. The Irish affiliates were therefore neither resident in Ireland, since they were managed and

---

[196] The expression "U.S. Senate" is referred to the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs.
[197] See U.S. SENATE Permanent Subcommittee on Investigations, of the Committee on Homeland Security and Governmental affairs, *Offshore Profit Shifting and the U.S. Tax Code - Part 2 (Apple Inc.),* Memorandum, Chapter III (Apple Case Study), *Washington D.C.*, May 21, 2013, p. 20.
[198] U.S. SENATE, *Ibidem*; see, more in depth, Figure 4 "Using Offshore Affiliates to Avoid U.S. Taxes (Apple Case)" in the Appendix of this work.
[199] TING A., *i Tax – Apple's International Tax Structure and the Double Non-Taxation Issue*, in British Tax Review, 2014, No. 1, p. 44.

controlled by the parent company Apple Inc in the US, nor resident in the US, since they had been incorporated in Ireland.

The US Senate found out that AOI operates without any employees, having therefore no permanent establishment in Ireland and being controlled from the headquarters in California (U.S.A.)

It mainly serves as an intermediate holding company that receives considerable dividends from its Irish affiliates: AOI income was almost $30 billion from 2009 to 2012, but it paid no corporate income tax in any country over that period, resulting in a double non-taxation of almost one third of Apple's total net profits from 2009-2011.

ASI operates as an intermediary between the manufacturers and the Apple distribution subsidiaries in Asia and Europe, but up until 2012 it did not have any direct employees and no permanent establishment in Ireland. Nevertheless, it was able to realise a profit of $74 billion, validating the idea that the subsidiary's main purpose was to absorb and inflate profits by applying very large mark-ups on the goods acquired from the manufacturers and later sold to the other affiliates. The Irish subsidiaries served not only to shield income from taxation, but also to help Apple Inc. to lower their US taxes altogether.

By entering in a cost-sharing agreement, ASI and Apple Inc. shared the costs and, most importantly, the economic rights on the intellectual property, even though most of Apple's research and development (R&D) efforts took (and still takes) place in the United States. ASI therefore did not have to pay royalties to its US parent, and evidence shows that it benefits disproportionately more in terms of income, leaving the profits generated by the intangible assets outside of the US (Ting, 2014; U.S. Senate, 2013)[200].

In brief, the cost-sharing agreement merely shifts the tax liability for Apple's profits to a different location, where income goes completely untaxed or is subject to extremely low corporate tax rates.

Indeed, when ASI reported in Ireland the corporate income sourced in the country, it paid very minimal taxes on it: in 2011 its tax liabilities were of $10 million on an overall

---

[200] TING A., *i Tax – Apple's International Tax Structure ...,* quoted, p. 45, states that "*the profits to cost rations under the cost sharing agreement were 7:1 for Apple Inc and 15:1 for ASI*". U.S. SENATE Permanent Subcommittee on Investigations, *Offshore Profit Shifting...,* quoted, p. 29, explain that: "*The figures disclose that Apple's Irish subsidiary, ASI, profited more than twice as much as Apple Inc. itself from the intellectual property that was largely developed in the United States by Apple Inc. personnel*".

income of $22 billion, with an embarrassing actual corporate tax rate around 1% (Niazi, Krever, 2021)[201].

The case was also at the centre of an investigation carried out by the EU Commission, since the extremely low tax rate applied to ASI, that in 2014 had declined even further to 0,005%, led to believe that Ireland helped Apple to lower its tax liabilities. Indeed, it was reported that two tax rulings issued by the Irish tax authority allowed Apple to artificially allocate profits in such a way that they would not be subject to tax in any country.

By offering this selective treatment, Ireland was giving a significant economic advantage to the American company over the competition, which is illegal under EU State Aid rules. The Commission decided that Apple had to pay €13 billion to Ireland, which is the amount of unpaid taxes in the period 2003-2014[202].

Both Ireland and Apple appealed to this decision, in September 2020, before the European Court of Justice. The dispute is not over yet, and it is clear that the Commission wants to be sure to *"use all tools at* [*their*] *disposal to ensure companies pay their fair share of tax"*[203].

2.4.2. The Pepsi Co. Case.

The *"Pepsi Co. Case",* is another worth-mentioning case, as it represents a further method that multinational companies exploit to lower their tax liabilities. Always relying on a chain of affiliate companies, the US based company was able to take advantage of cross-border differences in the treatment of hybrid instruments.

The critical point of the case revolves indeed around an enduring conflict in corporate finance and tax law between equity and debt. Companies sometimes attempt to benefit from the tax advantages correlated to each instrument, by creating hybrid securities that can be viewed as "debt" in some scenarios, and "equity" in others.

In the mid-1990s PepsiCo Inc., a major player in the beverages and snack food industry worldwide, sought to compete with its rivals in Eastern Europe and Asia, and for various

---

[201] NIAZI S.U.K., KREVER R., *Bespoke tax rulings and profit shifting in the European Union: assessing the EU's options*, in Australian Tax Forum, 2021, Vol. 36 (3), p. 363.

[202] EU Commission, *State Aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion*, Press release, 30 August 2016, available at *https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923*.

[203] EU Commission, *Statement by Executive Vice-President Margrethe Vestager on the Commission's decision to appeal the General Court's judgment on the Apple tax State aid case in Ireland*, Statement, 25 September 2020, available at *https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1746*.

commercial and tax-related reasons, the company established two subsidiaries in the Netherlands, “PepsiCo Worldwide Investments” and “PepsiCo Global Investments”.
Through a series of transactions, the Dutch subsidiaries received notes issued by PepsiCo in exchange for two ‘advanced arrangements’ that provided for a preferred return on these notes (Oats, 2021)[204].
PepsiCo intended for the Agreements to be treated as “debt” in the Netherlands, so as tax-deductible interest expenses, and as tax-free dividend income on “equity” in the United States[205].
The US Internal Revenue Service, however, disagreed and issued a tax bill for the period between 1998 and 2002, contending that the payments from PepsiCo’s Dutch subsidiaries to its parent company were debt interest payments subject to corporate income taxes.
In response, PepsiCo initiated a lawsuit against the IRS in 2009, contesting the tax assessment and remarking that its hybrid securities were indeed to be treated differently in the Netherlands and the United States.
The case is notable since the Court considered thirteen different factors, such as the name given to the instruments, the right to enforce payments or the source of payments, and labelled each of them as ‘neutral’, ‘indicative of debt’ or ‘indicative of equity’ (Oats, 2021)[206].
The U.S. Tax Court concluded that the hybrid securities were developed through “*legitimate tax planning*” (US Tax Court, 2012)[207], and that the payments made to PepsiCo should be categorized as equity non-taxable returns on capital investment.
The multinational company has therefore emerged victorious, and it did not have to pay the $363 million of allegedly unpaid taxes to the U.S. Internal Revenue Service.

2.4.3. Google vs Italian Revenue Agency.

[204]OATS L., *Principles of International Taxation*, London, 2021, p. 440.
[205] MCLIMORE E.M., GRILLI S.P., *Tax Court Upholds Equity Treatment of Hybrid Instrument in PepsiCo Puerto Rico*, in Tax News and Developments, December 2012, Volume XII-6, p. 4, available at *https://www.lexology.com/library/detail.aspx?g=8445dff8-a5f6-45d3-9f89-e560832e9801*.
[206] OATS L., *Principles of…*, quoted, p. 440.
[207] UNITED STATES TAX COURT, *Pepsico Puerto Rico, Inc. (Petitioner) v. Commissioner of Internal Revenue (Respondent)*, 155 T.C. Memo 2012-269, Docket Nos. 13676-09, 13677-09, Washington D.C., filed September 20, 2012, p. 38, available at *https://tpguidelines.com/us-vs-pepsico-september-2012-us-tax-court-155-t-c-memo-2012-269/*.

The case “*Google vs Italian Revenue Agency”* originates from a tax audit conducted by the Italian Guardia di Finanza (Economic and financial police) and coordinated by the Milan Public Prosecutor’s Office, after which the Italian tax authority formally accused Google, the U.S. multinational tech company, with non-payment of the corporate income tax (namely “IRES” in Italy) between 2009 and 2013: it was reported that the company diverted to Ireland €800 million of profits, evading IRES by 95 million euros.

The parties were able to settle the dispute amicably through an extra-judicial settlement, attesting both a victory for the Italian tax authority and a quick resolution for the U.S corporation.

Indeed, the negotiation and the following agreement with the Agenzia delle Entrate (Italian Revenue Agency) allowed Google to settle the taxes owed with a reduction in administrative penalties, and to avoid the onset of a tax litigation that could have reputational damage for the company.

The Italian Revenue Agency, on the other hand, was able to recover the lost tax income quickly and with certainty, through a less complex process than that required by Court procedures.

It took more than a year to reach an agreement, a sign of how far from easy it is to identify the tax boundaries of web giants by moving within national and international laws.

Nevertheless, these extra-judicial solutions are becoming widely used, since they allow to avoid bureaucratic delays to reach the collection of the amounts due.

In May 2017 an agreement of dozens of pages, that meticulously listed the details to resolve without dispute the investigations related to the period between 2002 and 2015, ordered that in addition to the taxes already paid in Italy for those years, Google would pay another 306 million euros to the Agenzia delle Entrate to make peace with the Italian tax authorities. Of these, more than 303 million were attributed to Google Italy and less than 3 million to Google Ireland.

Moreover, the landmark agreement establishes the criteria by which from now on Google will declare the corporate income derived from the activity on the Italian territory. This tax settlement agreement shows both the Italian Agency’s effort to pursue a policy of tax control, attentive to the operations of web multinationals in Italy, and Google’s commitment to Italy to continue to work to help grow the country's online ecosystem.

For years Google had been shifting profits between its various affiliates, with a pattern similar to the ones used by Apple and other big corporations. When analysing individual country results, there was an evident profit misalignment between where profits

originated and where they were reported. Google's revenues originated in Italy from contracts signed in the country totalled to €637 million in 2015, but only 67 million were reported in Italy, while the other 570 were invoiced in Ireland. Out of the 637 million revenues Google paid total taxes of €3.4 million, which was an effective tax rate of 0.5% on geographic revenues while the rate on profits was 24%.

What allowed the U.S. MNE to shift and accumulate tax-free profits in the Bermuda is a scheme called "*Double Irish with a Dutch Sandwich*".

This technique involves a tax triangulation between two Irish companies (one of which holding a permanent establishment in a tax haven) and an additional company in Netherlands, totally "empty" and used only to transfer profits, thus reducing the group's tax base and resulting in enormous tax savings. Through the payment of royalties, subsidiaries acquire not only the right to exploit the parent company's intangible assets, such as intellectual property and trademarks, but they also allow to shift profits from one state to another, with artificially constructed transfer prices. Profits therefore transited from Ireland, through the Netherlands, to finally be deposited in tax havens or low-tax states (Barry, 2019)[208].

When applied to the Google Italy case, the "*Double Irish with a Dutch sandwich*" involves different actors[209].

The way this system works is as follows: Google Italy Srl provides marketing services invoiced to Google Ireland Ltd, where the profits will be taxed on Ireland's average tax rate of 12.5 percent, which is far lower than the 24 percent at which it amounts in Italy.

However, the Irish unit pays royalties to a Dutch subsidiary, Google Netherlands Holdings, thus reducing massively the taxes owed in Ireland. In turn, this affiliate depends on the second Irish subsidiary, Google Ireland Holdings, which owns the rights to use outside the U.S. the intellectual property and receives likewise the royalties from the other subsidiaries.

This company resides on Irish soil, but is managed by a company based in Bermuda, Google Bermuda Unlimited. The profits generated by the Irish subsidiary are therefore collected by this company and deposited in the Caribbean Island, subjected to the tax regime of the well-known tax haven whose corporate income tax rate is zero[210].

---

[208] BARRY F., *Aggressive Tax Planning Practices and Inward-FDI Implications for Ireland of the New US Corporate Tax Regime*, in The Economic and Social Review, Vol. 50, No. 2, Summer 2019, p. 330.

[209] See, for further details, Figure 5 "From Italy to Bermuda (Google Case)" in the Appendix of this work.

[210] MINCUZZI A., *Google fa pace (dopo un anno) con il Fisco italiano: pagherà 306 milioni di euro*, in Sole 24 Ore – Norme & Tributi, 4 May 2017, available at *https://www.ilsole24ore.com/art/google-fa-pace-dopo-anno-il-fisco-italiano-paghera-306-milioni-euro-AEjqONCB*.

As of January 2020, following pressure from the European Commission and the OECD, the triangle between Ireland, the Netherlands and Bermuda to shift profits and thus pay less tax, turns out to be a practice prohibited by international standards.

Moreover, starting from 2015, all companies actually managed and controlled or incorporated in Ireland are considered to be tax resident there, placing a limit on the occurrence of double non-taxation of MNEs with affiliates in the country (Barry, 2019)[211].

2.4.4. The Huawei Case.

The three cases presented above deal specifically with the issue of double non-taxation, pointing out how big corporations exploit different methods to minimize their worldwide tax liabilities, the most common being profit shifting through a chain of affiliate entities and the use (or abuse) of hybrid instruments.

However, as already mentioned, the main issues of international tax law are increasingly linked to the issues of international trade and global geo-political structures (Draghi, 2023)[212].

Governments, international organizations and the general public are not only interested in the tax audits initiated against the most famous corporations (acronym "GAFAM" Group: Google, Apple, Facebook, Amazon, Microsoft), but they began to keep an eye on the market presence of other big companies from emerging countries.

In recent years, communication and technology businesses of the Far East, such as Samsung, Xiaomi and Huawei, became increasingly influential in this market segment, entering strong competition with Apple and other older Western companies. The great market power and worldwide diffusion of these Far East multinationals' products raised in developed countries, especially in the European Union and in the US, some concerns about matters of international trade, fair competition, and national security risks.

"The Huawei case" deals indeed with the concerns expressed by the United States on "*the counterintelligence and security threat posed by Chinese telecommunications companies doing business in the United States*" [213].

---

[211] BARRY F., *Aggressive Tax Planning Practices ...,* quoted, p. 331. See also *https://startingfinance.com/approfondimenti/double-irish-with-dutch-sallndwich/*, under "Double Irish with Dutch Sandwich".

[212] DRAGHI M., *Miriam Pozen Lecture*, Cambridge, MA - U.S.A., 2023, in Il Sole 24 Ore, 8 June 2023, and Il Foglio, 9 June 2023, p. 3.

[213] Civil Action No. 4:19-CV-159 United States District Court Eastern District of Texas Sherman Division Huawei Techs. USA, Inc. v. United States, 440 F. Supp. 3d 607 (E.D. Tex. 2020) decided on February 18, 2020, p. 2, available at *https://casetext.com/case/huawei-techs-usa-inc-v-united-states, in "Background"*.

Huawei Technologies USA is an affiliate incorporated in the United States of the multinational corporation Huawei Technologies Co. Ltd, based in Shenzhen, China. The subsidiary supplies telecommunication services and equipment to wireline and wireless carriers in the United States, along with a multitude of enterprise clients, including corporations, educational and state institutions.

Although Huawei is privately owned, in 2011 the U.S. - China Economic and Security Review Commission expressed concerns that Huawei might be an entity susceptible to Chinese influence, since it benefits from advantageous governmental policies that are designed to support its growth while hindering foreign competition.

Therefore, Huawei might be one of those large Chinese companies that "*are directly subject to direction by the Chinese Communist Party*"[214], raising concerns by the US Government and Intelligence, as they pose a security threat to the country and its institutions.

What started in 2012 as a recommendation to exclude Huawei's services and products from sensitive governmental services, private-sector entities and network providers, became in 2018 a solid prohibition of Huawei's telecommunications and video surveillance services or equipment.

Section 889 of the 2019 National Defense Authorization Act enacted by the US Congress states indeed that federal agencies are not allowed to procure, obtain, extend or renew any contract for the acquisition of equipment, system, or service provided by Huawei or by other enterprises that employ Huawei components, as they pose a serious threat of Chinese espionage in American systems.

In March 2019 Huawei sued the United States as it viewed Section 889 as unconstitutional, and asked for a dismissal of the statute. The petitioner's motion was denied, and the prohibition remained effective. Moreover, the Government highlighted how the dispute was also a matter of how tax income is spent, as there is an "*ancillary purpose of ensuring that federal tax dollars were not spent to procure, or otherwise further propagate on U.S. networks, products that pose the aforementioned Chinese cyber-threat*"[215].

It is worthy to note how multinational enterprises are under scrutiny not only to ensure that they pay their fair share of taxes, but their behaviour and actions have wider

[214] Civil Action No. 4:19-CV-159, *Ibidem*, in "Background", p. 2.

[215] Civil Action No. 4:19-CV-159 United States District Court Eastern District of Texas Sherman Division Huawei Techs. USA, Inc. v. United States, 440 F. Supp. 3d 607 (E.D. Tex. 2020) decided on February 18, 2020, p. 22, available at *https://casetext.com/case/huawei-techs-usa-inc-v-united-states*.

implications that fall into matters of international competition and trade, national security and how tax money are employed to ensure services to the taxpayers and a fair redistribution of income.

2.4.5. The Gazprom Case.

The *"Gazprom Case"* is a further example of how tackling the unlawful behavior of multinational enterprises is not only a matter of international taxation and tax avoidance. Minimizing their tax liabilities is just one way through which MNEs can gain economic benefits in the countries where they operate.
However, sometimes they do not engage in tax avoidance practices to earn more profits and put themselves in a competitive advantage, but they gain a dominant position in the market through less subtle practices, aimed at increasing their market share and defeating the competitors.
The case originates in 2011, when the EU Commission started investigating into companies in the natural gas sector across ten Member States, primarily in Central and Eastern Europe.
In 2012, the Commission initiated proceedings against Gazprom, to investigate whether the company abused its dominant market position in the gas supply market, violating EU competition rules by engaging in anticompetitive practices in Central and Eastern Europe. Gazprom's presence in the European gas market dates back to the mid-1970s, and it is now a key player in gas production, processing, and sales, that exports natural gas through its subsidiary, Gazprom Export LLC.
Russia owns over 50% of Gazprom's shares, and the State-controlled company has been the subject of many newspaper headlines in the last years, since the beginning of hostilities and the military conflict between Russia and Ukraine.
The case, therefore, had also a political reach, given the evident impact of the Russian-Ukrainian conflict, and numerous EU countries started to question the reliability of Russian gas, given the geopolitical uncertainties surrounding Ukraine and the potential decrease in gas supply from Russia.
The Commission's investigation resulted in a statement of objections in 2015, indicating that Gazprom interfered with competition in gas supply markets in Poland, the Czech Republic, Lithuania, Hungary, Estonia, Slovakia, Latvia, and Bulgaria. The statement also pointed out territorial restrictions in supply agreements, and that Gazprom used its

dominant position in the market to charge unfairly high gas prices in those Member States, way above the effective costs or the benchmark prices [216].

Both the EU Commission and Gazprom worked for years to negotiate a solution, and in 2018 the parties agreed on a list of 'commitments', aimed at significantly changing the behaviour of the Russian company in the Central and Eastern European gas market.

The Commission made the following obligations legally binding on Gazprom in May 2018[217]:

- no more contractual barriers to the free flow of gas;
- obligation to facilitate gas flows to and from isolated markets;
- structured process to ensure competitive gas prices;
- no leveraging of dominance in gas supply.

Moreover, the Commission confirmed that it would not sanction Gazprom with any fines, as they did not find infringement of Article 102 TFEU, that prohibits the abuse of a dominant market position[218].

While the Commission verified that Gazprom did hold a dominant position in all eight markets, they could not prove any abuse or anticompetitive behaviour that violated EU Antitrust policy, to which all companies operating in Europe have to comply with, no matter their country of origin [219].

Based on the conclusions drawn from the EC's investigation, it is likely that both the Commission and Gazprom had shared interests. Gazprom aimed at safeguarding its reputation, while the Commission possibly sought to enhance the advancement of European gas policies (Shaburova, 2019)[220].

Moreover, some allegations moved forward by the EU to Gazprom seem to address inefficiencies within the internal gas market and foreign policy considerations rather than

---

[216] EU COMMISSION, *Antitrust: Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets*, Press release, 22 April 2015, available at *https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4828*.

[217] EU COMMISSION, *Antitrust: Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in Central and Eastern European gas markets*, Press release, 24 May 2018, p. 1, available at *https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3921*.

[218] See *https://competition-policy.ec.europa.eu/antitrust_en*, under "Antitrust".

[219] EU COMMISSION, *Antitrust: Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in Central and Eastern European gas markets*, Press release, 24 May 2018, p. 1, available at *https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3921*. The Commissioner Margrethe Vestager stated indeed that: "*All companies doing business in Europe have to respect European rules on competition, no matter where they are from*."

[220] SHABUROVA T., *The Gazprom case: a tool to Foster an EU internal gas market.* European Competition and Regulatory Law Review Volume 3, Issue 1, 2019, p. 63 – 71.

significant competition law issues, probably explaining why the dispute was settled without imposing any fines on the company.

2.5. The OECD Action Plans to counter MNEs Harmful Tax Practices

The OECD has been engaged in addressing harmful tax practices since 1998, when the Organization established the Forum on Harmful Tax Practices (FHTP), setting the groundwork for its efforts in this field (Di Gregorio et al, 2005)[221].

The main task of the forum was to define harmful tax practices, focusing on identifying preferential tax regimes and tax havens, that could generate detrimental tax competition, which undermines the tax revenue of other jurisdictions, distorts international trade, and affects the equity and efficiency of tax systems[222].

The issue of double non-taxation was not much heartfelt by members of the public until the 2008 global financial crisis hit.

In the aftermath, there was a renewed emphasis around the work of the OECD to put an end to multinational companies' tax avoidance. Upon requests from the G20, the 15-point BEPS Action Plan was developed in 2013, and it soon became remarkable in outlining crucial measures to curb practices that erode the tax base and shift profits in low-tax countries.

The project was developed around three main axes, to which correspond a set of specific actions: ensuring coherence, aligning the place of taxation and of value creation, and ensuring transparency and certainty (Matsuoka, 2021)[223].

Among the 15 Actions outlined in the BEPS framework, that target specific aspects of current international taxation, four were considered Minimum Standards on which over 140 countries have committed to implementation. In particular, the Action 5 intends to counter harmful tax practices more effectively, bearing in mind the transparency and substance[224]. Through a collaborative approach among participating governments, the action is structured around two points: a comprehensive review of preferential tax regimes

---

[221] See, more in depth, DI GREGORIO C., MAINOLFI G. SCAZZERI G., *L'imposta sulle società nell'Unione europea*, already quoted, p. 357 – 386.

[222] See *https://www.oecd.org/tax/beps/beps-actions/action5/*, under "Action overview".

[223] MATSUOKA A., *The new international tax regime: analysis from a power-basis perspective*, in SN Business & Economics, 2021, 1:68, p. 7.

[224] OECD, *Model Tax Convention on Income and on Capital 2017,* p. 18.

within countries to ensure they are not harmful to other jurisdictions, as well as the implementation of a transparency framework (OECD-G20, 2019) [225].

The evaluation of preferential tax regimes is essential, as current domestic and international tax rules are one of the main reasons why MNEs succeed in tax avoidance practices. Current provisions work well in certain cases, especially in two-sided relationships, but their effectiveness is at risk when third countries enter the bilateral framework. Tax regimes, therefore, should be adapted in order to address the challenges posed by multilateral relationships and global value chains, in order to hinder corporations' harmful tax practices[226] .

The Forum on Harmful Tax Practices (FHTP) conducts a progress report, a peer review to ensure that the countries adhering to the BEPS Inclusive Framework are committing to Action 5.

A set of agreed criteria helps to evaluate and recognize whether countries are making effective and consistent progress in the implementation of the standard, and the mandatory exchange of information on tax rulings helps to enhance transparency between countries (OECD-G20, 2019)[227]. Since the first report of 2015, annual peer reviews are conducted, and each published report evaluates the preferential regimes and provides guidance on timelines for adjustments. The findings presented in both the 2018 and 2021 Progress Reports, show that more countries have aligning their regimes with the minimum standards, and several other countries also committed to amending or abolishing harmful preferential regimes.

The impact of BEPS Action 5 is significant, since nearly half of the 309 jurisdictions reviewed have eliminated or amended the harmful tax regimes, placing these countries on an equal level for multilateral consultation of international tax rules, according to the OECD[228].

Nonetheless, despite the various targets achieved and being the first real step towards the new international tax regime, there is some criticisms surrounding the BEPS project.

---

[225] OECD – G20, *Harmful Tax Practices - 2018 Progress Report on Preferential Regimes - INCLUSIVE FRAMEWORK ON BEPS: ACTION 5*, Paris-Cedex, 2019, p. 10.

[226] OECD, *Action Plan on Base Erosion and Profit Shifting*, Paris-Cedex, 2013, Action 5, p. 18.

[227] OECD – G20, *Harmful Tax Practices - 2018 Progress Report…,* quoted, p. 13. The report presents the list of five key factors and five other factors to assess preferential tax regimes.

[228] See *https://www.oecd.org/tax/beps/progress-towards-a-fairer-global-tax-system-continues-as-additional-countries-bring-their-preferential-tax-regimes-in-line-with-international-standards.htm.*

First, in developing countries the corporate income tax makes up a great percentage of the total tax revenue, making these countries more vulnerable to base erosion and tax avoidance practices by MNEs (Oats, 2021)[229].

Tax authorities in these jurisdictions usually lack the resources to comply with the BEPS requirements and to actively oppose MNEs harmful tax practices. Implementation of certain provisions, without taking into consideration the peculiarities of these nations, might even leave them in worse conditions.

Indeed, some affirm that implementation of BEPS project in these countries might have a concerning impact on tax revenues, and some proposals might not necessarily work if they are implemented by weak governments and institutions (Oats, 2021)[230].

Moreover, the plan was mostly shaped by major developed countries with strong markets and economy (Matsuoka, 2021)[231].

Even though the Inclusive Framework established in 2016 and now including over 135 member countries helped to increase the inclusiveness of the project, disparities in power among countries persist in the implementation of the BEPS. Developing nations often lack the necessary capacity and resources to actively engage in BEPS meetings, limiting their participation in the decision-making process, increasing the chances that some OECD member countries might impose their rules on other states.

For example, developing countries are often "source-countries" and are keen on reforms that reallocate revenues and taxes to their jurisdiction, while developed countries would prefer residence-based taxation.

Some States indeed claim that, despite the creation of the Inclusive Framework, the views of the historically more advanced Western economies, such as the ones of the European Union and the United States, still prevail in the discussions (Kurian, 2022)[232]. Within the Inclusive Framework, these nations are encouraged and in certain cases pressured to make an appearance, but they have yet to experience equal participation. Even in the post-BEPS projects discussions, they experience difficulties in negotiations, since they are put under pressure for supporting deliberations, without fully acknowledging the impact that these decisions will have on their economy. The reduced fiscal and organizational capacities of these countries would require simpler methods and rules in the new international taxation

---

[229] OATS L., *Principles of International Taxation …*, quoted, p. 601.
[230] OATS L., *Ibidem*, p. 602.
[231] MATSUOKA A., *The new international tax regime…,* quoted, p. 17.
[232] KURIAN A., *The evolution of international Tax Regime and the OECD Two Pillar solution*, in Journal of Economic Issues, August 2022, 1(1), p. 66.

regime, but some aspects of the new OECD Two-Pillar solution, for example, are far from simple, even if the OECD has assured technical support in the implementation process (Kurian, 2022)[233]. It seems therefore that the needs of developing countries are still being overlooked.

In more recent years, the impact of the OECD BEPS project has gone beyond the implementation of the fifteen actions, as countries started reforming their domestic rules to adhere with the new international standards.

Most notably, the recent 2017 Tax Cuts and Jobs Act (TCJA) reformed the former US tax regime, imposing a minimum taxation on US companies' foreign earned income, in order to prevent tax avoidance and double non-taxation of multinationals' profits (Avi-Yonah, 2019)[234]. Some of the reforms introduced in the US were also a starting point for the OECD Two-Pillar solution, proving that the influence and the power of the US economy still plays a major role in the Inclusive Framework (Matsouka, 2021)[235].

The BEPS project also gave impetus to European countries in their hunt for the taxation of big corporations' profits. The EU's unique multilateral institutional structure could make the coordination of corporate tax policies very efficient, but among Member States tax competition has always been strong, and a complete agreement that could efficiently mitigate profit shifting was not yet reached at that time (Hebous, Johannesen, 2021)[236].

However, initiatives that could further integrate tax policies among EU countries have received a "*renewed momentum*" under the guidance of the BEPS actions (Crivelli et al, 2021)[237].

In 2016 and 2017 the European Council adopted directives aimed at making not only the BEPS minimum standards, but also some additional actions and recommendations, mandatory for Member States (examples are the Anti-Tax Avoidance Directives and the Dispute Resolution Mechanism Directive). Other popular discussions revolved around finding an effective way to tax highly digitalized companies, or at harmonizing the corporate income tax rate, but no agreement has been reached on these matters.

In 2016 the proposal of the Common Consolidated Corporate Tax Base (CCCTB) was set up for discussion between the EU Member States. The rules would establish first how to

---

[233] KURIAN A., *Ibidem,* p. 64.

[234] AVI-YONAH R.S., *Advanced Introduction to International Tax Law*, Northampton, MA, U.S.A., 2019, p. 11.

[235] MATSUOKA A., *The new international tax regime…,* quoted, p. 18.

[236] In this sense, see HEBOUS S., JOHANNESEN N., *At your service! The role of tax havens in international trade with services*, in European Economic Review, Elsevier, 2021, Vol. 135, p. 1 – 25.

[237] CRIVELLI E., DE MOOIJ R., DE VRIER E., KLEMM A., *Taxing Multinationals in Europe*, 2021, IMF WP 21/12, Washington D.C., U.S.A., p. 23.

compute the tax base of large multinational groups operating in Europe with over 750 million profits, and later the method of formula apportionment would be used to allocate the income to each country in which the corporation carries out operational or managerial activities. The economic factors that would be weighted are payrolls and numbers of employees, tangible assets and sales.

Each jurisdiction shall have taxing rights on the portion of income allocable to the economic ties in that country, and tax according to its own tax rate. Since corporate income would be taxed in every jurisdiction where the company conducts real economic activities, the implementation of the formulary apportionment method would greatly discourage profit shifting, and therefore contrast MNEs' harmful tax practices that reduce the tax base and tax revenues in numerous jurisdictions.

The adoption of the proposal at the global level has been evaluated and discussed by numerous academics, as a method that could solve some criticalities of the current international tax system, such as the difficulties in applying the arm's length principle, or in defining and verifying the residency of a multinational corporation (Crivelli et al, 2021; Traversa, 2019; Marian, 2014)[238].

Nevertheless, no agreement has been found on this proposal yet, nor between EU member states, nor at the global level.

The current debate is instead focused on the introduction of a minimum tax rate to be applied to big multinational corporations, a scheme that would ensure that MNEs' income is subject to an overall minimum level of taxation.

In 2021, members of the OECD-G20 Inclusive Framework agreed on the adoption of a new plan to counter MNEs harmful tax practices and to ensure fairer and more transparent taxation of corporate profits.

Pillar Two indeed sets a global minimum tax rate to be applied to multinational corporations with revenue above €750 million, and various aspects of the proposal have been inspired by the US 2017 Tax Cuts and Jobs Act, which actively influenced the debate (Crivelli et al, 2021; Kurian, 2022)[239].

One of the main advantages of this plan is that it can offer an effective safeguard against the manipulation of profits. Indeed, the attractiveness of shifting profits to low-tax

---

[238] CRIVELLI E., DE MOOIJ R., DE VRIER E., KLEMM A., *Taxing Multinationals in Europe…,* quoted, p. 30. See also TRAVERSA E., *Corporate Tax Residence…*, quoted, p. 21. MARIAN O., *Function of Corporate Tax-Residence in Territorial Systems.* Chapman Law Review, 2014, p. 182.

[239] CRIVELLI E., DE MOOIJ R., DE VRIER E., KLEMM A., *Taxing Multinationals in Europe…,* quoted, p. 27. KURIAN A., *The evolution of international Tax Regime …,* quoted, p. 69.

countries would diminish, as the advantages for MNEs would be counteracted by the global minimum tax.

Even though member countries take seriously into account the recent developments of the BEPS Project, discussion around the new international tax regime is still ongoing at the OECD level.

The 2013 BEPS Project was focused on reducing the loopholes between international tax conventions and domestic laws, with Action 5 trying to limit the damages that preferential tax regimes have on the tax revenue of other jurisdictions and on international trade.

The new two-pillar solution model rules focus instead more directly on finding an effective way to tackle double non-taxation of multinationals' profits and to put to an end their tax avoidance practices, through the reallocation of taxing rights suggested by Pillar One and the application of the Global Minimum Tax under Pillar Two (Kurian, 2022)[240].

[240] KURIAN A., *The evolution of international Tax Regime …,* quoted, p. 65.

CHAPTER 3
GLOBAL MINIMUM TAX

3.1. Towards an International Corporate Tax Reform

The international tax system was created to respond to specific needs that, over time, changed to such an extent as to require new and substantial adaptations. As already written, globalization first and digitalization later, brought multinational corporations at the centre of the international economy and trade, breaking the classic business model: from activities linked to physical settlements, there has been a shift to distance commerce and the "e-commerce" model, which allows the companies to disregard having a permanent establishment in the territory of the State where the final consumers are located (Avi-Yonah, Kim, 2022)[241].

This led to today's inability to realign the place where income is produced and the place where actually it is taxed, and multinationals often conditioned the choices and behaviour of governments and tax authorities. Each State determines its tax policies, but to adapt to the needs of multinational corporations, they started offering increasingly lower and more advantageous levels of taxation, attempting to make their system more attractive in the eyes of investors. Some of these harmful policies, as they mine the tax revenue of other jurisdictions, started a "*race to the bottom*" and led more generally to an increase of harmful tax competition among countries, which has costs and negative outcomes both for high-tax countries and low-tax countries (IMF, 2022; Avi-Yonah, Kim, 2022)[242].

Over the past three decades, the action of the OECD and other regional organizations, such as the European Union, has been aimed at combating these phenomena. They have attempted to undertake a reform process with the aim of curbing the double non-taxation trend, introducing a minimum threshold to tax competition between States and devising mechanisms capable of forcing multinationals to pay their fair share of taxes.

As already seen, this path began in 2013 with the BEPS project, with the priority of addressing fiscal challenges arising from digitization. The main goal of BEPS was that of

---

[241] AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, in Michigan Journal of International Law, 2022, Vol. 43, Issue 3, p. 506.

[242] IMF, *Fiscal Monitor: Fiscal Policy from Pandemic to War,* Washington D.C., April 2022, p. 27; AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, quoted, p. 512.

targeting loopholes in international taxation, but there was no intent to renovate the framework itself.

As consequence, the effects of BEPS were limited, since the challenges posed by globalization and digitalization required a more revolutionary reform in the building blocks of the tax regime (IMF, 2023)[243].

Indeed, in the following years, the members of the Inclusive Framework on BEPS (here in after IF) agreed on the need to identify a proposal based on two pillars, which could have formed the basis for a shared solution on the issue of double non-taxation. Various meetings of the IF, public consultations and meetings with leaders and finance ministers of G20 countries were held over the years 2020 and 2021, demonstrating the urgency to find a common solution on the issue, amplified by the onset of the COVID-19 pandemic. On October 8, 2021, 136 members of the Inclusive Framework, representing more than 95% of the world's GDP (OECD, 2022)[244], made a final commitment to advance the international tax reform, known as the "*Two-Pillar Solution*" promoted by the OECD and G20, with implementation of the new regime set to start in 2023.

The package of measures proposes an alternative approach that, resting precisely on the two pillars, intends not only to set a limit to tax competition and neutralize the most common aggressive tax planning techniques devised by multinational groups, but also to modernize the international tax system. With the two pillars, the OECD hopes to address two shortfalls that BEPS left open: first, it addresses the reallocation of taxing rights between countries, and secondly it further targets profit shifting and tax competition, that had intensified due to the tightening of BEPS anti-tax avoidance measures (IMF, 2023)[245].

The purpose of Pillar One is to change the criteria for linkage with respect to the right of a State to levy taxes on business profits. The intent is to allow market jurisdictions and source-countries, i.e., those in which users are located, to subject residual profits generated in the said jurisdiction, without there being a physical presence on the territory (Avi-Yonah, Kim, 2022)[246]. The first subset, called "*Amount A*", provides for the redistribution of 25% of the taxing rights related to the income produced by multinationals in jurisdictions where the group earns revenues, and it applies to almost 100 big

[243] IMF, *International Corporate Tax Reform,* Washington D.C., February 2023, p. 5.
[244] OECD, *Tax Challenges Arising from the Digitalization of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two),* Paris-Cedex, 2022, p. 3.
[245] IMF, *International Corporate Tax Reform,* quoted, p. 21-22.
[246] AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, quoted, p. 506.

corporations with 20 billion euros turnover. "*Amount B*" instead, simplifies the application of the arm's length principle for marketing and distribution activities[247].

The other side of the reform is represented by Pillar Two, which provides for the introduction of a "*Global Minimum Tax*": this is the realization of the dual objective described by the OECD in the various reports, namely the introduction of a mechanism capable not only of limiting tax competition between states but also of ensuring that multinationals pay their due share of profits, regardless of where they decide to establish their production activities. The minimum threshold of the effective tax rate that each multinational group is required to pay in each of the jurisdictions in which it does business, provided it achieves at least 750 million euros in global turnover, is set at 15%. The functioning of the mechanism is ensured through the provision of different rules, all with the aim of safeguarding the operational efficiency of Pillar Two. It is a new way of efficiently taxing MNEs by providing that, if one State decides to impose a level of taxation below the one granted by the new rules, there is always another jurisdiction ready to tax the part of the income that is insufficiently taxed.

It is worth-mentioning to note that some (Clausing et al, 2021)[248] look at the Global Minimum Tax as a way of collecting the *"tax deficit"* of multinational companies, which is the difference between what the MNE would have paid if its corporate income was taxed at the minimum tax rate in each State where it conducts business, and the taxes that the MNE actually paid.

By applying this minimum taxation, incentives for corporations to shift profits where the corporate tax rates are lower will be highly reduced: even though the company pays lower taxes in some jurisdiction, it will have to pay more taxes in the country of residence for example, as the provisions of Pillar Two plan that the minimum level of taxation has to be reached, no matter if it is the source or the residence country that collects the taxes owed.

For Pillar Two to be effective, MNEs shall report their profits on a country-by-country basis, as already stated by Action 13 of the BEPS project: the foundations of this database had already been laid years ago.

---

[247] See *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*.

[248] CLAUSING K., SAEZ E., ZUCMAN G., *Ending Corporate Tax Avoidance and Tax Competition: A Plan to Collect the Tax Deficit of Multinationals*, in UCLA School of Law, Law-Econ. Research Paper, Los Angeles – CA, 2021, No. 20-12.

Another peculiar aspect of Pillar Two is indeed the minimum 15% tax rate agreed on by the IF, which was the result of a highly debated compromise, as two opposing facts had to be considered. On one hand, imposing a high enough tax rate would have stopped the race to the bottom and highly reduced profit shifting (Clausing et al, 2021)[249]. On the other hand, many low-tax jurisdictions that attract a great portion of MNEs' income, (e.g.: Ireland and Luxemburg) would have never agreed on a 28% or even 21% tax rate, as initially suggested by the United States. The OECD had therefore focused on setting the rate in the range 10-15%, to find a compromise between the various jurisdictions, and finally agreed on the 15% after the approval of the US[250].

The expected effect of the two pillars on profit shifting is promising. Some (IMF, 2023)[251] calculate that tax avoidance will generally decrease, as tax rates across jurisdictions will become more similar. The 15% minimum tax rate will increase overall the global tax revenues and at the same time reduce profit shifting by 36%.

While these estimates need to be interpreted carefully, as they have been calculated with simplifying assumption, disregarding other factors that influence profit shifting (such as specific provisions in double tax treaties), these first assessments forecast that Pillar Two will be beneficial to some countries, and less to others. For example, advanced and middle-income economies will gain in tax revenues from the reduced profit shifting, while low-tax jurisdictions will probably lose up to 3% of their current revenue. The size of this loss caused by the reduction in profit shifting is however still difficult to accurately estimate, since it could also be compensated by the extra revenue, coming from the application of the 15% minimum tax (IMF, 2023)[252].

Of course, the more countries adopt the rules, the more meaningful will be the global impact of the reform and wider the coverage of the minimum tax (IMF, 2023)[253]. This should bring greater stability to international taxation, preventing the future choices of a few from hindering the effects of a global agreement.

Cooperation is one of the crucial points of the international reform, as it supports its implementation and it helps in obtaining satisfactory results, which would be unattainable with uncoordinated tax interactions among different countries.

---

[249] CLAUSING K., SAEZ E., ZUCMAN G., *Ending Corporate Tax Avoidance…,* quoted, p. 5.

[250] See *https://kpmg.com/xx/en/home/insights/2021/05/global-minimum-tax-an-easy-fix.html,* under "Global Minimum Tax: An easy fix?".

[251] IMF, *International Corporate Tax Reform,* quoted, p. 15-16.

[252] IMF, *International Corporate Tax Reform, Ibidem*, p. 15-16. See Figure 6, in the Appendix.

[253] IMF, *International Corporate Tax Reform, Ibidem*, p. 24.

Through international coordination, countries can better understand the country-specific and global effects of the reform, that largely depend on how many countries will effectively implement it. However, tax coordination has always been challenging, as different jurisdictions have different characteristics and needs.

Nevertheless, double non-taxation affects all countries, and this common threat urges governments to find a compromise to accommodate the interests of developed and developing countries (IMF, 2022)[254].

The Two-Pillar solution seems finds that coordination can have real and positive outcomes, and even though the agreement is limited in scope and might not be the final solution, it is a step in the right direction (IMF, 2022)[255].

Others (Clausing at al, 2021)[256] confirm that this level of coordination is sufficient for the proposal to reach wide global coverage, since 91% of the major 2000 public multinational companies are based in G20 or OECD countries. Moreover, the IF also brings to the table the collaboration of other small countries.

It is worth-mentioning to note that regional cooperation could actually *"be a complement to the global reform process"* (IMF, 2023)[257], because regions have more similar economic and social characteristics, that could potentially make any tax agreement and its implementation easier and more successful, thanks to tax spillovers being larger on a regional scale. The EU directives on the application of the BEPS project and on Pillar Two represent an example of this.

The work on the reform is obviously not complete, and further development is expected in the next years. Some peculiar aspects of the rules are yet to be defined, and unforeseen obstacles in the implementation might rise and they will need to be addressed. In the latest development of July 2023 indeed the members of the IF agreed on an outcome statement, that summarizes the contents of the new package of implementation for the remaining elements of the Two-Pillar solution[258].

Cooperation could also be enhanced with the goal of increasing the scope of application of the reform, and on strengthening the principles of the new regime. Some (IMF, 2023)[259] indeed argue that the two-pillar solution could be further improved, for example by

---

[254] IMF, *Fiscal Monitor: Fiscal Policy from Pandemic to War,* Washington D.C., April 2022, p. 27.
[255] IMF, *Fiscal Monitor: Fiscal Policy from Pandemic to War,* quoted, p. 33.
[256] CLAUSING K., SAEZ E., ZUCMAN G., *Ending Corporate Tax Avoidance…,* quoted, p. 10.
[257] IMF, *International Corporate Tax Reform,* quoted, p. 23.
[258] See https://www.oecd.org/tax/138-countries-and-jurisdictions-agree-historic-milestone-to-implement-global-tax-deal.htm.
[259] IMF, *International Corporate Tax Reform,* quoted, p. 38.

simplifying some of the rules, so that they can be implemented even in developing countries where tax administrations have lower capacity and resources.

The Two-Pillar solution marks the beginning of a new and improved strategy for taxing the digital economy, through which countries have the chance to address the tax shortfall from multinational corporations located in tax havens. Despite the time required for implementing such measures, and the doubts surrounding their effectiveness, they represent a crucial step towards alleviating the pressure that tax competition has on governments worldwide.

The implementation of the Global Minimum Tax could therefore restore the fairness and the efficiency of the international tax regime, so that both governments and citizens stand to gain from it.

3.2. The basic principles of the Global Minimum Tax in the OECD – G20 Inclusive Framework on BEPS.

The second pillar of the OECD proposal is designed to ensure that internationally operating companies pay a minimum amount of tax, regardless of where they have their registered office, effective place of management or the jurisdictions in which they operate. Specifically, if an MNE's income is subject in any other jurisdiction at a rate lower than the agreed minimum, the home state of the said company will have the right to subject the income until the minimum rate is reached, through the so-called *"Top-up Tax",* which "*imposes a co-ordinated tax charge that brings the Group's ETR on that income in each jurisdiction up to the Minimum Rate"* (OECD, 2022)[260].

The purpose of the global minimum tax is therefore that the "effective tax rate" (ETR) paid by the corporation is at least 15%, in each jurisdiction where the company operates and where it is resident.

In the light of this legal basis, it can be inferred that the privileged tax policies of low-tax States would no longer be considered attractive to multinationals falling under the scope of the Pillar Two, as it eliminates the incentives that allow MNEs to engage in profit shifting, causing the 'race to the bottom' in corporate tax rates (Avi-Yonah, Kim, 2022)[261].

---

[260] OECD, *Tax Challenges Arising from the Digitalization of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two)*, Paris-Cedex, 2022, p. 8, Introduction.

[261] AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, quoted, p. 530.

For the purpose of applying Pillar Two, in the Global Anti-Base Erosion Model Rules (the *"GloBE"* rules) released in December 2021, the OECD has identified the definition of a multinational group, also called *"MNE Group"* or simply *"Group"*, which is the set of enterprises that operate in multiple jurisdictions and which are required to file Consolidated Financial Statements.

Probably for the first time, the GloBE package presents a more precise definition of a MNE Group, clarifying that it includes any group with *"at least one Entity or Permanent Establishment that is not located in the jurisdiction of the Ultimate Parent Entity"* (OECD, 2021)[262], and more precise definitions that further explain the meaning of the term 'Entity' are provided in various articles of the GloBE rules.

Without looking further into these definitions, it should be specified that Pillar Two does not apply to all groups defined as above, but only to multinational groups with an annual revenue of more than 750 million euros in at least two of the four previous fiscal years will have to be subject to these regulations. This threshold has been set in order to minimize the administration and compliance costs of adopting the Global Minimum Tax, both for businesses and tax authorities that will have to monitor the application of the rules. The threshold therefore reflects the outcome of cost-benefit analysis carried out to make sure that the impact and revenue benefits of Pillar Two are preserved (OECD, 2022)[263]. Excluded from the scope of the second pillar are investment funds, pension funds, governmental entities, International Organizations and Nonprofit Organizations (OECD, 2021)[264].

The GloBE Rules, that represent Pillar Two of the OECD are made up of mainly two rules: the 'Income Inclusion Rule' (IIR), and the 'Undertaxed Payments Rule' (UTPR).

According to the IIR, the foreign income of an entity will be subject to a top-up tax in the residence country of the parent entity if the source-country where the subsidiaries of the entity operate has imposed a tax rate below the minimum rate of 15%.

The purpose of the IIR is to ensure that a multinational group is subject to a minimum level of taxation in each jurisdiction in which it operates, regardless of where it is headquartered and without generating the risk of double taxation. For example, if a source

[262] OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*, Paris-Cedex, 2021, p. 8, Article 1.2.

[263] OECD, *Tax Challenges Arising from the Digitalization of the Economy ...,* quoted, p. 14, Article 1.1.

[264] OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*, Paris-Cedex, 2021, p. 9, Article 1.5. It is worth-mentioning that it is the first set of rules which include a general tax exemption on NPOs (also named PBOs – Public Benefit Organizations), at global level. See, more in depth, OECD Tax Policy Studies, *Taxation and Philantropy*, No 27, Paris Cedex, 2020, p. 41 – 49.

country only taxed the income at 10%, under the IIR the residence country of the company will have the right to tax at the remaining rate of 5%, to make sure that the global minimum tax has been reached.
The Undertaxed Payments Rule applies secondary to the IIR, as it allows source-countries instead to apply the top-up tax if the residence-country refused or failed to reach the 15% tax rate. This secondary taxation may happen by denying to the subsidiary operating in that country any deduction for payments made to the parent entity (IMF, 2023)[265].
The UTPR is therefore intended as an "*insurance policy against countries that refuse to implement Pillar Two"* (Avi-Yonah, Kim, 2022)[266], since it grants the right to tax a multinational's income to either the source or the residence country. It is a backup, a secondary top-up tax collection mechanism applied with respect to a constituent entity's income outside the scope of IIR (Baraké et al, 2022)[267], and is intended to counter the erosion of the tax base of intra-group payments made to low-tax jurisdictions.
The details concerning the GloBE rules are very complex and technical, but the OECD released a short factsheet that helps multinational to understand the steps they shall go through, in order to implement and determine whether they have a liability under Pillar Two[268].
After identifying the entities that fall within the scope of the rules and their location, it is fundamental to determine the income of each entity that is part of the MNE Group, also by relying on the country-by-country reporting required under Action 13 of the BEPS project.
The determination of an entity's income for GloBE purposes (so-called GloBE income) is determined on entity's pre-tax profit calculated on financial accounts (Avi-Yonah, Kim, 2022)[269].
The income of each constituent entity is assigned to the jurisdiction of the enterprise that earned it, after making some adjustments to align it better for tax purposes. For example, revenues coming from dividends and equity gains will be excluded from the computation. The central element of the GloBE rules is the computation of the effective tax rate that all the constituent entities of the group located in the same jurisdiction have been subject to.

[265] IMF, *International Corporate Tax Reform,* quoted, p. 8.
[266] AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, quoted, p. 532.
[267] BARAKÉ M., CHOUC P.-E., NEEF T., ZUCMAN G., *Revenue Effects of the Global Minimum Tax Under Pillar Two*, in Intertax, 2022, Vol. 50, Issue 10, p. 690.
[268] See https://www.oecd.org/tax/beps/pillar-two-model-rules-in-a-nutshell.pdf.
[269] AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, quoted, p. 534.

The group must first calculate, for each enterprise, the income to be attributed to the relevant jurisdiction, together with the taxes paid to the jurisdiction in which the company generated and reported the related income.

The effective tax rate is then computed on a jurisdictional basis, determined by dividing the amount of taxes (Covered Taxes) of each entity in the jurisdiction by the net income determined under the GloBE provisions (OECD, 2022)[270].

If the effective tax rate of a jurisdiction in which the group operates is lower than the minimum rate of at least 15%, that MNE Group will be subject to Pillar Two and the 'top-up tax' owed will have to be calculated [271].

This top-up tax rate is calculated simply as the difference between the minimum rate of 15% and the ETR paid to the jurisdiction in question. As clarified in an example provided in the Commentary to the GloBE rules, if the ETR in the source jurisdiction is 8.18%, the top-up tax percentage will be equal to 6.82% (which is the difference 15% - 8.18%) (OECD, 2022)[272].

Subsequently, this top-up tax percentage is applied to excess profits of that corporation, so to the GloBE income within that jurisdiction after applying a substance-based carve-out.

This carve out, computed as a percentage on tangible assets and payroll expenses, serves to reduce exposure to the minimum tax, applying the top-up tax on the part of the income that is not related to real economic activities. An 8% of the value of tangible assets and 10% of payroll will be exempt from taxation, while the amount will decline to 5% in a period of ten years (Avi-Yonah, Kim, 2022; IMF, 2023; Baraké et al, 2022)[273]. The affiliates that have low values of payrolls and tangible assets therefore will have a larger tax base to which the top-up tax will be applied.

The last step of Pillar Two consists in applying the IIR and the UTPR, determining which jurisdiction the top-up tax shall be allocated to. Under the IIR, the minimum tax is paid by the parent entity in proportion to its ownership of low-taxed entities. Normally, the IIR is applied at the topmost level, involving the ultimate parent entity, and then progresses down the ownership hierarchy. The safety measure of the UTPR is necessary to ensure

---

[270] OECD, *Tax Challenges Arising from the Digitalization of the Economy ...,* quoted, p. 115, Article 5.1.1.

[271] See also *https://www.oecd.org/tax/beps/pillar-two-GloBE-rules-fact-sheets.pdf*, for a more visual representation of the calculations.

[272] OECD, *Tax Challenges Arising from the Digitalization of the Economy ...,* quoted, p. 117, Article 5.2.1.

[273] AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, quoted, p. 532. IMF, *International Corporate Tax Reform,* quoted, p. 8. See also BARAKÉ M., CHOUC P.-E., NEEF T., ZUCMAN G., *Revenue Effects of the Global Minimum Tax Under Pillar Two*, quoted, p. 691.

that the minimum tax is paid even when the subsidiary's income is not taxed on the parent entity under the IIR. When an MNE Group has more affiliates in different jurisdictions, the allocation of the UTPR, calculated through a peculiar formula (OECD, 2021)[274], to the respective source country is determined using a formula based on the relative shares of assets and employees. This approach links this adjustment to entities that are typically better equipped to pay the required top-up tax[275].

However, since the subsidiaries are spread out in various jurisdictions, the UTPR needs of a greater level of administrative cooperation. The rules therefore also contain provisions regulating the *"standardized information return in each jurisdiction that has introduced the GloBE Rules in order to provide information on the tax calculations made by the MNE under the GloBE Rules"* (OECD, 2021)[276].

An additional measure proposed in the OECD Pillar Two project is the "Subject to Tax Rule" (STTR), which aims to nullify the exploitation of certain benefits provided by bilateral treaties, that MNEs have used to shift profits to low-tax countries (Avi-Yonah, Kim, 2022)[277].

This measure is particularly important for developing countries, as it is designed to protect their tax base. The STTR requires changes in existing bilateral double tax treaties, and the multilateral instrument facilitates this process without the need to amend every bilateral treaty.

Specifically, the source country that, under the bilateral treaty, cedes taxing rights over business income to the taxpayer's State of residence must be able to apply a supplementary tax rate in order to subject the income to the agreed minimum level of taxation.

The STTR applies on certain deductible payments between companies operating in two contracting states, such as royalties, interests, intra-group service payments, with an agreed minimum rate of 9%.

IF members who apply corporate income tax rates lower than the STTR minimum rate, will incorporate the STTR into their bilateral agreements to make sure that the source country is allowed to apply the top-up tax for the difference between the minimum rate

[274] For the detailed formula, see OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*, Paris-Cedex, 2021, p. 13, Article 2.6.
[275] See *https://www.oecd.org/tax/beps/pillar-two-model-rules-in-a-nutshell.pdf.*
[276] OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*, Paris-Cedex, 2021, p. 46, Article 8.1.
[277] AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, quoted, p. 532-533.

and the tax rate applied to the payment in the residence country. The residence state will be obliged to exempt such income, to avoid double taxation[278].

To clarify: the royalties paid by a subsidiary to the parent company represent an income. Supposing that income is subject to a 3% tax rate in the residence country of the parent entity: under the STTR provision, the source-country where the subsidiary operates has the right to levy, by imposing withholding tax, for instance, the remaining 6%, namely the difference between the minimum rate of 9% and the 3% applied in the residence state (Avi-Yonah, Kim, 2022)[279].

GloBE regulations have the status of a "common approach", meaning that the countries adhering to the OECD – G20 IF on BEPS are not obliged to adopt these rules. However, should they decide to adopt it, they will have to construct a regulatory framework in line with what has been specified under Pillar Two, to reach the intended outcomes of the new regime and following the guidance provided by the OECD.

At the same time, countries shall accept the application of the rules by other IF members, even if they chose to not implement it themselves.

Coherence and cooperation in implementing GloBE Rules is fundamental not only to reach the intended results, but also to respect the avoidance of double or over-taxation of MNEs (OECD, 2022; Tandon, 2022)[280].

As far as the timeframe for the implementation of Pillar Two is concerned, it should have been enacted starting from 2023, with the IIR and UTPR becoming effective in 2024. However, the timeline has been delayed, and more likely, Pillar Two should be adopted by 2024-2025, as jurisdictions decide to implement the proposal[281].

3.3. First Assessment on the International Corporate Tax Reform.

In the last years, since the first discussions around the Two-Pillar solution started in 2019, much research was conducted to study the various effects of the proposal, and some scholars presented their opinions on the promises and pitfalls of the new international corporate tax reform.

---

[278] See https://www.oecd.org/tax/beps/pillar-two-subject-to-tax-rule-in-a-nutshell.pdf

[279] AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, quoted, p. 532-533.

[280] OECD, *Tax Challenges Arising from the Digitalization of the Economy …,* quoted, p. 8, Introduction; For a particular comment on the impact of the GloBe Rules on the developing countries see TANDON S., *The Need for Global Minimum Tax: Assessing Pillar Two*, in Intertax, Vol. 50, Issue 5, p. 396 – 413.

[281] See *https://oecdpillars.com/pillar-tab/pillar-two-implementation/*, under "Pillar Two Implementation".

However, it should be noted that these estimates of the effects on profit shifting, revenue and on firms are to be interpreted carefully, as they depend on numerous factors that cannot be fully observed before the implementation of the Two-Pillar reform, and calculations therefore rely on several simplifying assumptions[282]. Such factors include the number of countries that will possibly adopt it, and behavioral responses by corporations, investors and governments (IMF, 2023)[283].

Each Pillar of the reform targets particular aspects of the international tax regime. Pillar One finally addresses some issues that have risen with the digital economy, by shifting taxing rights to the country of final consumption, thus aiming at restoring the inter-nation equity of taxation. Both Pillars achieve significant improvements as compared to the current system, by tackling profit shifting and tax competition, and can be a solution to preventing non-compliance (IMF, 2023; Aslam, Coelho, 2021)[284].

A Global Minimum Tax is also predicted to improve the overall fairness of the tax system, adjusting the tax burden distribution. It can both enhance the horizontal equity of a jurisdiction's corporate tax system and its tax neutrality, ensuring that all businesses pay their due share of taxes. Often inequalities arise when domestic corporations' tax burden is heavier than the one of businesses operating internationally. The minimum tax can therefore have positive effects on the trust of taxpayers, also improving overall compliance and leading to generate economic surplus for the whole population (Aslam, Coelho, 2021)[285].

The first major impact of the draft new tax regime will concern countries' tax revenue.

In particular, the Pillar Two is considered a "*true revenue generator*" (Avi-Yonah, Kim, 2022)[286], as it is expected to generate each year additional global tax revenues for $150 billion, or €127 billion, according to OECD estimates[287], and raise global corporate

[282] See *https://www.oecd.org/tax/beps/brochure-addressing-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2020.pdf*, for the 2020 preliminary estimates by the OECD.

[283] IMF, *International Corporate Tax Reform,* quoted, p. 12. At the time of writing, the countries that have joined the OECD-G20 Inclusive Framework on BEPS - Two-Pillar solution are more than 140.

[284] IMF, *International Corporate Tax Reform,* quoted, p. 11; ASLAM A., COELHO M.D., *A Firm Lower Bound: Characteristics and Impact of Corporate Minimum Taxation*. International Monetary Fund - Working Papers, 2021, p. 13.

[285] ASLAM A., COELHO M.D., *A Firm Lower Bound: Characteristics and Impact of Corporate Minimum Taxation*. International Monetary Fund Working Papers, 2021, p. 18.

[286] AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, quoted, p. 545.

[287] See *https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf* .

income tax revenues by almost 6%, according to International Monetary Fund estimates[288].

A relatively larger portion of this revenue will be collected by high-income countries, which are often the residence country of the MNE parent entity (Tandon, 2022)[289].

Low-income countries could still benefit from the reduced profit shifting, but with the current GloBE rules, they would gain very limited additional revenues from introducing the global minimum tax.

However, it is still hard to predict which countries will levy the top-up taxes, since the OECD is still considering some changes on whether source or residence countries will have the priority on the application of the global tax (IMF, 2023; Baraké et al, 2022)[290].

In the EU for example, in the first year of adoption, findings estimate 47 billion euros in additional tax revenue, considering the carve outs, with Germany, Ireland and Luxemburg being the countries that will benefit the most. Without accounting for carve outs, the revenues would reach 67 billion euros in the EU, and the United States instead would be the country with the highest revenue of 58 billion euros (Baraké et al, 2022)[291].

On the other hand, low-tax countries that attract disproportionate amount of MNEs income, without being their residence country, are expected to experience a decline in tax revenues and in economic activity, and they will also be affected by investors' negative perceptions of the country's future finances (Gómez-Cram, Olbert, 2023)[292].

Although the new tax regime does not harmonize corporate tax rates worldwide, it implements a new mechanism by which countries do not find it profitable anymore to lower their tax rates. Reducing the rate below the minimum will not attract corporate profits, since the tax savings in the source country will be canceled out by the top-up tax on the foreign income imposed in the residence country. The Global Minimum Tax provides therefore a lower bound to the effective tax rate that multinationals can secure through profit shifting practices.

---

[288] See, for further details, Figure 6, in the Appendix.

[289] TANDON S., *The Need for Global Minimum Tax: Assessing Pillar Two Reform*, 2022, in Intertax, Vol. 50, Issue 5, p. 396 - 413.

[290] IMF, *International Corporate Tax Reform,* quoted, p. 14. See also BARAKÉ M., CHOUC P.-E., NEEF T., ZUCMAN G., *Revenue Effects of the Global Minimum Tax Under Pillar Two*, quoted, p. 705. According to the paper, "*The geographical distribution of revenue gains among countries heavily depends on which jurisdiction is granted the priority or access to apply the minimum tax*".

[291] BARAKÉ M., CHOUC P.-E., NEEF T., ZUCMAN G., *Revenue Effects of the Global Minimum Tax Under Pillar Two*, quoted, p. 694-696.

[292] GÓMEZ – CRAM R., OLBERT M., *Measuring the Expected Effects of the Global Tax Reform*, in The Review of Financial Studies, 2023, 0038, Oxford University Press, p. 3-7.

In more economic terms, some (Johannesen, 2022)[293] predict that the introduction of the global minimum tax leads to a new equilibrium in the economy, where first tax havens are induced to increase their rate, and later all countries set their tax rates at the minimum agreed rate.

This effect is also proved by historical evidence, which suggests that tax rates usually move in the same direction (IMF, 2022)[294].

At first, the introduction of a global minimum tax has a negative effect on a country's welfare, as companies' tax liabilities increase causing a loss of private consumption for firm owners. However, the overall effect on the welfare of non-tax haven countries is positive: as the difference in tax rates between countries narrows, with a sufficiently high minimum rate, MNEs stop engaging in profit shifting; tax revenues increase and consequently so does the general welfare, as a result of the gain of public consumption.

The afore mentioned study also interestingly implies that setting a too low global minimum tax rate might be risky. If the new tax rate does not eliminate the incentives for multinational firms to stop profit shifting altogether, tax haven countries might earn part of the additional global revenues associated with the new regime (Johannesen, 2022)[295].

In a nutshell, the effect of the new reform package on tax competition might be significant. Some (IMF, 2023)[296] optimistically estimate that the reduced tax competition could increase global tax revenues by an additional 8%. Moreover, for tax competition to be limited, it might be sufficient that G20 countries adopt Pillar Two, as over 90% of MNEs are resident in those countries and will have to comply with the same minimum tax rate.

Therefore, Pillar Two does not need universal implementation by all IF members, even though international cooperation and a widespread adoption of the reform will contribute to its success. Each individual country can decide to implement it as a way of protecting its own tax base, no matter what other jurisdictions decide (Avi-Yonah, Kim, 2022)[297].

Nevertheless, this scenario raises a new risk that has not been totally accounted for by the GloBE rules, since MNEs could decide to change their residence in order to escape from the IIR provision in the G20 countries. While for European corporation this is unlikely,

---

[293] JOHANNESEN N., *The global minimum tax*, in Journal of Public Economics, 2022, Vol. 212, Article 104709, p. 2-5.

[294] IMF, *Fiscal Monitor: Fiscal Policy from Pandemic to War,* quoted, p. 32.

[295] JOHANNESEN N., *The global minimum tax*, quoted, p. 6-7.

[296] IMF, *International Corporate Tax Reform,* quoted, p. 16.

[297] AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, quoted, p. 554.

given the high corporate exit taxes they will have to face, the issue is more concerning for US and UK multinationals (Avi-Yonah, Kim, 2022; Tandon, 2022)[298].

Based on the criteria for the application of Pillar Two, some estimate that the global minimum tax will apply to 1963 companies, more than a half of which concentrated in the United States, Japan and China (Tandon, 2022)[299].

The tax burden for these firms will likely increase, even more if they were benefitting from the previous tax regime. With higher taxation and reduced occasions for tax avoidance, the effective rate on investment increases, making investments more costly. Corporate investments are predicted to slightly decline, as consequence of higher effective tax rates (IMF, 2022; IMF, 2023)[300].

It is worth-mentioning that the companies that will be affected by the reform have lost significant shareholder value in the moments immediately following the announcement of the reform.

For instance, in the US, Apple's stock price dropped after countries first agreed on the reform in July 2021, while domestic companies experienced no such loss. This probably happened because investors understood that some companies would be affected more than others by the reform. Overall, multinational firms with exposure to the new tax regime will see a meaningful economic impact (Gómez-Cram, Olbert, 2023)[301].

Another interesting reaction of firms is connected to the reduced profit shifting, which implies that there will be a decline in the global profits reported in low-tax countries. The introduction of the global minimum tax leads therefore to more truthfully reported profits, which will be increasingly connected to the country where they have been generated.

Furthermore, the minimum tax will require additional reporting elements from multinational firms: consequently, a country's database will be more complete, thanks to this increased taxpayer information coverage (Aslam, Coelho, 2021)[302].

---

[298] AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, quoted, p. 547. See also TANDON S., *The Need for Global Minimum Tax: Assessing Pillar Two Reform*, quoted, p. 411.

[299] TANDON S., *The Need for Global Minimum Tax: Assessing Pillar Two Reform*, quoted, p. 401.

[300] IMF, *Fiscal Monitor: Fiscal Policy from Pandemic to War,* quoted, p. 32. Also in IMF, *International Corporate Tax Reform,* quoted, p. 14.

[301] GÓMEZ – CRAM R., OLBERT M., *Measuring the Expected Effects of the Global Tax Reform*, in The Review of Financial Studies, 2023, 0038, Oxford University Press, p. 5-30.

[302] ASLAM A., COELHO M.D., *A Firm Lower Bound: Characteristics and Impact of Corporate Minimum Taxation.* International Monetary Fund Working Papers, 2021, p. 27-30. The authors state indeed that: "*the year in which the minimum tax was introduced/reformed is often accompanied by a spike in the number of reporting companies*".

Although the OECD proposal has received positive comments from governments and scholars, there are still criticalities that raise some concerns.
The first critique is that Pillar Two establishes that residence-countries have the primary taxing right through the IIR over the foreign income that has not been taxed at the 15% minimum by the source country. The global minimum tax will therefore mostly favor high income countries, without taking into consideration the different needs of developing countries, more economically fragile. The backup provisions such as the UTPR and the STTR are only applicable subsequently, in case the residence country refrains from taxing. The STTR moreover, is optional and should be included in bilateral treaties, so it is still uncertain if it will be in fact introduced (Tandon, 2022)[303].
The elements presented lead some to state that Pillar Two is *"not reflective of the concerns of developing countries"* (Avi-Yonah, Kim, 2022)[304]. Specifically, this new residence-based taxation of MNEs will make it more difficult for developing countries to attract foreign direct investments (FDI) through tax concessions, as they will not be favorable anymore for corporations.
Another challenge arises from the complexity of the rules of the Pillars, which increases the administrative and compliance costs. This aspect is especially concerning for low and middle-income countries, which often cannot rely on efficient administrative institutions, have weak legislative rules and generally find difficulties in enforcing the payment of taxes on MNEs. Moreover, they might lack the ability to efficiently apply some of the most complicated reforms, as it became already evident with the BEPS project. Their experience with foreign tax administration is limited, and they have major problems in accessing databases and in contributing to them. All these elements suggest that they will need longer time to incorporate the new regime in their jurisdiction, and they most probably will not be able to respect the short original timelines of the package (IMF, 2023)[305].
It should also be considered that during the negotiations of Pillar Two throughout 2020 and 2021, the consensus was not unanimous.

[303] TANDON S., *The Need for Global Minimum Tax: Assessing Pillar Two Reform*, quoted, p. 401- 407. At p. 402, the author suggests indeed that "*it may be expected that tax treaties may continue to provide preferential tax treatment unless the STTR is adopted as a minimum standard*".
[304] AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, quoted, p. 548.
[305] IMF, *International Corporate Tax Reform,* quoted, p. 19.

Several countries, such as Ireland, Hungary and China expressed their contrasting opinions, requiring for example a minimum tax rate under 15%, or that the provisions would be applied only to companies with a global expansion.

In the end, most countries agreed to the new deal, but several carve-out and exemptions had to be included in the Two-Pillar solution. Some argue that these reservations undermine the real scope of the new tax regime, weakening the effectiveness of the GloBE rules and offering once again some loopholes that still offer certain States methods for continuing tax competition (Tandon, 2022)[306]. Moreover, the existence of these carve-out complicates the enforcement and the monitoring of the provision, especially in low-income countries where administrative resources are limited (IMF, 2023)[307].

3.4. Spillover Effects on the Foreign Direct Investments.

The consequences of the adoption of the global minimum tax on tax revenues, on firms and on governments have attracted much attention. Spillover effects on foreign direct investments (FDI) income are also to be expected, but the topic received significantly less consideration.

For context, a FDI is a *"cross-border investment in which an investor resident in one economy establishes a lasting interest in and a significant degree of influence over an enterprise resident in another economy*" [308].

FDI income is the total returns on the direct investment paid by the foreign enterprise to their investor, and it is one of the factors that drive investment decisions. It usually consists of earnings on interests on debt payables by the company plus equity investments.

When examining the effects of the global minimum tax, the OECD concentrated on the cost of investment for MNEs, which is expected to grow, even though not significantly. However, this analysis does not provide any insight on the cost of FDI, since these do not take place in the country where the entity has its residence, as opposed to MNE's investment decisions.

---

[306] TANDON S., *The Need for Global Minimum Tax: Assessing Pillar Two Reform*, quoted, p. 410.

[307] IMF, *International Corporate Tax Reform,* quoted, p. 11.

[308]See *https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-fdi/indicator-group/english_9a523b18-en*, under "Foreign direct investment".

In order to better study the impact of Pillar Two on the FDI, some (Casella, Souillard, 2022)[309] argued that using standard effective tax rates (ETR) would be incorrect, since this measure only provides information on the taxes paid in a certain jurisdiction on the *reported* profits. The ETRs therefore do not reflect the real percentage of taxes paid on the profits *originated* within that jurisdiction, when some of those profits have been shifted to low-tax countries to avoid full taxation. The difference between *reported* and *generated* profits is crucial to understand corporate investment decisions and FDI strategies, and an adjusted measure of ETR is needed. The *FDI-level effective tax rate* provides indeed a solution, since it captures both standard ETR and profit shifting information. Specifically, they depend on *"the ETR in the host country, where production takes place and profits are made, and on ETRs in place in offshore financial centers (OFCs), where some profits are shifted and recorded. The weights associated to these ETRs are determined by […] the share of profits shifted from the host jurisdiction to each OFC"* (Casella, Souillard, 2022)[310]. The FDI-level ETR is computed by dividing the tax on the FDI income generated in the source country, by the whole FDI income.

This measure therefore gives a more comprehensive representation of the entire income generated by foreign direct investment, including the income shifted to low-income countries (also called offshore financial centers).

After the introduction of Pillar Two, the FDI-level ETR increases, as the combined effect of the increase in ETRs in source (host) countries and also in low-tax countries, and of the decrease in profit shifting by corporations. Analyzing both these effects allows to determine the overall impact of the reform on MNEs and their foreign direct investments. When accounting for the carve-outs featured in the GloBE rules, it was observed that they mitigate the increase in the FDI-level ETR. Carve-outs reduce the tax base to which the top-up tax will be applied, and therefore the bigger the carve-outs, the less the tax rate will increase (Casella, Souillard, 2022)[311].

The study also confirmed, as seen in the previous paragraph, that the global minimum tax reduces profit shifting. Some countries are more exposed than others to the phenomenon, and on this exposure depends the impact of the reform in each country. Countries with high corporate income tax rates are of course more exposed to tax avoidance practices by

---

[309] CASELLA B., SOUILLARD B., *A new framework to assess the fiscal impact of a global minimum tax on FDI*, in Transnational Corporation Journal, 2022, Vol. 29, n. 2, available at *https://ssrn.com/abstract=4137479*.

[310] CASELLA B., SOUILLARD B., *A new framework to assess the fiscal impact…*, quoted, p. 3.

[311] CASELLA B., SOUILLARD B., *Ibidem,* p. 9-11.

MNEs, while instead offshore financial centers that offer low tax rates and tax incentives attract shifted income. Before the reform comes into effect, it was seen that 17% of FDI income generated in source countries with high tax rates was artificially shifted. When the global minimum tax is adopted and firms adapt to the new tax rates, this percentage decreases to 12% (Casella, Souillard, 2022)[312].

Prior to Pillar Two reform, profit shifting reduces the taxes paid on FDI income by around 13% in developed countries, and this effect is instead more pronounced for developing economies, where the average gap between the effective tax rate and the FDI-level ETR (which incorporates profit shifting dynamics) is 15%, reaching 21% in the least developed economies.

When profit shifting is accounted for, the FDI income that is taxed at an effective rate below 15% is considerably higher in all countries. This has important consequences, as it proves that if the real magnitude of profit shifting was considered, the effective tax rate paid by multinational firms would be even lower than the average ETR normally calculated by statistics. As consequence, the imposition of a minimum tax of 15% is more ambitious than it might seem, as it already promises to capture a high share of untaxed profits.

Indeed, with the implementation of the 15% global minimum tax, multinational corporations will have to pay on average 14% more taxes on their FDI income. As a consequence of the higher taxes paid, the volume of global FDI flow will slightly decrease. On the other hand, this could be compensated by new investments based on non-tax factors.

In developed countries, the introduction of the minimum tax increases the FDI-level ETRs way more than it does in developing countries (16% increase, versus a 9% increase in developing economies), and this is mainly attributable to the increase in the average ETR. In developing countries instead, the FDI-level ETRs show a smaller gap between the period pre and after the reform, but this increase is primarily attributable to the effect of the reduced profit shifting. Meaning, that if developing countries gain less tax revenues than high income ones with the global minimum tax, they might still benefit from the overall decrease in profit shifting by MNEs (Casella, Souillard, 2022)[313]. The behavioral

[312] For the details of the pre and post-Pillar Two profit shifting shares, see Figure 5, p. 23, in CASELLA B., SOUILLARD B., *A new framework to assess the fiscal impact…,* quoted and reproduced in the Appendix, Figure 7.
[313] CASELLA B., SOUILLARD B., *Ibidem,* p. 26-29.

changes of businesses could therefore be more relevant than the mere additional revenues coming from the application of the GloBE rules.

The change in the tax rate differentials post-Pillar Two also changes the distribution of FDI, as investment is diverted from low-tax to high-tax jurisdictions. Developing countries are expected to gain from this diversion, with great gains for Africa and Asia in particular, where an average 2% increase in FDI inflows is expected. Through this shift, developing countries could in the longer run counterbalance the loss in the volume of global FDI caused by the higher tax rates (UNCTAD, 2022)[314].

Certainly, Pillar Two alters tax competition by making taxation a less relevant element in the economic and investment choices of multinational companies. Countries will therefore have to adapt to this change in the factors of competition, and review their investment policies to continue attracting FDI capitals.

The main critiques surrounding Pillar Two revolve around its negligence towards the position of developing countries. The complexity of the GloBE rules, the burden it brings to weak tax administration and already scarce enforcement resources, and the expected gains that ultimately fall in the hands of high-income countries are some of the unconvincing points of the reform.

Some (Avi-Yonah, Kim, 2022)[315] argue that the critique that the global minimum tax will disadvantage developing countries is exaggerated. The provisions that have been agreed on are intended to reduce the risk of double non-taxation of MNEs profits: if the source-country does not enforce full taxation, the right to tax the remaining income is given to another country.

However, acknowledging the preoccupation and the needs of developing countries, the GloBE rules introduced a new mechanism that could possibly solve the concerns about who has the priority to collect the additional tax revenue, and offer an alternative to the complexity of the reform.

Pillar Two indeed offers the opportunity to establish a Qualified Domestic Minimum Top-up Tax (QDMTT), that preserves the first right of taxation to the source country (IISD-ISLP, 2022)[316].

---

[314] UNCTAD, *World Investment Report 2022: International Tax Reforms and Sustainable Investment*, New York and Geneva: United Nations, 2022, p. 129.

[315] AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, quoted, p. 549.

[316] IISD-ISLP, *A Guide for Developing Countries on How to Understand and Adapt to the Global Minimum Tax*, Winnipeg, Canada, 2022, p. 5-6.

Whilst jurisdictions are free to choose whether or not to incorporate a domestic minimum tax in their legislation, there is a strong incentive to do so, since the QDMTT would ensure that the source country where the MNE conducts economic activities has the primary right to collect the Pillar Two top-up tax on multinational's profits.
With the introduction of such mechanism, the IIR and the UTPR provisions would fade to the background: the residence-country of the corporation will not collect the top-up tax firsthand, as the domestic country already made sure that the MNE's income was taxed at the 15% minimum rate.
Additional tax revenues coming from the global minimum tax would be more distributed among countries with the QDMTT in action, compared to the IIR provision which concentrates the additional revenue in the few countries of residence. Developing countries would therefore experience the positive effects of the global minimum tax, with a great increase in potential tax revenues (Baraké et al, 2022)[317].
Another positive aspect of the QDMTT is that it increases domestic tax revenues without increasing the tax liabilities for multinational firms, leaving them indifferent about where to pay taxes, whether locally, where they carry out the actual productive activities, or in the country of residence. Moreover, domestic companies excluded from the scope of Pillar Two won't be affected (IISD-ISLP, 2022)[318].
Introducing a QDMTT also allows developing countries to remain competitive. They will not have to increase their general corporate tax rate and risk losing domestic businesses or foreign firms that are not subject to the minimum tax, so they could still attract new investment and FDI. Leaving their tax rate unchanged but adding a QDMTT, would only allow them to secure the additional tax revenues coming from the 15% global tax on MNEs, remaining yet competitive for other businesses.
The final impact of Pillar Two on each individual country is still hard to estimate with no information on the behavioral response of businesses and governments. Some estimates however prove that the introduction of a QDMTT would significantly change the distribution and the size of additional revenues. G7 countries for example would collect €90 billion with the IIR, but profits would fall to €17 billion if source countries introduced the QDMTT. The difference would be distributed between source countries, which have the most to gain with the QDMTT. Low-tax countries that have attracted multinational

[317] BARAKÉ M., CHOUC P.-E., NEEF T., ZUCMAN G., *Revenue Effects of the Global Minimum Tax Under Pillar Two*, quoted, p. 700.
[318] IISD-ISLP, *A Guide for Developing Countries on How to Understand and Adapt to the Global Minimum Tax*, quoted, p. 14.

subsidiaries and profits would also experience additional revenues under the QDMTT (Baraké et al, 2022)[319]. However, if MNEs lose the incentive to shift profits to these jurisdictions and decide to leave them in the country where they have been originated, tax revenues for source countries could increase even more.

Countries should assess whether the adoption of Pillar Two will have a substantial impact on their tax revenues and investment potential. They might have to contemplate whether they should react by implementing internal reforms, to capture the additional tax potential through mechanisms like a Qualified Domestic Minimum Top-up Tax (QDMTT).

Conducting a comprehensive evaluation of how GloBE affects their domestic taxpayers and tax regulations will aid countries in determining the most advantageous courses of action, for the time being (IISD-ISLP, 2022)[320].

3.5. The EU Directive on ensuring a Global Minimum Level of Taxation for Multinational Enterprise Groups. Basic Principles.

The Council Directive (EU) No. 2022/2523 of 14 December 2022 was published on the Official Journal of the EU on 22 December 2022, after the Council of the EU agreed unanimously on the adoption of the directive aimed at ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.

The Directive converts into EU law the Global Anti-Base Erosion Model Rules (Pillar Two) approved by the OECD/G20 Inclusive Framework, to which the EU Member States had all adhered to in December 2021, introducing the Global Minimum Tax within the European Union and thereby ensuring that European law complies with the objectives of OECD Pillar-Two[321].

Following OECD guidance, therefore, the new framework aims at making the location of multinational companies less sensitive to tax considerations, while limiting compliance costs and avoiding double taxation phenomena. Furthermore, as confirmed by the evidence presented above, by removing a substantial portion of the benefits derived from profit shifting, the Directive aims at establishing a level playing field for multinational

---

[319] BARAKÉ M., CHOUC P.-E., NEEF T., ZUCMAN G., *Revenue Effects of the Global Minimum Tax Under Pillar Two*, quoted, p. 697.

[320] INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (IISD) - ISLP, *A Guide for Developing Countries on How to Understand and Adapt to the Global Minimum Tax*, quoted, p. 22.

[321] As it may be inferred by the Table 2 in the Appendix, the EU Member States all adhere to the Inclusive Framework on BEPS, since November 2021.

companies within the Union and allow jurisdictions to protect their tax bases (European Council, 2022, Brunelli et al, 2023)[322].

According to the Article 2 of the Directive, the new rules apply to:

« constituent entities located in a Member State that are members of an MNE group or of a large-scale domestic group which has an annual revenue of EUR 750 000 000 or more, […] in its ultimate parent entity's consolidated financial statements in at least two of the four fiscal years immediately preceding the tested fiscal year» (European Council, 2022)[323].

Differently from the Model Rules, the European Directive also applies to purely domestic groups and not only to multinationals, providing that they reach the minimum turnover threshold.

The reason behind this extension is to avoid discrimination between internationally operating and domestic firms, ensuring adherence to the EU fundamental freedoms[324].

Member States are therefore assumed to levy the top-up tax not only on foreign low-taxed profits, but also on low-taxed profits within the European Union or even domestically (Baraké et al, 2022)[325].

As it often happens, purely domestic groups might be already subject to an effective tax rate above 15%. In this case, the minimum level of taxation would have already been reached, so there will be no need to apply the rules of the Directive on these companies.

This is confirmed by a study carried out before the final approval of the directive proposal, where it was estimated that the purely domestic groups that meet the turnover requirements are 182 in the European Union. Among these, more than 75% operate within few States (Germany, France, Italy, and the Netherlands), and the additional revenues coming from the application of the minimum tax on these firms are very marginal, around 35 million euros. According to the authors (Baraké et al, 2022)[326] the domestic groups are already subject to an effective tax rate between 25% and 27%, and the substance-based

---

[322] EUROPEAN COUNCIL, *Council Directive (EU) 2022/2523*, Brussels, 14 December 2022, p. 1, *Considerandum* (2). See also BRUNELLI F., TRONCI S., FORESTIERI V., *Pillar 2: meccanismo applicativo e "rule of order",* in Non solo Diritto Bancario [online], May 2023, available at *https://www.dirittobancario.it/art/pillar-2-meccanismo-applicativo-e-rule-of-order/, p. 1.*

[323] EUROPEAN COUNCIL, *Council Directive (EU) 2022/2523*, quoted, Article 2.

[324] Particularly to the ones provided for in the Articles 49 (Freedom of Establishment), 56 (Freedom of services), 62 (Freedom of movement of Capital) of TFEU consolidated.

[325] BARAKÉ M., CHOUC P.-E., NEEF T., ZUCMAN G., *Revenue Effects of the Global Minimum Tax Under Pillar Two*, quoted, p. 693.

[326] BARAKÉ M., CHOUC P.-E., NEEF T., ZUCMAN G., *Revenue Effects of the Global Minimum Tax Under Pillar Two, Ibidem*, p. 701.

carve-outs have a strong impact on the computation of the excess profits, since they reduce the tax base by 38% in the first year of application.

As to the GloBE rules of Pillar-Two, the Directive is also based on the application of the two mechanisms of the IIR and the UTPR, that allow to collect the top-up tax. To recall, specifically these are:

- the income inclusion rule (IIR), through which controlling entities calculate and pay their attributable share of supplementary tax for each low-tax group entity, regardless of whether it is located in the Union or outside;
- the undertaxed profit rule (UTPR), envisioned to support the IIR, which provides for an *"additional cash tax expense equal to its share of top-up tax that was not charged under the IIR in respect of the low-taxed constituent entities of the group"* (European Council, 2022)[327].

Expanding the application of the IIR to domestic entities is facilitated by the Commentary accompanying the OECD Model Rules. The Directive incorporates this extension, stipulating that a parent entity must apply the IIR to itself as well as to subsidiaries with low taxation situated within the same Member State. This extension mirrors the one applied to large-scale domestic groups, with the aim of preventing discrimination between domestic and cross-border scenarios [328].

The Directive specifies that it provides a set of common specific rules that should be used for a uniform computation of the tax base among Member States, to which it will depend the effective tax rate, to be computed at the jurisdictional level, and the consequent top-up tax that will be applied to the multinational company. The starting points of this calculation would be the consolidated financial accounts, and as in the GloBE rules approved by the OECD, the top-up tax will be applied on the excess profits of the corporation. These are to be calculated by subtracting to the net income the substance-based carve outs, i.e. 5% of the value of payroll costs of employees and 5% of tangible assets (European Council, 2022)[329].

The EU Directive, as Pillar-Two, also includes the possibility for member states to apply a qualified domestic minimum top-up tax. The QDMTT "subverts" the application mechanism of the top-up tax by granting the country in which the low-taxed subsidiaries

[327] EUROPEAN COUNCIL, *Council Directive (EU) 2022/2523*, quoted, see the Article 1.
[328] See *https://globaltaxnews.ey.com/news/2022-6224-eu-member-states-unanimously-adopt-directive-implementing-pillar-two-global-minimum-tax-rules.*
[329] EUROPEAN COUNCIL, *Council Directive (EU) 2022/2523*, quoted, see the Articles 27 and 28.

are located the right to tax with priority excess profits that would otherwise be levied under the IIR/UTPR mechanisms in other states (European Council, 2022)[330].

As already reported, the application of the domestic top-up tax has several positive aspects. IN particular, it will still have incentives to compete on corporate income tax rates, but at the same time, the introduction of the QDMTT will enable the country concerned to reach the minimum desired level of taxation, without losing competitive advantages. It is clear, therefore, that in addition to carefully evaluating their own incentive tax policies (and their effect on the ETR), States will also need to consider the technical modalities of introducing the QDMTT and its interaction with their corporate income tax in order to preserve their ability to attract investment from multinational companies (Brunelli et al, 2023)[331].

As far as multinational groups are concerned, the parent entity, which directly or indirectly holds a controlling interest in all the other constituent entities of the group, is the main actor in the mechanism. The parent entity, in fact, consolidates the financial statements of all group entities and therefore holds the information necessary for the application and proper functioning of the GloBE rules.

Therefore, the parent company is the entity called upon in priority to apply the IIR and to pay in its State of residence the top-up tax for the share attributable to it. This will happen in relation to all the subsidiaries and affiliates located in low-taxed jurisdictions. With specific reference to the European Directive, this rule applies indifferently to low-taxed subsidiaries located in the Union or outside the Union (provided, clearly, that the residence country of the parent entity has implemented the Model Rules).

EU Member States are required to incorporate the provisions of the Directive into their national laws by 31 December 2023, and generally enforce these provisions for fiscal years beginning from 31 December 2023 (European Council, 2022)[332].

However, it should be noted that the UTPR is slated to take effect for fiscal years beginning on or after 31 December 2024.

As opposed to Pillar-Two, the Directive also allows for a delayed application of the IIR and UTPR for certain Member States: in States where no more than twelve ultimate parent entities of multinational groups have their residence, such jurisdiction can choose not to apply the provisions for six fiscal years starting from December 2023. Nevertheless,

[330] EUROPEAN COUNCIL, *Council Directive (EU) 2022/2523, Ibidem*, see the Article 11.
[331] BRUNELLI F., TRONCI S., FORESTIERI V., *Pillar 2: meccanismo applicativo e "rule of order",* quoted, p. 27.
[332] EUROPEAN COUNCIL, *Council Directive (EU) 2022/2523*, quoted, see the Article 56.

Member States that opt for this delay must notify the EU Commission about their decision.

It should be noted that in cases where a Member State chooses to delay the application of the IIR/UTPR, other Member States can and will still apply these rules to constituent entities belonging to a multinational enterprise headquartered in the Member State that has opted for this delayed application. Therefore, if a certain jurisdiction does not immediately comply with the new tax regime, the other Member States can still make sure that the multinational firms' profits are still taxed, proportionately to their economic ties with the country applying the new regime (European Council, 2022)[333].

In this way, double non-taxation should be avoided, or at least reduced, since the Directive provides to Member State the right to tax the untaxed or low-taxed MNEs' profits.

Additionally, the national governments members of the EU should carefully evaluate the current configuration of the tax incentives contemplated by their legislation, verifying their consistency with the GloBE system. It is in each jurisdiction's interest to avoid the possibility that the combination of tax incentives and nominal tax rate places the same multinational company to be taxed with an ETR below the 15 percent threshold, and ultimately lead to the transfer of taxing power to the benefit of other countries under the IIR/UTPR mechanism (Brunelli et al, 2023)[334].

Finally, it should be considered the reason why the European Union decided to issue a Directive to implement the global minimum tax, and why the matter was not left to the decision of each individual jurisdiction, as in the OECD framework.

As the Directive states, *"in a Union of closely integrated economies, it is crucial that the global minimum tax reform be implemented in a sufficiently coherent and coordinated fashion. Considering the scale, detail and technicalities of those new international tax rules, only a common Union framework would prevent a fragmentation of the internal market in the implementation of them"* (European Council, 2022)[335].

Through the Directive, rules for implementation can be uniform among States, thus reducing the administrative burden of having to resolve eventual disputes coming from an uneven application of the OECD standards (Linn, 2021)[336].

---

[333] EUROPEAN COUNCIL, *Council Directive (EU) 2022/2523*, *Ibidem*, see the Article 50.

[334] BRUNELLI F., TRONCI S., FORESTIERI V., *Pillar 2: meccanismo applicativo e "rule of order"*, quoted, p. 21.

[335] EUROPEAN COUNCIL, *Council Directive (EU) 2022/2523*, quoted, p. 2, *Considerandum* (4).

[336] LINN A., *Global minimum tax – Challenges for the EU,* Vereinigung der Bayerischen Wirtschaft, Munich, 2021, available at *https://urbis.europarl.europa.eu/urbis/sites/default/files/generated/document/en/vbw-Study-Global-Minimum-Tax.pdf*, p. 18-24.

The Directive is therefore an instrument that can guarantee not only the harmonization of Pillar Two within the Member States, but this harmonization also makes sure that possible violations of primary law or conflicts with other Directives are avoided.

It is also fundamental that the new rules do not violate the fundamental freedoms, in particular the freedom of establishment and the free movement of capital (Linn, 2021)[337]. The Global Minimum Tax seems to fit well between these freedoms: it prevents multinationals from obtaining tax advantages through profit shifting, gaining therefore an economic advantage at the expenses of EU domestic companies that are subject to higher tax rates.

The biggest difference between the OECD Pillar Two and the European Directive on the global minimum tax is its effectiveness in implementation.

While the OECD GloBE rules are a common approach (so countries are not obligated to adopt them), the EU Directive is binding for Member States, as they will have to transpose it into their national tax regimes by the end of 2023.

Therefore, the EU Directive is an important progress in the implementation of the Pillar-Two Global Minimum Tax. In the few years to come, it is expected that other countries will intensify their actions towards the adoption of the tax reform[338].

It is still hard to predict the effective number of countries that will actively levy the global minimum tax on MNEs, and what behavioral reactions businesses and governments will have. The implementation process of the new tax regime is therefore long and uncertain, but as of today, it seems to be the most complete attempt to resolve the issue of double non-taxation, at least in the field of the corporate tax.

---

[337] LINN A., *Global minimum tax – Challenges for the EU,* quoted, p. 30-31.

[338] See *https://globaltaxnews.ey.com/news/2022-6224-eu-member-states-unanimously-adopt-directive-implementing-pillar-two-global-minimum-tax-rules.*

CONCLUSION

The new global and digital industry now operates and competes across national borders, in a space often situated "above" national territories. A production system that has ceased to function in conventional ways renders the traditional methods of taxing businesses with the corporate income tax obsolete, and despite the crucial role that this kind of tax has in a State's tax revenues, globalization challenges its enforceability.

In order to understand how the issue developed to the magnitude it has today, it is fundamental to look at the historical and conceptual background of how the international tax regime originated and developed.

In the 1920s the League of Nations established two main principles. The first principle stated that the corporate tax shall be levied by the source-country's government: this made sense at the time when companies were carrying out both production and sales in a single country, but the real layout of today's globalized economy is far from being that simple. The other main outcome was that international tax disputes were to be solved at bilateral level, and bilateral double tax treaties became the norm.

Those models were shaped and adapted around the business models and needs of the time, mainly with the objective of allocating taxing rights among jurisdictions and avoiding double taxation of the worldwide income. The inconsistencies between the laws of individual nations and some criticalities in the Model Tax Conventions led instead to the opposite situation of double non-taxation.

As stated in the BEPS project, "*no or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it. In other words, what creates tax policy concerns is that, due to gaps in the interaction of different tax systems, and in some cases because of the application of bilateral tax treaties, income from cross-border activities may go untaxed anywhere, or be only unduly lowly taxed*" (OECD, 2013) [339].

The case studies presented demonstrate how the phenomenon of double non-taxation had reached vast scale and almost became a habit amongst big multinational enterprises.

Apple Inc., through a complex network of affiliates and controlled entities, was able to shift profits and reduce the effective tax rate paid to around 1% in 2011. Between 2009

[339] OECD, *Action Plan on Base Erosion and Profit Shifting*, Paris-Cedex, 2013, Chapter 2 – Background, p. 10.

and 2013, Google diverted € 800 million profits to its affiliates in Ireland and in Bermuda, thus evading the payment of € 95 million in taxes, owed to the Italian tax authority. The list of examples could go on, but these few numbers are indicative of the proportion of the phenomenon, and explain why the dissatisfaction of the general public grew strongly in the aftermath of the 2008 financial crisis.

Multinational companies' tax avoidance schemes have a common factor: they rest on a complex organizational structure that allows them to take advantage of the loopholes of the international tax regime, more precisely those arising from the differences in the tax legislation of two countries (Ting, 2014)[340].

The conclusion that can be drawn is therefore twofold.

Firstly, MNE business models have evolved into complex networks of affiliates and intragroup relationships, which did not exist when the tax framework was developed in the 1920s. This poses a fundamental challenge for the current corporate income tax framework: defining and separating business operations from profit sources according to national boundaries is not straightforward. Moreover, the growth in digital services and trade undermines another foundation of the international tax regime: the idea of determining taxing rights based on a company's physical presence (Crivelli et al, 2021)[341].

Secondly, MNEs have converted bilateral transactions to a multilateral scenario. Profits, no matter where they are generated, travel to two or more countries through a chain of subsidiaries, and escape both source taxation and residence taxation. The network of bilateral treaties between countries has almost become useless. The involvement of third countries in the bilateral framework has indeed given rise to various schemes, such as the use of conduit entities, the establishment of low-taxed branches in foreign countries, and the artificial manipulation of the origin of income through transfer pricing arrangements. As the OECD recognised, adaptation of the current rules is required, to prevent these harmful practices resulting from interactions among several countries (OECD, 2013)[342].

One of the solutions to this problem would be therefore to adopt a multilateral approach, in order to include all the countries involved into the discussion. Multilateral instruments

---

[340] TING A., *i Tax – Apple's International Tax Structure and the Double Non-Taxation Issue*, in British Tax Review, 2014, No. 1, p. 46. Apple Inc. (and Google as well) exploits the "*complementary definitions of corporate tax residence in the two countries, as well as the source principle, to facilitate the creation of the double non-taxation outcome*". In this specific context, the two countries at issue are Ireland and the United States.

[341] CRIVELLI E., DE MOOIJ R., DE VRIER E., KLEMM A., *Taxing Multinationals in Europe*, 2021, IMF WP 21/12, Washington D.C., U.S.A., Executive Summary, p. viii.

[342] OECD, *Action Plan on Base Erosion and Profit Shifting*, Paris-Cedex, 2013, Action 5 (ii), p. 18.

indeed have recently gained strength and overall approval, precisely thanks to their ability to adapt to a wider multitude of situations.
The BEPS project is considered as the first *"multilateral effort to combat corporate tax avoidance"* (Mason, 2020)[343], and the latest development of Pillar Two can rely on the strength given to it by the approval of the International Framework.
These reforms therefore can be truly effective only with the cooperation of multiple jurisdictions, since bilateral treaties have become insufficient and seem instead to have allowed tax avoidance practices. Some state that "*the two-pillar solution demonstrates that coordination can succeed. The Inclusive Framework agreement is a step in the right direction*" (IMF, 2022)[344]. Nevertheless, efforts to enhance this coordination are still necessary, particularly to include the needs and interests of developing countries into the discussion.
As presented in this work, there are some criticalities in the implementation of both the BEPS project and the Global Minimum Tax in these countries. Facilitating access to data and to country-by country information on multinationals could certainly support these tax authorities to enforce the corporate tax reform.
On the same note, it is fundamental to enhance tax transparency between jurisdictions, as sharing data and being able to access information is critical in order to prevent double non-taxation of international profits. The effectiveness of the global minimum tax rests indeed on the correct computation of MNEs tax liabilities and effective tax rates in each jurisdiction where they operate.
Pillar Two is expected to have some significant economic impact.
First, the reform is expected to affect countries' public finances, through the increase in effective tax rates and the reallocation of MNEs tax base. Tax revenues will mostly increase for developed countries, since they are the country of residence of a large majority of the MNEs that will be subject to the global minimum tax. Even if additional tax revenues will not be significant for developing countries (which are most often source countries), the application of Pillar Two can still be beneficial to them, thanks to a reduction in profit shifting and to a change in the determinants of competition. The FDI inflows will slightly increase for these nations as well, and a minimum tax will reduce the pressure on these low and middle-income countries to offer tax rates below 15% (Crivelli

[343] MASON R., *The Transformation of International Tax*, in American Journal of International Law, Volume 114, Issue 3, July 2020, p. 353.
[344] IMF, *Fiscal Monitor: Fiscal Policy from Pandemic to War,* Washington D.C., April 2022, p. 33.

et al, 2021)[345]. Investment will be diverted from tax havens to high-tax jurisdiction, as consequence of the lost incentive to shift profits. The peculiar design of the GloBE rules, indeed, removes the incentive for big corporations operating in different jurisdictions to declare their profits in low-tax countries. Even if the source state imposes a low taxation, the residence country has the right to tax the foreign income up to a minimum 15% effective tax rate, thus eliminating the risk of double non-taxation. Moreover, the global minimum tax will reduce the intensity of tax competition, putting a floor to the race to the bottom in corporate tax rates.

The objective of this thesis was also to consider some of the flaws of the global minimum tax, with the aim of evaluating its effectiveness in tackling double non-taxation.

What is important to recall, is that one of the causes of double non-taxation are the loopholes in the definition of corporation and corporate tax residence between the various jurisdictions. A clear and generally accepted interpretation of these concepts does not exist in the Model Conventions.

The Two Pillar solution still does not address or solve the dispute, leaving this regulatory void open.

Numerous academics looked through possible ways that could evolve the concept of corporate tax residence, adapting definitions into nowadays economy. The BEPS project tried to deal with some of these problems, trying to impose some minimum standards on members of the OECD, but failed to reform the old tax regime. The Two-Pillar solution tried instead to circle around the issue, dealing instead more directly with multinational enterprises, tailoring the GloBE rules to the companies with €750 million profits, to counter their harmful tax practices. Nevertheless, the global minimum tax leaves out of its scope other businesses that are below the threshold, which might still engage in tax avoidance schemes.

There is also controversy surrounding the existence of the substance based carve outs, that weaken the effectiveness of the GloBE rules, and complicate the enforcement and the monitoring of the provision (Tandon, 2022)[346]. The minimum tax rate of 15% is also considered to be too low and to limit the additional tax revenues, but it has to be kept in

[345] CRIVELLI E., DE MOOIJ R., DE VRIER E., KLEMM A., *Taxing Multinationals in Europe*, 2021, IMF WP 21/12, Washington D.C., U.S.A., Executive Summary, p. viii.

[346] TANDON S., *The Need for Global Minimum Tax: Assessing Pillar Two*, in Intertax, Vol. 50, Issue 5, p. 410.

mind that it *"was the best that can be expected from including so many countries"* into the agreement (Avi-Yonah, 2023)[347].

The reform proposed by the OECD has an undeniable set of merits.

First and foremost, it brings to fruition the path initiated with the BEPS project ten years ago, finally introducing a limit to tax competition between states and ensuring that multinational corporations, regardless of where they choose to locate their headquarters, pay their share of taxes. The reform ultimately marks a clear turning point for international taxation.

However, it is clear that to understand whether the choices made will be effective, one will still have to wait for the actual implementation of the global minimum tax itself, which is by no means free of weaknesses. While the effort to promote the reform in a short time frame is highly appreciable and signals the importance of the issue for the global society, in the future the text of the legislation could be revised, to account for new challenges or more favorable solutions.

At this time, the biggest dilemma is how many countries will actually adopt and enforce the global minimum tax, as the only certainty is that all the Member States of the European Union will include it in their legal systems, under obligation of the EU Council Directive No. 2022/2523. The realization of Pillar Two also relies on the amplitude of its implementation and consensus.

In particular, it is reasonable to assume that these measures will take some time to implement, and most probably, they will not be the definitive solution to the issue of double non-taxation. Nevertheless, they are an important step in the process of reforming the international tax regime, toward reducing profit shifting by big MNEs and toward removing the pressures of tax competition (Clausing et al, 2021)[348].

This work opened with the observation that *"just at the time that inequality has being growing, the ability to redistribute income through taxation has been reduced enormously"* (Stiglitz, 2011)[349]. The introduction of the Global Minimum Tax has indeed the potential to restore some of this ability.

---

[347] AVI-YONAH R. S., *International Taxation, Globalization, and the Economic Digital Divide*, in Journal of International Economic Law, 2023, No 26, p. 107.

[348] CLAUSING K., SAEZ E., ZUCMAN G., *Ending Corporate Tax Avoidance and Tax Competition: A Plan to Collect the Tax Deficit of Multinationals*, in UCLA School of Law, Law-Econ. Research Paper, Los Angeles – CA, 2021, No. 20-12, p. 13.

[349] STIGLITZ J., *Globalization and the economic role of the state in the new millennium*, in Industrial and Corporate Change, Oxford University Press, 2003, Volume 12, Number 1, p. 3.

REFERENCES

Authors or Publishers

AULT H. J., SCHON W., SHAY S., *Base Erosion and Profit Shifting: A Roadmap for Reform*, in Bulletin for International Taxation, 2014, No 68, p. 275 – 279.

AVI-YONAH, R S., *The International Tax Regime: A Centennial Reconsideration,* University of Michigan Public Law Research Paper, 2015, p. 27 – 30.

AVI-YONAH R.S., *Advanced Introduction to International Tax Law*, Northampton, MA, U.S.A., 2019, p. 3 – 12.

AVI-YONAH R. S., *The Single Tax Principle*, University of Michigan May 27, 2022, Public Law Research Paper No. 22-024, Available at SSRN: *https://ssrn.com/abstract=4121180 or http://dx.doi.org/10.2139/ssrn.4121180*.

AVI-YONAH R. S., *The Benefits Principle*, June 2, 2022, University of Michigan Public Law Research Paper No. 22-027, Available at SSRN: https://ssrn.com/abstract=4126198.

AVI-YONAH R. S., *International Taxation, Globalization, and the Economic Digital Divide*, in *Journal of International Economic Law*, 2023, No 26, p. 101–109.

AVI-YONAH R. S., *Who Invented the Single Tax Principle? An Essay on the History of US Treaty Policy*, in N. Y. Law School Law Review 59, no. 2, (2015), p. 305-15.

AVI-YONAH, R S., *The International Tax Regime: A Centennial Reconsideration,* U of Michigan Public Law Research Paper, 2015.

AVI-YONAH R. S., KIM Y. R., *Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax*, in Michigan Journal of International Law, 2022, Vol. 43, Issue 3, p. 505 – 556.

BARAKÉ M., CHOUC P.-E., NEEF T., ZUCMAN G., *Revenue Effects of the Global Minimum Tax Under Pillar Two*, in Intertax, 2022, Vol. 50, Issue 10, p. 689 – 710.

BARRY F., *Aggressive Tax Planning Practices and Inward-FDI Implications for Ireland of the New US Corporate Tax Regime*, in The Economic and Social Review, Vol. 50, No. 2, Summer 2019, p. 325-340.

BAS J., *Clash of the Titans: OECD vs. UN Model Treaty*, archipeltaxadvice.nl, 29 November, 2022, available at https://www.archipeltaxadvice.nl/insights/oecd-vs-un-model-treaty/.

BERNARDO J.G., JANSKÝ P., TØRSLØV T., *Multinational corporations and tax havens: evidence from country-by-country reporting*, in International Tax and Public Finance, 2021, Vol. 28, p. 1519–1561.

BEER S., DE MOOIJ R., LIU L., *International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots*, IMF Working Paper, Washington D.C., 2018, p. 1 – 45.

BEER S., MICHIELSE G., *Strengthening Source-Based Taxation* in 'Corporate Tax under Pressure, Why Reform Is Needed and How It Could be Designed', IMF Library, 2021, Washington D.C., p. 229 – 252.

BIONDI Y., *The Firm as an Enterprise Entity and the Tax Avoidance Conundrum: Perspectives from Accounting Theory and Policy*, in Accounting, Economics and Law: A Convivium, 2017, vol. 7, no. 1, available at *https://doi.org/10.1515/ael-2017-0001*.

CASELLA B., SOUILLARD B., *A new framework to assess the fiscal impact of a global minimum tax on FDI*, in Transnational Corporation Journal, 2022, Vol. 29, n. 2, p. 1 – 39, available at *https://ssrn.com/abstract=4137479*.

CLAUSING K., SAEZ E., ZUCMAN G., *Ending Corporate Tax Avoidance and Tax Competition: A Plan to Collect the Tax Deficit of Multinationals*, in UCLA School of Law, Law-Econ. Research Paper, Los Angeles – CA, 2021, No. 20-12.

CRIVELLI E., DE MOOIJ R., DE VRIER E., KLEMM A., *Taxing Multinationals in Europe*, 2021, IMF WP 21/12, Washington D.C., U.S.A., p. 4 – 43.

DAURER V., KREVER R., *Choosing between the UN and OECD Tax Policy Models: An African Case Study*, in) African Journal of International and Comparative Law, 2014, Vol.22, (1) p. 1-21.

DE MOOJI R., KLEMM A., PERRY V., *Corporate Income Tax under pressure. Why Reform is Needed and How It Could Be Designed*, IMF, Washington D.C., 2021, p. 33 – 56; 189 - 228.

DEVEREUX M.P., VELLA J., *Implications of digitalization for international corporate tax reform*, Oxford University Centre for Business Taxation, 2017, WP 17/07.

DI GREGORIO C., MAINOLFI G., SCAZZERI G. L'imposta sulle società nell'Unione Europea, Milano, 2005, p. 327 – 334; 357 – 386.

DRAGHI M., *Miriam Pozen Lecture*, Cambridge, MA - U.S.A., 2023, Il Sole 24 Ore, 8 June 2023, and Il Foglio, 9 June 2023, p. 3.

DUMITER F.C., *The Correlation Between Double Taxation Conventions, Tax Compliance, and Tax Evasion. Empirical Evidence from OECD Countries,* Vilnius Gediminas Technical University, 2023, Technological and Economic Development of Economy, Vol. 29 Issue 3: p. 902–948.

DU PLESSIS I., *Place of Effective Management: Finding Guidelines in Case Law*, in Intertax, 2020, Vol. 48, Issue 2, p. 195 – 217.

ELKINS D., *The Myth of Corporate Tax Residence*, in Columbia Journal of Tax Law, 9 (1), p. 5–43.

ERDOS E., KISS, L. N., *Double Taxation and Double Non-Taxation as the New Tendencies of EU e-Tax Law*, in Multi Science - XXXIII. Micro CAD International Multidisciplinary Scientific Conference University of Miskolc, 23-24, 2019, *https://www.uni-miskolc.hu/~microcad/cd2019/e1/E_Erdos_Eva.pdf*

EUROPEAN COMMISSION - Directorate-General Taxation and Customs Union, *Summary report of the responses received on the public consultation on factual examples and possible ways to tackle double non-taxation cases,* Brussels, 5 July 2012.

EUROPEAN COMMISSION - Directorate-General Taxation and Customs Union, *The internal market: factual examples of double non-taxation cases*, 2012, p. 1 – 15.

EUROPEAN COUNCIL General Secretariat of the Council, *Euco 23711 on 24 June 2011 – Conclusions*, Brussels, 2011, Chapter I – Economic Policy, Para.6, fourth period.

FIELD H.M. *Checking In on Check the Box*, in Loyola of Los Angeles Law Review, 2009, Vol. 42, p. 451 – 528.

FRANCOIS M., VICARD V., *Tax Avoidance and the Complexity of Multinational Enterprises*, in CEPII Working Paper, Paris-Cedex, No. 2023 – 04, p. 1 - 36

GÓMEZ – CRAM R., OLBERT M., *Measuring the Expected Effects of the Global Tax Reform*, in The Review of Financial Studies, 2023, 0038, p. 1 – 47, Oxford University Press, also available at *https://doi.org/10.1093/rfs/hhad038.*

HEBOUS S., JOHANNESEN N., *At your service! The role of tax havens in international trade with services*, in European Economic Review, Elsevier, 2021, Vol. 135, p. 1 – 25.

HERZFELD M., *International Taxation in a nutshell*, St. Paul, MN, 2020, p. 17 – 31; 105 – 121.

HERZFELD M., *OECD Pillars: A Bretton Woods Moment?* in Tax Notes, 5 October 2020, in *www.taxnotes.com.*

INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (IISD), *A Guide for Developing Countries on How to Understand and Adapt to the Global Minimum Tax*, Winnipeg, Canada, 2022, p. 1 – 47.

IMF, *International Corporate Tax Reform,* Washington D.C., February 2023.

JOGARAJAN S., *Double Taxation and the League of Nations,* Cambridge, 2018, p. 98 – 166.

JOHANNESEN N., *The global minimum tax*, in Journal of Public Economics, 2022, Vol. 212, Article 104709, p. 1 – 8.

KANE M., *A Defense of Source Rules in International Taxation*, in Yale Journal of Regulation, 2015, Vol. 32, p. 311 – 361.

KLEINBARD E. D., *Stateless income.* Fla. Tax Rev., 2011, 11: 699.

KURIAN A., *The evolution of international Tax Regime and the OECD Two Pillar solution*, in Journal of Economic Issues, August 2022, 1(1), 61-71.

LAZAROV I., *Anti-Tax-Avoidance in Corporate Taxation under EU Law*, Amsterdam, 2022, p. 33 – 90.

LEAGUE OF NATIONS, Financial Committee, *Experts' Report on Double Taxation: Document E.F.S.73.F.19*; Geneva, April 5, 1923, *Excerpt from the University of Sidney Library, https://adc.library.usyd.edu.au/view?docId=split/law/xml-main-texts/brulegi-source-bibl-1.xml;chunk.id=item-1;toc.depth=1;toc.id=item-1;database=;collection=;brand=default.*

LINN A., *Global minimum tax – Challenges for the EU,* Vereinigung der Bayerischen Wirtschaft, Munich, 2021, available at *https://urbis.europarl.europa.eu/urbis/sites/default/files/generated/document/en/vbw-Study-Global-Minimum-Tax.pdf.*

MARCHGRABER, C. *Double Non-Taxation: Not only a Policy but also a Legal Problem,* in Kluver International Tax Blog, Amsterdam, January 5, 2018, available *http://kluwertaxblog.com/2018/01/05/double-non-taxation-not-policy-also-legal-problem/.*

MARIAN O., *The Function of Corporate Tax-Residence in Territorial Systems*, in Chapman Law Review, 2014, Vol. 18, Issue 1, p. 157 – 184.

MATSUOKA A., *The new international tax regime: analysis from a power-basis perspective*, in SN Business & Economics, 2021, 1:68, p. 1 – 23.

MASON R. *The Transformation of International Tax*, in American Journal of International Law, Volume 114, Issue 3, July 2020, p. 353 – 402.

MCLIMORE E.M., GRILLI S.P., *Tax Court Upholds Equity Treatment of Hybrid Instrument in PepsiCo Puerto Rico*, in Tax News and Developments, December 2012, Volume XII-6, p. 4, available at *https://www.lexology.com/library/detail.aspx?g=8445dff8-a5f6-45d3-9f89-e560832e9801.*

MEROLA A., *International Double Taxation and Double non-taxation*, in ITAXA Blog, Roma, 2022, available in *https://www.itaxa.it/blog/en/international-double-taxation-double-non-taxation/.*

MILLAR R., *Intentional and unintentional double non-taxation issues in VAT*. Sydney Law School Research Paper, 2009, Vol. 9, p. 409 - 435.

MUSGRAVE P.B., *Combining Fiscal Sovereignty and Coordination. National Taxation in a Globalizing World,* in I. Kaul and P. Conceicao (eds) The New Public Finance. Responding to Global Challenges, Oxford, 2006, pp. 167–93.

NERSESYAN N., *The Current International Tax Architecture: A Short Primer*, in *Corporate Income Taxes Under Pressure. Why Reform Is Needed and How It Could Be Designed – Chapter 3*, IMF Library, Washington D.C., 2021, p. 23 – 31.

NIAZI S.U.K., KREVER R., *Bespoke tax rulings and profit shifting in the European Union: assessing the EU's options*, in Australian Tax Forum, 2021, Vol. 36 (3), p. 347 – 368.

NICODEME G., *Corporate Tax Competition and Coordination in the European Union: What do we know? Where do we stand?* MPRA Paper No. 107, posted 05 Oct 2006 UTC, European Commission Directorate-General for Economic and Financial Affairs Publications, No. 250, p. 1 – 46, *http://europa.eu.int/comm/economy_finance.*

OATS L., *Principles of International Taxation*, London, 2021, p. 24 – 34; 80 – 83; 264 – 276; 440; 601 – 602.

OECD, *Tax Challenges Arising from the Digitalization of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two)*, Paris-Cedex, 2022, p. 14 – 42; 115 – 158.

OECD, *Corporate Tax Statistics*, Paris-Cedex, 2022.

OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris-Cedex, 2019, available *http://dx.doi.org/10.1787/g2g972ee-en.*

OECD, *Action Plan on Base Erosion and Profit Shifting*, Paris-Cedex, 2013.

OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, Paris-Cedex, November 24, 2016 Updated.

OECD, *Hybrid Mismatch Arrangements. Tax Policy and Compliance Issues*, Paris-Cedex, 2012, p. 1 – 25.

OECD, *Corporate Loss Utilisation through Aggressive Tax Planning*, Paris-Cedex, 2011.

OECD, *Countering Offshore Tax Evasion. Questions and Answers*, Paris-Cedex, 2009.

OECD – G20, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, Paris-Cedex, 2014, p. 1 – 112.

OECD – G20, *Neutralizing the Effects of Branch Mismatch Arrangements, - INCLUSIVE FRAMEWORK ON BEPS ACTION 2*, Paris – Cedex, 2017.

OECD – G20, *Inclusive Framework on BEPS. Progress report July 2020 – September 2021*, Paris-Cedex, 2021.

OECD – G20, *Harmful Tax Practices - 2018 Progress Report on Preferential Regimes - INCLUSIVE FRAMEWORK ON BEPS: ACTION 5*, Paris-Cedex, 2019.

OXFAM, *Off the Hook. How the EU is about to whitewash the world's worst tax havens*, Oxford, 2017.

PARADA L., *Double Non-Taxation and the Use of Hybrid Entities: An Alternative Approach in the New Era of BEPS*, in Series on International Taxation Vol. 66, Alphen aan den Rijn, the Netherlands, 2018.

PEDROSA LOPEZ J. C., *An Overview of Double Non-Taxation, Cross-Border Transactions and Tax Implications*, in Party Autonomy in

European Private (and) International Law, Tome II, 2015, p. 103 – 123.

RIBES A.R., *Tax residence and the mobility of companies in the European Union: the desirable harmonization of the tax connecting factors*, Intertax, 2012, Volume 40, Issue 11, p. 606-615.

RIXEN T., *From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance*, in Review of International Political Economy, Vol. 18, May 2011, p. 197 – 227.

RIZZO A., *The Role of Corporate Residence in Tax Matters and its Relationship with the Provision of Dividend Relief: A Comparative Analysis between the UK and the US Tax Systems*, in International Journal of Accounting and Taxation June 2019, Vol. 7, No. 1, p. 35-39.

ROSENBLUM D., *The Futility of Walls: How Traveling Corporations Threaten State Sovereignty*, in Tulan Tax Review, 2019, p. 645 – 679.

ROSENZWEIG A. H., *Source as a Solution to Residence*, Florida Tax Review, Vol. 17, No. 6, 2015, Washington University in St. Louis Legal Studies Research Paper No. 15-06-01, p. 471 – 526;

SALLUSTI F., *Measuring profit shifting by MNEs in Italy*, November 17, 2022 in www.imf.org/Files/News/Seminars.

SCAPA A., HENIE L. A., *Avoidance of Double Non-Taxation under the OECD Model Tax Convention*, in Intertax, Amsterdam, 2005, volume 33, Issue 6/7, p. 267 – 285.

SHABUROVA T., *The Gazprom case: a tool to Foster an EU internal gas market.* European Competition and Regulatory Law Review Volume 3, Issue 1, 2019, p. 63 – 71.

STIGLITZ J., *Globalization and the economic role of the state in the new millennium*, in Industrial and Corporate Change, Oxford University Press, 2003, Volume 12, Number 1, p. 3–26.

TING A., *i Tax – Apple's International Tax Structure and the Double Non-Taxation Issue*, in British Tax Review, 2014, No. 1, p. 40 – 71.

TINHAGA P. Z., *From Avoiding 'Double Taxation' Yesterday to Avoiding 'Double Non-Taxation' Today: The Urgent Need for an International Tax Regime Based on Unitary Tax Principles*, Ann Arbour – Michigan, U.S.A., 2016, available in *https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1005&context=sjd.*

TØRSLØV T., WIER L. S., ZUCMAN G., *The Missing Profits of Nations*, in NBER WP Series, 2020, Cambridge, MA, U.S.A., p. 1 – 56.

TANDON S., *The Need for Global Minimum Tax: Assessing Pillar Two Reform*, in Intertax, Vol. 50, Issue 5, p. 396 - 413.

TRAVERSA E., *Corporate Tax Residence and Mobility*, IBFD, Amsterdam, 2019, p. 1 – 26; 56 – 76; 105 – 134.

TOSI L., BAGGIO R., *Lineamenti di diritto tributario internazionale,* Padova, 2022, p. 9 - 16.

UNCTAD, *World Investment Report. Investor Nationality: Policy Challenges*, Geneva, 2016.

UNITED NATIONS Department of Economic & Social Affairs, *Model Double Taxation Convention between Developed and Developing Countries*, New York – U.S.A., 2017 Updated.

UNITED NATIONS Department of Economic & Social Affairs, *Model Double Taxation Convention between Developed and Developing Countries – Commentary*, New York – U.S.A., 2021.

U.S. SENATE Permanent Subcommittee on Investigations, of the Committee on Homeland Security and Governmental affairs, *Offshore Profit Shifting and the U.S. Tax Code - Part 2 (Apple Inc.),* Memorandum*,* Chapter III (Apple Case Study), *Washington D.C.*, May 21, 2013, p. 20.

UNITED STATES TAX COURT, *Pepsico Puerto Rico, Inc. (Petitioner) v. Commissioner of Internal Revenue (Respondent)*, 155 T.C. Memo 2012-269, Docket Nos. 13676-09, 13677-09, Washington D.C., filed September 20, 2012, available at *https://tpguidelines.com/us-vs-pepsico-september-2012-us-tax-court-155-t-c-memo-2012-269/.*

VAN DE VIJVER A., *International double (non-)taxation: comparative guidance from European legal principles*, in EC Tax Review, 2015, No 5, p. 240 – 257.

WEINZIERL M., *Revisiting the Classical View of Benefit-Based Taxation*, in NBER WP Series, 2014, Cambridge, MA, U.S.A., No 20735, p. 1 – 32.

WIER L., *Tax havens cost governments $200 billion a year. It is time to change the way global tax works*, Publication of the World Economic Forum, February 27 2020, p. 1 – 6, *https://www.weforum.org/agenda/2020/02/how-do-corporate-tax-havens-work/.*

WIER L., ZUCMAN G., *New global estimates on profits in tax havens suggest the tax loss continues to rise*, 4 dec. 2022, available in

https://cepr.org/voxeu/columns/new-global-estimates-profits-tax-havens-suggest-tax-loss-continues-rise.

ZUBIMENDI A., *The Single Tax Principle as a Limit to Double Non-Taxation? A Broad Perspective*, in Revista Internacional Consinter de Direito, 2019, Vol. 5, No 8, p. 389 – 414.

ZUCMAN G., *Taxing across borders: Tracking personal wealth and corporate profits*, in Journal of economic perspectives, , No. 4 – Fall, 2014, p. 121 – 148.

Relevant Websites and Portals

- *https://adc.library.usyd.edu.au*
- *https://www.cambridge.org/core/series/cambridge-tax-law-series/91CCB9BCD4BA5BAFBC2F5FB9AFAE8982#*
- *https://casetext.com*
- *https://www.ciat.org/international-taxation-network/?lang=en*
- *https://competition-policy.ec.europa.eu/antitrust_en*
- *https://ec.europa.eu/commission/presscorner/detail/en*
- *http://europa.eu.int/comm/economy_finance*
- *https://harvardlawreview.org/topics/taxation/*
- *https://www.ibfd.org/*
- *https://www.ibfd.org/bulletin-international-taxation*
- *https://www.imf.org/en/Publications/FM*
- *https://www.internationaltaxreview.com/*
- *https://www.itaxa.it/blog/en/*
- *https://kluwerlawonline.com/Journals/EC+Tax+Review/19*
- *https://kluwerlawonline.com/Journals/Intertax/3*
- *https://www.lexology.com/library/detail.aspx?g=8445dff8-a5f6-45d3-9f89-e560832e9801.*
- *http://www.nber.org/papers/*
- *https://www.oecd.org/ctp/*
- *https://www.oecd-ilibrary.org/*
- *https://www.oecd.org/tax/beps/beps-actions/action5/*
- *https://www.oecd.org/tax/beps/progress-towards-a-fairer-global-tax-system-continues-as-additional-countries-bring-their-preferential-tax-regimes-in-line-with-international-standards.htm.*
- *https://www.oecd.org/g20/topics/international-taxation/*
- *https://www.rdti.it/en*
- *https://www.springer.com/journal/10797*
- *https://taxlawjournal.columbia.edu/*
- *https://www.taxnotes.com/tax-notes-today-international*
- *https://www.yalelawjournal.org/tag/tax*

APPENDIX

Table 1 – List of OECD Member countries - Ratification of the Convention on the OECD.

No.	Country	Year of Accession
1.	Australia	1971
2.	Austria	1961
3.	Belgium	1961
4.	Canada	1961
5.	Chile	2010
6.	Colombia	2020
7.	Costa Rica	2021
8.	Czech Republic	1995
9.	Denmark	1961
10.	Estonia	2010
11.	Finland	1969
12.	France	1961
13.	Germany	1961
14.	Greece	1961
15.	Hungary	1996
16.	Iceland	1961
17.	Ireland	1961
18.	Israel	2010
19.	Italy	1962
20.	Japan	1964
21.	Korea	1996
22.	Latvia	2016
23.	Lithuania	2018
24.	Luxembourg	1961
25.	Mexico	1994
26.	Netherlands	1961
27.	New Zealand	1973
28.	Norway	1961
29.	Poland	1996
30.	Portugal	1961
31.	Slovak Republic	2000
32.	Slovenia	2010
33.	Spain	1961
34.	Sweden	1961
35.	Switzerland	1961
36.	Türkiye	1961
37.	United Kingdom	1961
38.	United States	1961

Key Partners

- Brazil
- China
- India
- Indonesia
- South Africa

Table 2 – Members of the OECD/G20 Inclusive Framework on BEPS (updated November 2021).

1. Albania
2. Andorra
3. Angola
4. Anguilla
5. Antigua and Barbuda
6. Argentina
7. Armenia
8. Aruba
9. Australia
10. Austria
11. The Bahamas
12. Bahrain
13. Barbados
14. Belarus *(Suspended)*
15. Belgium
16. Belize
17. Benin
18. Bermuda
19. Bosnia and Herzegovina
20. Botswana
21. Brazil
22. British Virgin Islands
23. Brunei Darussalam
24. Bulgaria
25. Burkina Faso
26. Cabo Verde
27. Cameroon
28. Canada
29. Cayman Islands
30. Chile
31. China (People's Republic of)
32. Colombia
33. Congo
34. Cook Islands
35. Costa Rica
36. Côte d'Ivoire
37. Croatia
38. Curaçao
39. Czech Republic
40. Democratic Republic of the Congo
41. Denmark
42. Djibouti
43. Dominica
44. Dominican Republic
45. Egypt
46. Estonia
47. Eswatini
48. Faroe Islands
49. Finland
50. France
51. Gabon
52. Georgia
53. Germany
54. Gibraltar
55. Greece
56. Greenland
57. Grenada
58. Guernsey
59. Haiti
60. Honduras
61. Hong Kong, China
62. Hungary
63. Iceland
64. India
65. Indonesia
66. Ireland
67. Isle of Man
68. Israel
69. Italy
70. Jamaica
71. Japan
72. Jersey
73. Jordan
74. Kazakhstan
75. Kenya
76. Korea
77. Latvia
78. Liberia
79. Liechtenstein
80. Lithuania
81. Luxembourg
82. Macau, China
83. Malaysia
84. Maldives
85. Malta
86. Mauritania
87. Mauritius
88. Mexico
89. Monaco
90. Mongolia
91. Montenegro
92. Montserrat
93. Morocco
94. Namibia
95. Netherlands
96. New Zealand
97. Nigeria
98. North Macedonia
99. Norway
100. Oman
101. Pakistan
102. Panama
103. Papua New Guinea
104. Paraguay
105. Peru
106. Poland
107. Portugal
108. Qatar
109. Romania
110. Russian Federation *(Suspended)*
111. Saint Kitts and Nevis
112. Saint Lucia
113. Saint Vincent and the Grenadines
114. Samoa
115. San Marino
116. Saudi Arabia
117. Senegal
118. Serbia
119. Seychelles
120. Sierra Leone
121. Singapore
122. Slovak Republic
123. Slovenia
124. South Africa
125. Spain
126. Sri Lanka
127. Sweden
128. Switzerland
129. Thailand
130. Togo
131. Trinidad and Tobago
132. Tunisia
133. Türkiye
134. Turks and Caicos Islands
135. Ukraine
136. United Arab Emirates
137. United Kingdom
138. United States
139. Uruguay
140. Viet Nam
141. Zambia

Note: Further information on the OECD/G20 Base Erosion and Profit Shifting Project, may be found in *www.oecd.org/tax/beps/about.*

Table 3 - Signatories and Parties to the Multilateral Convention to implement Tax Treaty related measures to prevent Base Erosion and Profit Shifting status as of 10 November 2022.

No	Jurisdiction	Signature	Deposit of Instrument of Ratification, Acceptance or Approval	Entry into Force	Notifications made pursuant to Article 35(7)(b) of the MLI	Notifications made after becoming a Party	Arbitration Profile
1	Albania	28-05-2019	22-09-2020	01-01-2021			
2	Andorra	07-06-2017	29-09-2021	01-01-2022			28-06-2022
3	Argentina	07-06-2017					
4	Armenia	07-06-2017					
5	Australia	07-06-2017	26-09-2018	01-01-2019		02-10-2020	28-06-2022
6	Austria	07-06-2017	22-09-2017	01-07-2018			28-06-2022
7	Bahrain	27-11-2020	23-02-2022	01-06-2022			
8	Barbados	24-01-2018	21-12-2020	01-04-2021			25-03-2021
9	Belgium	07-06-2017	26-06-2019	01-10-2019		25-11-2021	28-06-2022
10	Belize	11-01-2019	07-04-2022	01-08-2022			
11	Bosnia and Herzegovina	30-10-2019	16-09-2020	01-01-2021			
12	Bulgaria	07-06-2017	16-09-2022	01-01-2023			
13	Burkina Faso	07-06-2017	30-10-2020	01-02-2021			
14	Cameroon	11-07-2017	21-04-2022	01-08-2022			
15	Canada	07-06-2017	29-08-2019	01-12-2019		08-10-2020	28-06-2022
16	Chile	07-06-2017	26-11-2020	01-03-2021			
17	China (People's Republic of)	07-06-2017	25-05-2022	01-09-2022			
18	Colombia	07-06-2017					
19	Costa Rica	07-06-2017	22-09-2020	01-01-2021			
20	Côte d'Ivoire	24-01-2018					
21	Croatia	07-06-2017	18-02-2021	01-06-2021			
22	Curaçao	20-12-2017 [1]	29-03-2019	01-07-2019			25-03-2021
23	Cyprus	07-06-2017	23-01-2020	01-05-2020			
24	Czech Republic	07-06-2017	13-05-2020[2]	01-09-2020			
25	Denmark	07-06-2017	30-09-2019	01-01-2020		29-06-2021	
26	Egypt	07-06-2017	30-09-2020	01-01-2021			
27	Estonia	29-06-2018	15-01-2021	01-05-2021	01-06-2022		
28	Fiji	07-06-2017					25-03-2021
29	Finland	07-06-2017	25-02-2019	01-06-2019			28-06-2022
30	France	07-06-2017	26-09-2018	01-01-2019		22-09-2020	16-09-2022
31	Gabon	07-06-2017					
32	Georgia	07-06-2017	29-03-2019	01-07-2019			
33	Germany	07-06-2017	18-12-2020	01-04-2021			28-06-2022
34	Greece	07-06-2017	30-03-2021	01-07-2021			25-03-2021
35	Guernsey	07-06-2017	12-02-2019	01-06-2019			
36	Hong Kong (China)	07-06-2017	25-05-2022	01-09-2022			
37	Hungary	07-06-2017	25-03-2021	01-07-2021			28-06-2022
38	Iceland	07-06-2017	26-09-2019	01-01-2020		14-12-2021	
39	India	07-06-2017	25-06-2019	01-10-2019			
40	Indonesia	07-06-2017	28-04-2020	01-08-2020	10-11-2022		
41	Ireland	07-06-2017	29-01-2019	01-05-2019			25-03-2021
42	Isle of Man	07-06-2017	25-10-2017	01-07-2018			
43	Israel	07-06-2017	13-09-2018	01-01-2019			
44	Italy	07-06-2017					28-06-2022
45	Jamaica	24-01-2018					
46	Japan	07-06-2017	26-09-2018	01-01-2019		21-04-2022	28-06-2022
47	Jersey	07-06-2017	15-12-2017	01-07-2018			
48	Jordan	19-12-2019	29-09-2020	01-01-2021			
49	Kazakhstan	25-06-2018	24-06-2020	01-10-2020		26-11-2020	
50	Kenya	26-11-2019					
51	Korea	07-06-2017	13-05-2020	01-09-2020			
52	Kuwait	07-06-2017					
53	Latvia	07-06-2017	29-10-2019	01-02-2020		20-04-2021	

Following Table 3

No	Jurisdiction	Signature	Deposit of Instrument of Ratification, Acceptance or Approval	Entry into Force	Notifications made pursuant to Article 35(7)(b) of the MLI	Notifications made after becoming a Party	Arbitration Profile
54	Lesotho	09-02-2022	28-07-2022	01-11-2022			28-06-2022
55	Liechtenstein	07-06-2017	19-12-2019	01-04-2020			25-03-2021
56	Lithuania	07-06-2017	11-09-2018	01-01-2019			
57	Luxembourg	07-06-2017	09-04-2019	01-08-2019			28-06-2022
58	Malaysia	24-01-2018	18-02-2021	01-06-2021		10-11-2022	
59	Malta	07-06-2017	18-12-2018	01-04-2019			28-06-2022
60	Mauritius	05-07-2017 [3]	18-10-2019	01-02-2020			28-06-2022
61	Mexico	07-06-2017					
62	Monaco	07-06-2017	10-01-2019	01-05-2019			
63	Mongolia	06-10-2022					
64	Morocco	25-06-2019					
65	Namibia	30-09-2021					
66	Netherlands	07-06-2017	29-03-2019	01-07-2019		25-11-2021	25-03-2021
67	New Zealand	07-06-2017	27-06-2018	01-10-2018			25-03-2021
68	Nigeria	17-08-2017					
69	North Macedonia	29-01-2020					
70	Norway	07-06-2017	17-07-2019	01-11-2019			
71	Oman	26-11-2019	07-07-2020	01-11-2020			
72	Pakistan	07-06-2017	18-12-2020	01-04-2021			
73	Panama	24-01-2018	05-11-2020	01-03-2021			
74	Papua New Guinea	23-01-2019					28-06-2022

No	Jurisdiction	Signature	Deposit of Instrument of Ratification, Acceptance or Approval	Entry into Force	Notifications made pursuant to Article 35(7)(b) of the MLI	Notifications made after becoming a Party	Arbitration Profile
75	Peru	27-06-2018					
76	Poland	07-06-2017	23-01-2018	01-07-2018			
77	Portugal	07-06-2017	28-02-2020	01-06-2020			25-03-2021
78	Qatar	04-12-2018	23-12-2019	01-04-2020		25-11-2021	
79	Romania	07-06-2017	28-02-2022	01-06-2022			
80	Russian Federation	07-06-2017	18-06-2019	01-10-2019	21-10-2021		
81	San Marino	07-06-2017	11-03-2020	01-07-2020			
82	Saudi Arabia	18-09-2018	23-01-2020	01-05-2020			
83	Senegal	07-06-2017	10-05-2022	01-09-2022			
84	Serbia	07-06-2017	05-06-2018	01-10-2018			
85	Seychelles	07-06-2017	14-12-2021	01-04-2022			
86	Singapore	07-06-2017	21-12-2018	01-04-2019		11-08-2021	28-06-2022
87	Slovak Republic	07-06-2017	20-09-2018	01-01-2019			
88	Slovenia	07-06-2017	22-03-2018	01-07-2018			28-06-2022
89	South Africa	07-06-2017	30-09-2022	01-01-2023			
90	Spain	07-06-2017 [4]	28-09-2021	01-01-2022	01-06-2022		25-03-2021
91	Sweden	07-06-2017	22-06-2018	01-10-2018			25-03-2021
92	Switzerland	07-06-2017	29-08-2019	01-12-2019	18-12-2020		28-06-2022
93	Thailand	09-02-2022	31-03-2022	01-07-2022			
94	Tunisia	24-01-2018					
95	Türkiye	07-06-2017 [5]					

No	Jurisdiction	Signature	Deposit of Instrument of Ratification, Acceptance or Approval	Entry into Force	Notifications made pursuant to Article 35(7)(b) of the MLI	Notifications made after becoming a Party	Arbitration Profile
96	Ukraine	23-07-2018	08-08-2019	01-12-2019			
97	United Arab Emirates	27-06-2018	29-05-2019	01-09-2019			
98	United Kingdom	07-06-2017	29-06-2018	01-10-2018			28-06-2022
99	Uruguay	07-06-2017	06-02-2020	01-06-2020			
100	Viet Nam	09-02-2022					

The following jurisdictions have expressed their intent to sign the Convention:

- Algeria
- Eswatini
- Lebanon

Table 4 – List of Members of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes – Last Update May 2023.

The 168 members of the Global Forum on Transparency and Exchange of Information for Tax Purposes

Last update: May 2023

Albania	Djibouti	Liberia	Saint Vincent and the Grenadines
Algeria	Dominica	Liechtenstein	Samoa
Andorra	Dominican Republic	Lithuania	San Marino
Angola	Ecuador	Luxembourg	Saudi Arabia
Anguilla	Egypt	Macau, China	Senegal
Antigua and Barbuda	El Salvador	Madagascar	Serbia
Argentina	Estonia	Malaysia	Seychelles
Armenia	Eswatini	Maldives	Sierra Leone
Aruba	Faroe Islands	Mali	Singapore
Australia	Finland	Malta	Sint Maarten
Austria	France	Marshall Islands	Slovak Republic
Azerbaijan	Gabon	Mauritania	Slovenia
Bahamas	Georgia	Mauritius	South Africa
Bahrain	Germany	Mexico	Spain
Barbados	Ghana	Moldova	Sweden
Belarus	Gibraltar	Monaco	Switzerland
Belgium	Greece	Mongolia	Tanzania
Belize	Greenland	Montenegro	Thailand
Benin	Grenada	Montserrat	Togo
Bermuda	Guatemala	Morocco	Trinidad and Tobago
Bosnia and Herzegovina	Guernsey	Namibia	Tunisia
Botswana	Guinea	Nauru	Türkiye
Brazil	Guyana	Netherlands	Turks and Caicos Islands
British Virgin Islands	Haiti	New Zealand	Uganda
Brunei Darussalam	Honduras	Niger	Ukraine
Bulgaria	Hong Kong, China	Nigeria	United Arab Emirates
Burkina Faso	Hungary	Niue	United Kingdom
Cabo Verde	Iceland	North Macedonia	United States
Cambodia	India	Norway	Uruguay
Cameroon	Indonesia	Oman	Uzbekistan
Canada	Ireland	Pakistan	Vanuatu
Cayman Islands	Isle of Man	Palau	Viet Nam
Chad	Israel	Panama	Zimbabwe
Chile	Italy	Papua New Guinea	
China (People's Republic of)	Jamaica	Paraguay	
Colombia	Japan	Peru	
Congo (Republic of the)	Jersey	Philippines	
Cook Islands	Jordan	Poland	
Costa Rica	Kazakhstan	Portugal	
Côte d'Ivoire	Kenya	Qatar	
Croatia	Korea	Romania	
Curaçao	Kuwait	Russian Federation	
Cyprus	Latvia	Rwanda	
Czech Republic	Lebanon	Saint Kitts and Nevis	
Denmark	Lesotho	Saint Lucia	The European Union fully participates in Global Forum work

Observers

The Global Forum has 23 observers, listed below in alphabetical order:

1. African Development Bank
2. African Tax Administration Forum

3. African Union Commission
4. Asian Development Bank
5. Asian Infrastructure Investment Bank
6. Caribbean Community
7. Cercle de Réflexion et d'Échange des Dirigeants des Administrations Fiscales
8. Commonwealth Secretariat
9. Council of Europe Development Bank
10. European Bank for Reconstruction and Development
11. European Investment Bank
12. Financial Action Task Force
13. Inter-American Center of Tax Administrations
14. Inter-American Development Bank
15. International Finance Corporation
16. International Monetary Fund
17. Intra-European Organisation of Tax Administrations
18. Pacific Islands Tax Administrators Association
19. Study Group on Asia-Pacific Tax Administration and Research
20. United Nations
21. West African Tax Administration Forum
22. World Bank Group
23. World Customs Organisation

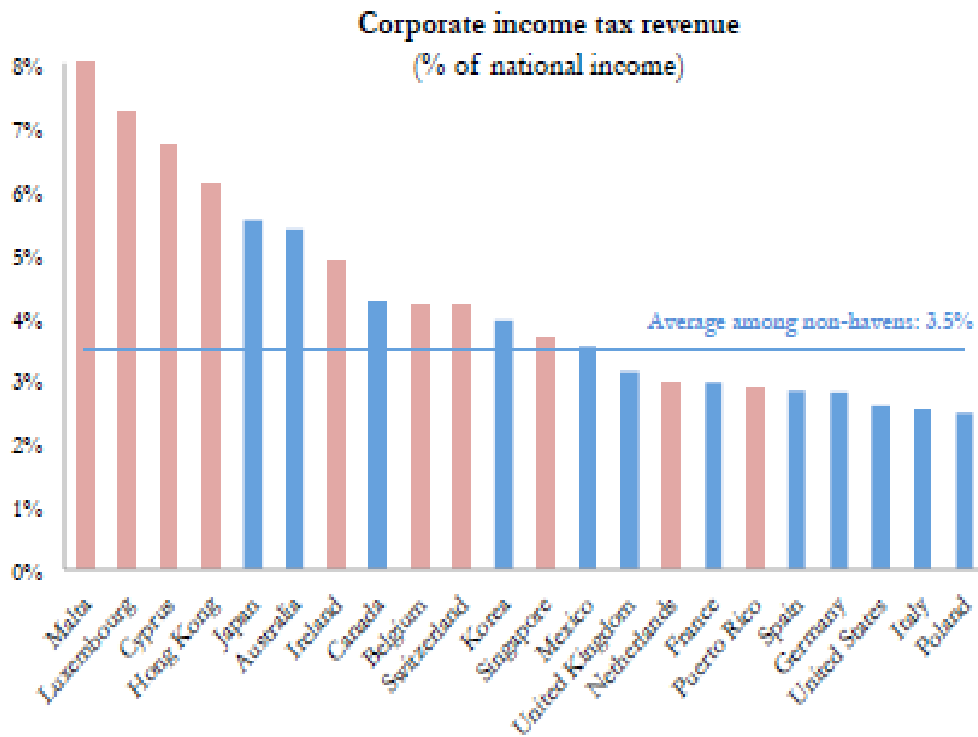
Table 5 – Profitability in Tax Havens ***(Tax haven characteristics of selected countries*****).**

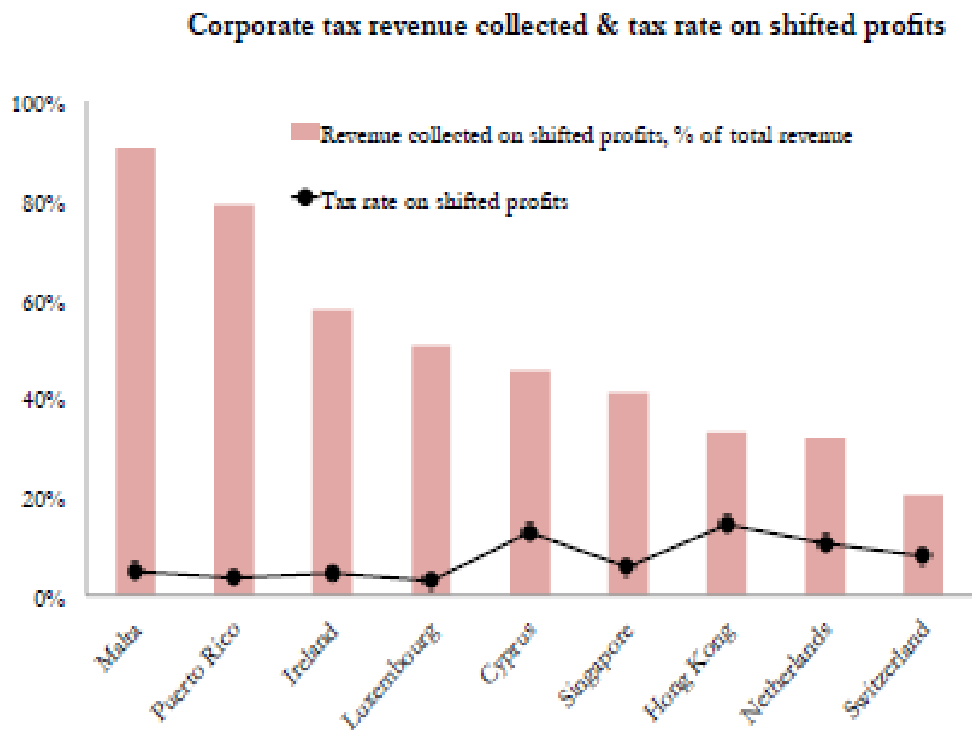
Countries	CIT stat	CIT eff	FSI	TIEAs number	TH-score
Columns	(1)	(2)	(3)	(4)	(5)
Anguilla	0	0	78.2	16	100.00
Bermuda	0	0	72.73	22	100.00
British Virgin Islands	0	0	71.3	20	100.00
Cayman Islands	0	0	76.08	20	100.00
Gibraltar	10	5	69.48	19	65.59
Guernsey	0	0	70.65	18	97.50
Isle of Man	0	0	64.68	16	100.00
Panama	25	5	71.88	1	71.78
Average 21 Tax havens	*11.05*	*2.48*	*71.12*	*13.52*	*82.81*
Median 21 Tax Havens	*10.00*	*3.00*	*71.88*	*18.00*	*72.84*
Hong Kong	16.5	18	66.38	0	73.03
Ireland	12.5	4	48.15	17	75.67
Luxembourg	28.7	3	55.45	0	72.44
Netherlands	25	10	67.4	26	78.01
Singapore	17	8	64.98	0	81.35
Switzerland	17.9	21	74.05	0	83.31
Average 6 Conduits	*19,69*	*10.80*	*62.74*	*7.16*	*77.30*
Average 9 Conduits	*20.46*	*11.44*	*60.60*	*7.11*	*74.66*
Average 12 Conduits	*21.97*	*12.50*	*58.40*	*6.75*	*71.70*
Median 9 Conduits	*17.9*	*10*	*61.75*	*0*	*73.51*
China	25	20	59.85	2	58.30
France	31	27	49.9	29	55.70
Germany	29.7	11	51.73	16	52.34
Poland	19	10	55.55	0	40.45
USA	27	21	62.89	13	43.21
Average 21 other	*25.04*	*19.80*	*52.33*	*8.86*	*52.65*
Median 21 other	*23.59*	*20.04*	*52.13*	*3.00*	*52.95*

Sources: OECD, KPMG on statutory tax rates (CIT stat), Tørsløv et al. (2020) on effective tax rates in 2015 (CIT effect), Tax Justice Network on F(inancial) S(ecrecy) (I)ndicator and Tax haven score in 2019, and OECD (2011) on number of TIEAs (tax information exchange agreements). Annex 1 shows an extended table of 21 tax havens, 12 conduits, and 21 other (developed) countries.

Note: Excerpt from Lejur A., *The Role of Conduit Countries and Tax Havens in Corporate Tax Avoidance*, e. (CentER Discussion Paper; Vol. 2021-014). CentER, Center for Economic Research. p. 9.

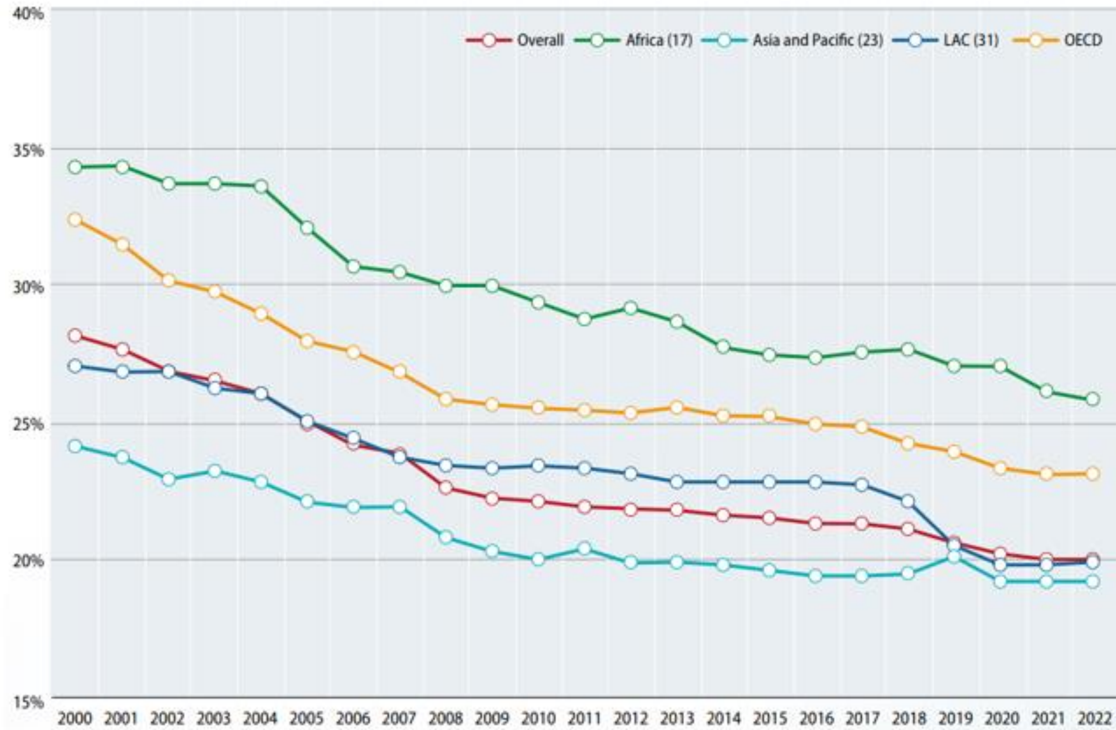
Figure 1 - Corporate Tax Revenue in Tax Havens.





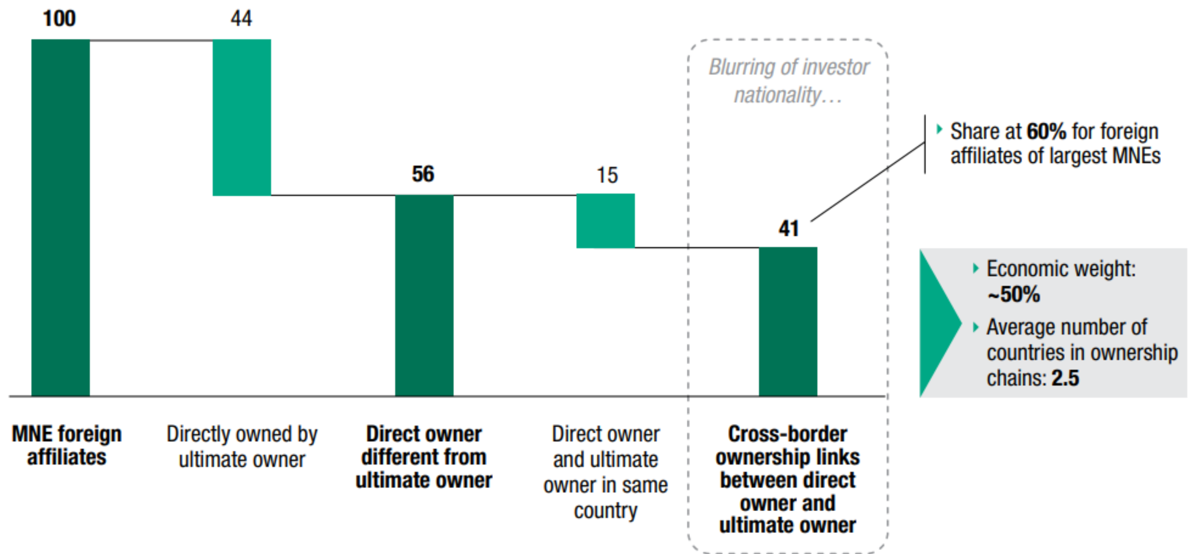
Note: Excerpt from the National Bureau of Economic Research WP Series, n. 24701 /2020 edited by Thomas R. Tørsløv, Ludvig S. Wier, Gabriel Zucman, "The Missing Profits of Nations", in June 2018, revised in April 2020, by NBER 1050 Massachusetts Avenue, Cambridge, MA 02138, United States of America, Figure 10.

Figure 2 - Average statutory corporate income tax rates by region from 2000 to 2022.



Note: Excerpt from OECD, Corporate Tax Statistics, Fourth Edition, Paris-Cedex, 2022, Figure 6, p. 12.

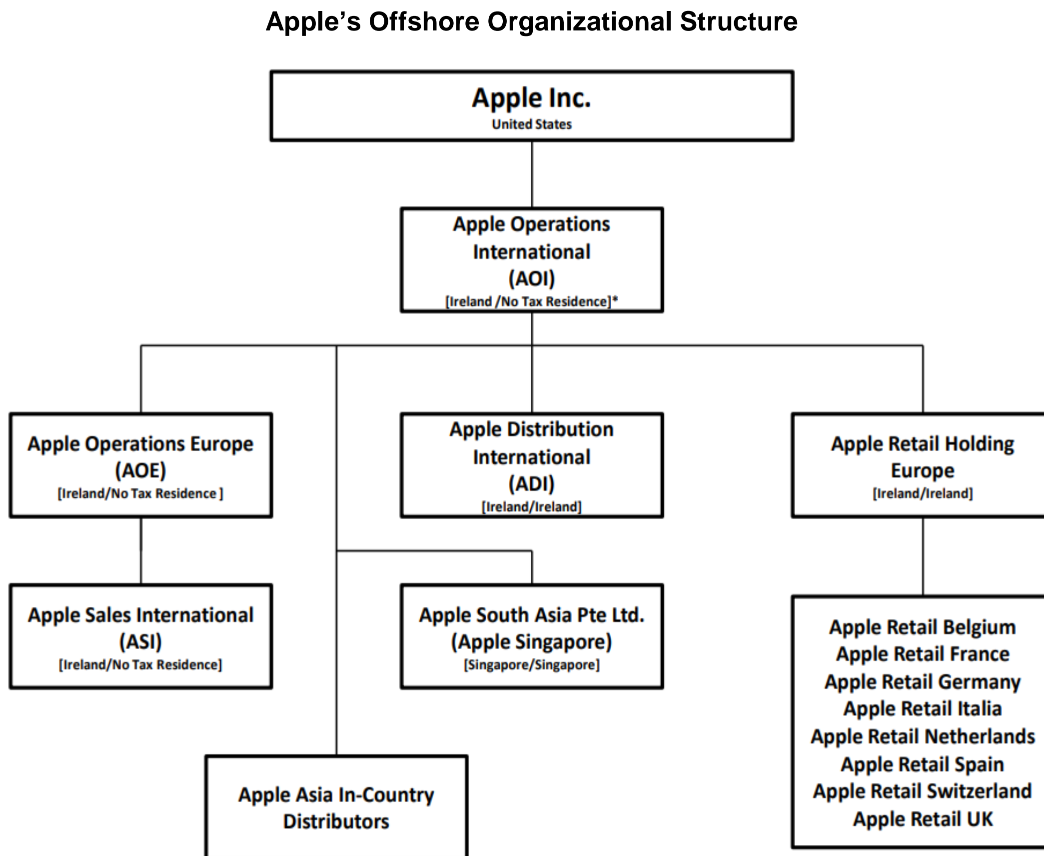
Figure 3 - Complex Ownership of MNE foreign affiliates.



Source: ©UNCTAD analysis based on Orbis data (November 2015).
Note: Analysis based on a global sample of 720,000 foreign affiliates. The economic weight is computed using reported revenues. The share at 60 per cent for the largest MNEs is calculated based on foreign affiliates of UNCTAD's Top 100 MNEs (the largest MNEs ranked by transnationality, i.e. foreign assets, foreign sales and foreign employment).

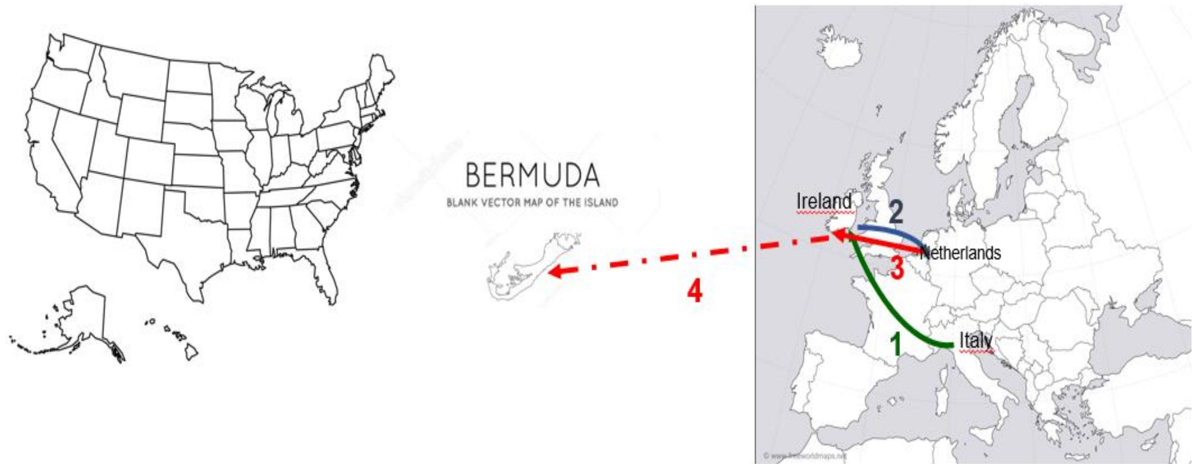
Note: Excerpt from UNCTAD World Investment Report Investor Nationality: Policy Challenges, Geneva, 2016, p. 125.

Figure 4 - Using Offshore Affiliates to Avoid U.S. Taxes (Apple Case).



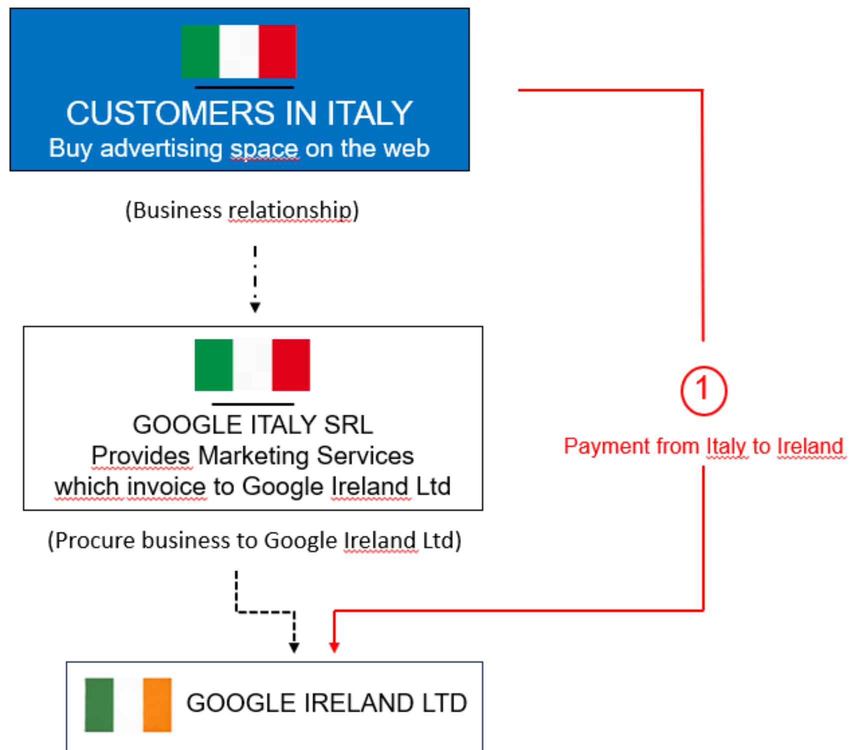
Note: Excerpt from U.S. SENATE Permanent Subcommittee on Investigations, of the Committee on Homeland Security and Governmental affairs, *Offshore Profit Shifting and the U.S. Tax Code - Part 2 (Apple Inc.),* Memorandum, Chapter III (Apple Case Study), *Washington D.C.*, May 21, 2013, p. 20.

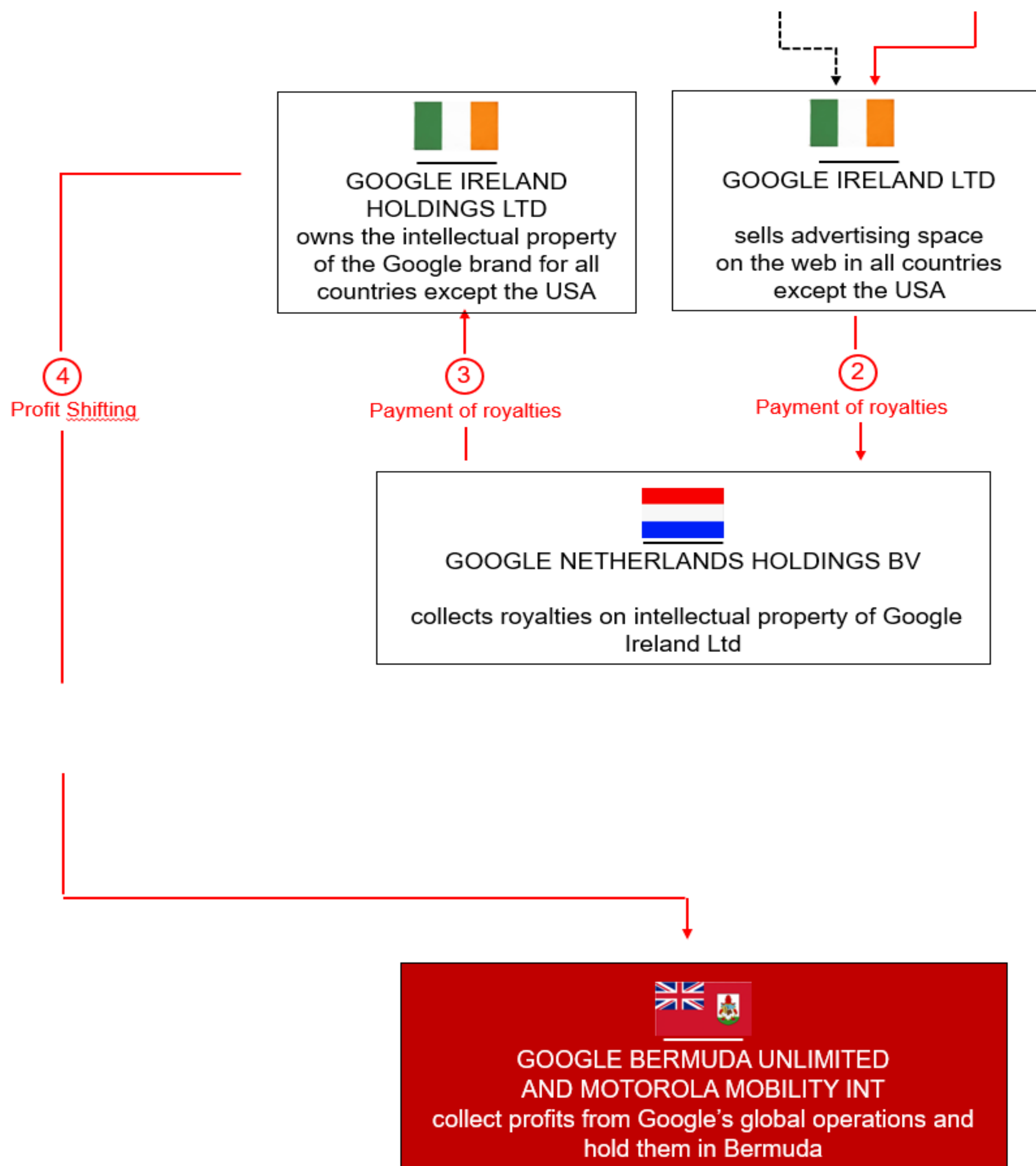
Figure 5 - From Italy to Bermuda (Google Case)



LEGENDA:

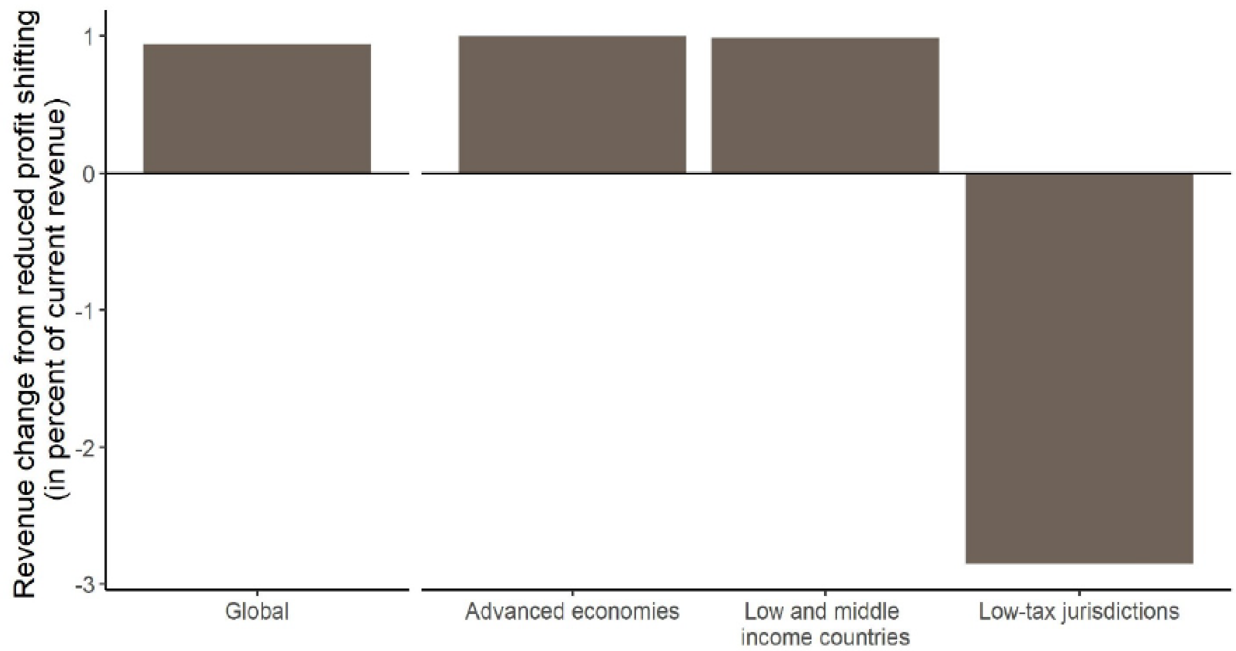
1. Payments from Italy to Ireland
2. Payment of royalties
3. Payment of royalties
4. Profit transfer





Note: The figures reproduce and translate the scheme of MINCUZZI A., *Google fa pace (dopo un anno) con il Fisco italiano: pagherà 306 milioni di euro*, in Sole 24 Ore – Norme & Tributi, 4 May 2017.

Figure 6 – The Impact of Pillar 2 on Profit shifting gains and losses

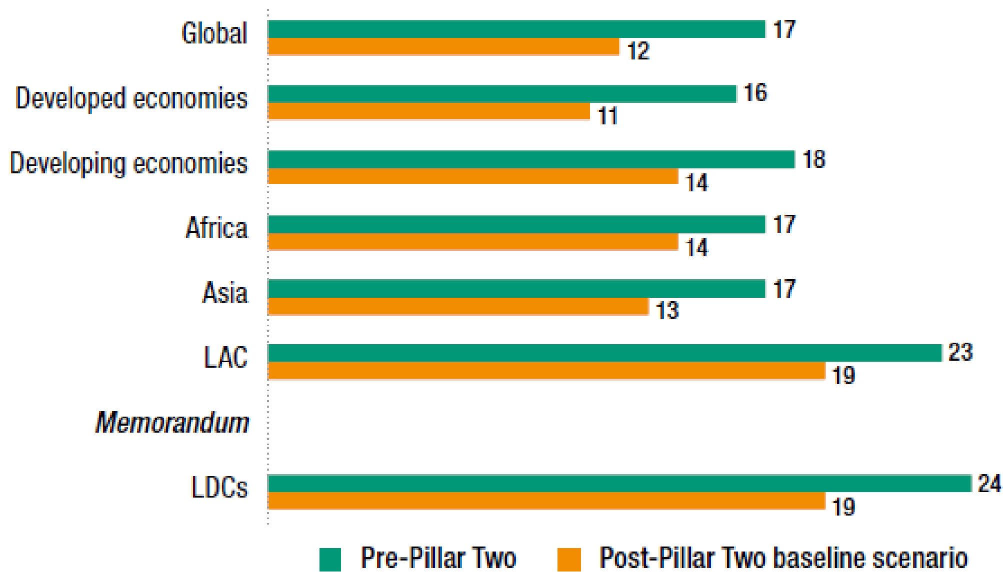


Source: IMF Staff estimates.

Notes: Graph shows weighted average gains and losses from changed profit-shifting behavior. Low-tax jurisdictions include 19 jurisdictions with statutory tax rates below 15 percent. The remaining countries are grouped into 34 advanced economies and 116 low and middle-income countries.

Note: Excerpt from IMF, International Corporate Tax Reform, Washington D.C., February 2023, Figure 2, p. 16.

Figure 7 – Pre- and post- Pillar Two profit shifting shares (Percentage)



Source: Authors' calculations.

Note: Green bars represent pre-Pillar Two profit shifting shares. They also represent post-Pillar Two profit shifting shares, assuming no profit shifting response, as in Hanappi and Cabral (2020) and OECD (2020). Orange bars represent post-Pillar Two profit shifting shares, assuming partial reduction of profit shifting (baseline scenario). FDI-weighted averages. LAC: Latin America and the Caribbean. LDCs: least developed countries. Offshore financial centres are excluded since we assume no profit shifting out of offshore financial centers (assumption 3).

Note: Excerpt from CASELLA B., SOUILLARD B., *A new framework to assess the fiscal impact of a global minimum tax on FDI*, in Transnational Corporations, Volume 30, 2022, No. 2, p. 127.