Tax Nexus and Jurisdiction in International and EU Law

Editor: **Edoardo Traversa**

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Why this book?
Since the foundation of the international tax regime, the concept of "nexus" has played a key role in the developments of international and EU tax law. The exercise of fiscal sovereignty requires a connecting factor, or nexus, between the taxable event and the state collecting the tax, which may take different forms, with residence and source being the most common criteria. In the wake of the BEPS initiative, the debate around nexus has been revived due to the proliferation of aggressive tax planning strategies, the ever-increasing exploitation of intangibles by MNEs and the use of base and conduit companies. Under EU law, the nexus has acquired special significance with regard to the territorial application of common EU tax rules contained in EU corporate income tax directives, VAT directives or even customs duties regulations, as well as in relation to the tax-based resources of the EU budget.

This book is composed of 11 chapters, written by established and uprising scholars from different EU Member States. They comprehensively discuss the foundations of the jurisdiction to tax and the forms of nexus requirements in international and EU tax law. The purpose of the book is to provide academics, tax authorities and practitioners with a comprehensive examination of the nexus by distinguishing all the relevant concepts according to the different taxes that come into play from both a theoretical and a practical perspective, with special attention paid to the latest developments, in particular, the OECD's Pillar One and Two initiatives. It is based on the presentation made during the 15th GREIT conference, organized by Edoardo Traversa and hosted by the Research Center on Law, Economy and Society (CRIDES) of UCLouvain (Belgium)

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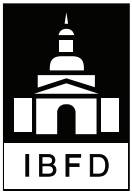

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Table of Contents

Foreword

Albeit relatively novel terminology, the concept of "nexus" is inherently connected to the developments of international and EU tax law and has been somewhat present since the 1920s, when the international tax regime is believed to have taken shape. Since then, indeed, it has been widely advocated in literature (and in case law) that the exercise of fiscal sovereignty is somehow influenced by the need for there to be a connecting factor, or nexus, between the taxable event and the state purporting to exercise its taxing rights. In the last decades, this debate has significantly surged due to the proliferation of aggressive tax planning strategies and the ever-increasing exploitation of immaterial (and, thus, highly volatile) production factors by multinational enterprises. This latter element in particular has led to the rethinking of some fundamental international tax concepts that seemed unshakeable until just a few years ago.

This book explores the essential concepts concerning the notion of nexus in the digitalized economy and, therefore, the potential constraints that might prevent sovereign states from exercising their jurisdiction to tax. Being mindful of its international and EU traits, the purpose of this book is to provide the reader with a comprehensive examination of nexus by distinguishing all the relevant concepts according to the different taxes that come into play. Although this notion is a rudimentary element that all those operating in the tax law field handle nearly on a daily basis, it is not, in fact, easy to properly interpret (and clearly understand) the tax rules contingent upon nexus, as its contours have, over time, become more and more evanescent, remarkably by virtue of its progressive departure from certain traditional elements, such as the idea of territory in its taken-for-granted significance.

Chapter 1 of the book (Kokott) offers a perspective on the definition of "nexus" from the viewpoint of international public law. The concept of a "genuine link" is not only used to demarcate the jurisdiction to tax in its prescriptive and enforcement dimensions, but also in all those frequent hypotheses – concerning whatever area of law – in which different jurisdictions intend to exert their sovereign powers over a certain person or event on the assumption that such person or event proves to have a sufficient connection with the state. In this regard, the genuine link, or nexus, may be deemed a medium that helps avoid interferences with the exercise of taxing powers by multiple jurisdictions. In developing this perspective, the author engages with traditional concepts, such as the relationship between nexus and different types of jurisdictions, as well as the notion of single taxation,

and innovative concepts, such as today's blurred definition of territoriality and the idea of the market as a nexus in the context of new "hybrid" taxes.

Chapter 2 (Gadžo) delves into this very idea (i.e. the market as a nexus) and develops a comparison between the approach adopted in the pre-BEPS era and that endorsed following the advent of BEPS 2.0 (notably, Pillar One). In particular, this chapter highlights the steps that may have led to the idea that market states may exert a legitimate taxing claim regardless of any further points of reference that a taxpayer has in their territory. In doing so, the author provides various examples of market-based source rules found in bilateral tax treaties and inspects the concept of the source of income, also discerning the "supply approach" from the "supply-demand approach". In addition, the chapter seeks to shed light on the role played by the notion of "permanent establishment" at the conventional level and its relationship with market-based taxation. Along the same lines, chapters 3 and 4 (Otto and Van de Vijver and Monsenego) discuss the role of market states in the digitalized economy and the concept of nexus from a transfer pricing angle, respectively. The purpose of these chapters is to develop an analytical framework to investigate how Pillar One building blocks effectively contribute to a fairer and more efficient allocation of taxing rights among jurisdictions – paying special attention to the principles that legitimize the allocation of Amount A – and to draw a comparison between the allocation of profits before and after the BEPS 2.0 reform, while focusing on the role of the arm's length principle in the Pillar One context.

Chapter 5 (Buitrago) investigates some issues underlying nexus in the context of BEPS Actions 1 and 5, as both Actions, despite being independent from each other and aiming at different challenges, produce significant impacts on intangibles. Just as BEPS Action 1 is aimed towards the digital economy (and, thus, towards business that is dependent on intangibles), BEPS Action 5, in dealing with harmful tax practices, requires jurisdictions offering intellectual-property-related propitious regimes to demand from the taxpayer a certain degree of research and development as substantial activity taking place within the jurisdiction granting the incentive, thereby entailing a nexus. The author presents an in-depth analysis of the relationship between nexus and innovation and seeks to evaluate the extent to which such global reform has the potential to promote or hamper innovation, while touching upon economic concepts relating to the theory of innovation.

Chapter 6 (Pascucci) closes the first part of the book, concerning nexus in its international dimension, and scrutinizes the effects of Pillar Two (or GloBE) on the (re)allocation of taxing rights between source and residence

states. Despite the fact that Pillar Two does not provide for a "new" nexus, as occurs under Pillar One, the time-honoured rules governing the allocation of taxing powers are, nevertheless, altered due to the implementation of the GloBE rules, as residence states will be granted additional taxation (in the form of a top-up tax) whenever source states do not adequately tax business income. More specifically, this chapter purports to explore the origins and evolution of business income taxation throughout the 20th century, especially from a source-residence perspective, and seeks to single out the arguments that might have eventually led a vast majority of sovereign countries to introduce a global minimum tax.

Chapters 7 and 8 (Brokelind and Pistone) analyse the concept of nexus in the EU dimension and discuss the legal constraints under EU law in detail. In particular, chapter 7, after commenting on certain background issues on the notion of nexus, analyses the limitations under EU law and offers examples from EU secondary legislation – especially in the field of financial transaction taxes – to examine the notions of sovereignty and (extra)territoriality and their relationship with digital-based income taxation. Chapter 8, on the other hand, introduces observations concerning the policy rationales that have prompted jurisdictions to stretch the concept of nexus and explores possible avenues for reform within the European Union. In doing so, the author also discusses the lack of a shared approach at the EU level when it comes to identifying the connecting factors and provides a series of examples concerning both direct and indirect taxes to emphasize the importance of consensus as regards nexus.

The area of indirect taxation and customs duties are discussed in chapters 9 and 10 (Senyk and Masseglia). In particular, chapter 9 comments on the challenges stemming from the digital economy from a VAT standpoint and, particularly, the new EU VAT rules extending obligations to digital platforms that facilitate online supplies of goods. In this context, the problems in terms of nexus require specific observations in consideration of VAT's distinctive nature and the presence of hypotheses of (extra)territorial taxation, which are globally justified by the destination principle (implying final consumption being taxed in the jurisdiction where it occurs). Chapter 10 specifically concerns customs duties, not only evaluating their international dimension, but also investigating the EU framework, given the exclusive competence of the European Union in the field of customs law. The customs experience also provides unique insights in terms of nexus due to its peculiarities (e.g. the relevance of borders and the criterion of the origin of goods). Additionally, customs duties offer meaningful lessons regarding the harmonization of the notion of nexus at the EU level, as EU customs law is,

no doubt, the most coordinated field of EU tax law, both from a legislative and a procedural standpoint.

Chapter 11 (Traversa) completes the whole picture and takes on a singular perspective on nexus by addressing some issues that might emerge from the interconnection between the development of tax harmonization among EU Member States' domestic tax systems and the financing of the EU budget through tax-based own resources. At the EU level, alongside the traditional problems concerning nexus (i.e. prescriptive and enforcement jurisdiction to tax), there appear to be two further dimensions, borrowed from the theory of fiscal federalism, that form a four-faceted conundrum. These are the territorial dimension of the EU "internal market" (which represents the criterion used to attribute competences to the European Union in the area of taxation) and the territorial dimension of the own-resources funding of the EU budget. More specifically, while evaluating this last dimension, the author inspects the evolution of the own-resources system from the dawn of the European Community to today's elements that contribute to the EU budget and offers a nexus perspective on possible reforms at the EU level that might lead not only to the introduction of additional EU own resources, but also to the debut of genuine EU taxes.

Most of the contributions are based on presentations held during the 15th Conference of the Group for Research on European and International Taxation (GREIT) on 17-18 September 2020 and hosted by the Research Center on Law, Economy and Society (CRIDES) of UC Louvain (Belgium).

Edoardo Traversa, Fabrizio Pascucci and Elena Masseglia

Chapter 1

Public International Law and Taxation: Nexus and Territoriality

J. Kokott

1.1. Introduction

The GREIT annual research theme of A Common Nexus Rule in International Tax Law touches upon two legal disciplines: tax law and public international law. "Nexus" is the term used in tax law for the genuine link that public international law generally requires for the exercise of jurisdiction. Therefore, nexus is a fundamental concept both of public international law and of tax law. The two academic communities generally operate apart from each other. The internationalization of tax law requires, however, the integration of public international law and tax law. The current system of international taxation was framed in the 1920s on the basis of public international law.[1] However, in 1938, the International Fiscal Association split from the International Law Association (ILA), and two separate communities were established. This did not make sense, as taxpayers' rights, nexus, fairness in international relations, mutual agreement procedures and arbitration are all matters of public international law rather than technical matters to be left to the fiscal experts and the OECD only. Therefore, a committee within the ILA was recently established. It has been dealing with taxpayers' rights (Part One of its research), then with tax nexus (Part Two) and, finally, with mutual agreement procedures and arbitration (Part Three). In the first part of its research, that committee aimed at putting taxpayers' rights on the global agenda, counterbalancing the current BEPS discussion, with its focus being on combating fraud and abuse.[2] The second phase now takes

1. S. Jogarajan, *Double Taxation and the League of Nations* (Cambridge University Press 2018). *See also* E. Gil García, *The Single Tax Principle: Fiction or Reality in a Non-Comprehensive International Tax Regime?*, 11 World Tax J. 3 (2019), Journal Articles & Opinion Pieces IBFD; and R. Mason, *The Transformation of International Tax*, 114 AJIL 3, p. 353 et seq., sec. F. (2020).

2. For a short introduction, *compare* J. Kokott, P. Pistone & R. Miller, *Public International Law and Tax Law: Taxpayers' Rights – The International Law Association Project on International Tax Law: Phase 1*, 52 Georgetown Journal of International Law 2, p. 381 (2021). For the Italian and German versions, *see Diritto internazionale pubblico e diritto tributario: i diritti del contribuente*, XVII Diritto e Pratica Tributaria Internazionale

up the legitimate reasons behind BEPS, that is, adapting nexus to the new digitalized economy and fair taxation.

This chapter is important for applying nexus as developed under public international law to taxation. It will be shown that the most important basis for (tax) jurisdiction, i.e. territoriality, has undergone substantial change. The new territoriality has to be understood broadly, and the difference between territorial and extraterritorial jurisdiction is blurred.

1.2. New concepts in international tax law

The implementation of the OECD BEPS initiative is expected to generate a new tax order.[3] Besides combating fraud and abuse, its main elements are single or full taxation, minimum taxation and the adaptation of nexus to the new digitalized economy. The current combating of tax avoidance indicates that the focus of international tax law has shifted from avoiding double taxation to avoiding double non-taxation. Taken together with the bilateral tax agreements established for avoiding double taxation, this may lead to single taxation.

The author will first shortly address the concepts of single and minimum taxation (*see* sections 1.2.1. and 1.2.2.). Then, she will focus on nexus and its different requirements and on the new broader concept of territoriality as a nexus (*see* section 1.3.) before concluding (*see* section 1.4.).

1.2.1. The concepts of single or full taxation

Non-taxation, just like double or multiple taxation, results from the interplay of different tax regimes of states in the absence of coordination and harmonization. Taxpayers benefiting from double non-taxation do not necessarily act illegally, even when the non-taxation is planned. The fact that states do not succeed in coordinating their systems is not the taxpayers' responsibility.[4] Non-taxation, and double taxation are two sides of the same

(2020); and *Völkerrecht und Steuerrecht – Die Rechte der Steuerpflichtigen*, 97 Steuer und Wirtschaft (StuW) (2020).

3. X. Ditz & R. Pinkernell, *Die neue "Weltsteuerordnung" rückt näher: OECD veröffentlicht Blueprints zu den Säulen 1 und 2*, 9 ISR 12, p. 417 (2020); and Mason, *supra* n. 1, at p. 353 et seq., sec. V. ("seismic shifts in international tax law").

4. *See also* Mason, id., at p. 353 et seq., sec. 3 (legality of tax gaps); and F.D. Martínez Laguna, *Abuse and Aggressive Tax Planning: Between OECD and EU Initiatives – The*

coin:[5] Neither one nor the other is legally prohibited, as there is no clear responsibility for such unwanted phenomena. Moreover, single taxation still leaves open the question of where to tax. It is becoming more and more difficult in the digital world to determine where a company's real business activities take place.

However, avoiding double taxation has been a long-standing and very important objective of European and international tax law,[6] and more recently, single/full taxation has become another such objective.[7] Both avoiding double taxation and single/full taxation moreover correspond to the principle of the ability to pay.[8]

1.2.2. The concept of minimum taxation

Minimum taxation means coordinated controlled foreign corporation (CFC) taxation. CFC regimes trigger additional taxation of the parent company in its residence state when there has been (in the parent company state's view) insufficient taxation of the foreign controlled company in that company's residence state. Minimum taxation involves the determination of a tax rate that is considered "insufficient" internationally. It will be more difficult for multinationals to avoid such coordinated legislation than it will be for a particular state's CFC regime.[9] However, the tax base still leaves room for unwanted tax planning. Therefore, a harmonized tax base would be very useful.

The implementation of international minimum taxation can only take place in accordance with EU law. In the *Cadbury Schweppes* case, the Court of Justice of the European Union held that CFC legislation violates the fundamental freedoms unless it "relates only to wholly artificial arrangements

Dividing Line between Intended and Unintended Double Non-Taxation, 9 World Tax J. 2, p. 189 et seq., sec. 1. (2017), Journal Articles & Opinion Pieces IBFD ("due consequence of the proper application of the law in cross-border situations").

5. *See also* Gil García, *supra* n. 1, at sec. 3.

6. *Compare* J. Kokott, *EU Tax Law* (2022); R. Avi-Jonah, *Who Invented the Single Tax Principle? An Essay on the History of U.S. Treaty Policy*, 59 N.Y.L. Sch. L. Rev. 2, p. 305 (2014/2015); and, critical, id., at p. 497.

7. Supposedly accepted as a norm; *compare* Mason, *supra* n. 1, at p. 353 et seq., sec. C.

8. DK: Opinion of Advocate General Campos Sánchez-Bordona, 1 Jan. 2018, Case C-650/18, *Bevola*, para. 37 et seq.

9. Mason, *supra* n. 1, at p. 353 et seq., sec. 3. (Fiscal Fail-Safes).

intended to escape the national tax normally payable".[10] Whether the same would apply to internationally agreed minimum taxation – possibly implemented by EU secondary law – is still an open question.[11]

Minimum taxation inhibits competition by clawing back the benefit of low tax rates or tax holidays.[12] On the other hand, one could see this effect as contributing to a fair international tax regime.

Finally, non or low taxation is a choice and a way to exercise tax sovereignty. A duty to tax that underlies the concept of minimum taxation would restrict that sovereignty.[13] However, under the planned minimum taxation regime, states are not legally obliged to impose taxes. Moreover, they can always agree not to accept double (non) taxation.

Minimum taxation is new insofar as extraterritorial revenue is taxed only because the state where it is generated does not tax it sufficiently.

1.3. Nexus/genuine link

A "nexus", or genuine link, under public international law is a means to delimit the jurisdiction of states with regard to the exercise of state power in all kinds of areas,[14] including taxation.[15] Requiring a genuine nexus helps avoid situations in which every state exercises its jurisdiction everywhere. Theoretically, the jurisdiction of states could be universal and only limited by the jurisdiction of other states.[16] However, the prevailing approach today is that states only have jurisdiction to prescribe, legislate and enforce their

10. UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, para. 76, Case Law IBFD.
11. *Compare* J. Englisch & J. Becker, *International effective minimum taxation – the GLOBE proposal*, sec. VI. (11 Apr. 2019), available at https://ssrn.com/abstract=3370532 (accessed 17 May 2022).
12. Mason, *supra* n. 1, at p. 353 et seq., sec. 3. (Fiscal Fail-Safes).
13. *Compare* Martínez Laguna, *supra* n. 3, at p. 189; and Gil García, *supra* n. 1, at sec. 3.2.1.3.
14. F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 Recueil des Cours, pp. 1 et seq. and 15 (1964).
15. Id. at pp. 1 et seq. and 15; C. Braumann, *Taxes and Custom: Tax Treaties as Evidence for Customary International Law*, 23 Journal of International Economic Law 3, p. 747 et seq. (2020); and J. Kokott, *The "Genuine Link" Requirement for Source Taxation in Public International Law*, in *Tax and the Digital Economy* p. 9 et seq. (W. Haslehner, G. Kofler & K. Pantazatou eds., Wolters Kluwer 2019).
16. *Compare*, e.g. UK: Opinion of Advocate General Jääskinen, 20 Nov. 2014, Case C-507/13, *United Kingdom v. Parliament and Council*, para. 37; and Sternberg, *Die extraterritoriale Besteuerungsgewalt des Staates* p. 159 et seq. (Duncker & Humblot 2019).

rules and to adjudicate with regard to persons and events to which they have a sufficient link or nexus.[17] The generally recognized connections are territory, effects within the territory, active and passive personality and protection.[18]

Globalization increases the occurrence of multiple nexus, meaning that several states have to coordinate their overlapping jurisdictions. This can be done by finding a hierarchy between different types of nexus[19] by identifying the dominant or effective nexus, as in the law of diplomatic protection,[20] or by relying on soft concepts, such as "jurisdictional reasonableness" or comity. Comity is based on courtesy, tradition, goodwill or utility. However, comity is only enshrined in rules of tradition or usage.[21] Similar to the other concepts, the rule of reason aims at identifying the state with the strongest connection to the situation in terms of contacts or interests.[22]

Non-taxation by another state certainly does not create a nexus. However, when there is a sufficient nexus with more than one state, as in CFC or minimum taxation situations, non-taxation by the other state(s) strengthens the legitimacy of the taxing state to exercise its jurisdiction.[23]

17. M. Kamminga, *Extraterritoriality*, para. 9 et seq. (Max Planck 2020); B. Oxman, *Jurisdiction of States*, para. 10 et seq. (Max Planck 2007); and American Law Institute, Restatement of the Law 4th, § 402 (2018).
18. American Law Institute, id., at Introductory Note 1 and § 407; DE: *Strafgesetzbuch* [Criminal Code] secs. 3-7; and Oxman, id., at margin no. 4 et seq. For the jurisdiction to protect, *see*, e.g. DE: ECJ, 23. Apr. 2015, Case C-424/13, *Zuchtvieh-Export GmbH* (in that case, relating to protecting animals).
19. There are arguments that, in general, territorial jurisdiction is primary and that extraterritorial jurisdiction must be restrained in deference to the policies of the state where the act or omission occurs. *Compare* Oxman, *supra* n. 17, at para. 51.
20. Article 7 Draft Articles of the ILC on Diplomatic Protection, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (2006); and J. Dugard, *Diplomatic Protection*, para. 26 et seq. (Max Planck 2021),
21. *Compare* J. Kämmerer, *Comity* (Max Planck 2020).
22. C. Ryngaert, *The concept of jurisdiction in international law*, in *Research Handbook on Jurisdiction and Immunities in International Law* pp. 50 et seq. and 62 et seq. (A. Orakhelashvili ed., Edward Elgar 2015).
23. This is in line with concept of subsidiary jurisdiction in international law. *Compare* id., at pp. 50 et seq. and 67 et seq.

1.3.1. Nexus and its different requirements, depending on the type of jurisdiction

1.3.1.1. Stricter requirements for enforcement

The requirements for affirming a sufficient link depend on the type of jurisdiction in question.[24] The closest link is necessary when a state takes enforcement measures in another state. A lesser link is sufficient as a basis for the jurisdiction to prescribe[25] or where the courts of one state adjudicate cases or events that took place in another state. This is logical: taking enforcement measures in other states interferes much more with the sovereignty of those other states than making laws or judgments that are supposed to apply in other states. The American Law Institute's Restatement of the Law 4th provides "jurisdiction to enforce in the territory of other states [only] with the consent of those other states".[26] It is indeed generally recognized that each state has a monopoly on the exercise of governmental power within its borders, and no state may perform an act in the territory of a foreign state without consent.[27] Even within the European Union, agreement between the Member States remains the basis for foreign tax officials' participation in joined audits, and, in principle, those foreign tax officials cannot take enforcement measures.[28]

Therefore, finding a sufficient nexus for taxing foreign residents abroad on the basis of a significant digital presence or the marketplace principle (jurisdiction to prescribe) does not mean that revenue can effectively be collected (jurisdiction to enforce). Obtaining the tax revenue rather requires the

24. *Compare*, e.g. CA: Tax Court of Canada, 1 Apr. 2016, Case 2011-815(SLP)G, no. 17, *Oroville*.
25. Nevertheless, "a genuine connection between the subject of the regulation and the state seeking to regulate" is generally required. *Compare*, e.g. https://www.bundestag.de/resource/blob/631880/60eea4a146277b27b05859405f89559c/WD-2-176-18-pdf-data.pdf (accessed 20 July 2022); Ryngaert, *supra* n. 22, at p. 50 et seq.; and American Law Institute, *supra* n. 17, at Introductory Note 1, § 407. However, *see*, by contrast, Opinion of Advocate General Jääskinen, *supra* n. 16, at para. 36 et seq. *See also* Sternberg, *supra* n. 16, at pp. 216 et seq. and 259 et seq., stating that states' power to legislate extraterritorially is only limited by the prohibition to exercise such jurisdiction arbitrarily or mala fide. *See also* W. Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht/ Extraterritorial Jurisdiction* in Public Economic Law (1994).
26. American Law Institute, *supra* n. 17, at § 431(2).
27. *Compare* id., at § 431 Reporters' Note 1. and § 432; Kamminga, *supra* n. 17, at para. 22; *Oroville* (2011-815(SLP)G), paras. 17 and 27; and Ryngaert, *supra* n. 22, at pp. 50 et seq. and 58 et seq.
28. Council Directive 2011/16 of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64/1, art. 11 (2011), Primary Sources IBFD.

consent and cooperation of the state where the taxpayer is located, or other types of access to the taxpayer's assets.[29]

1.3.1.2. What is "enforcement"?

One may ask whether the prohibition of extraterritorial enforcement also applies to technological remote searches on computer networks located abroad. Is it, for example, legal that Belgian investigating judges may order the copying of data located abroad, provided that the territorial state is merely informed?[30] In any case, such virtual searches carried out by a state with respect to information held on websites, computers or servers located outside its territory are not contested when the information is publicly accessible.[31] Moreover, public international law does not prohibit espionage,[32] although public international law recognizes the right of territorial states to apply their laws to the spies and to punish them.[33] Therefore, it was, for example, considered an unfriendly act – but not a breach of international law – that the United States eavesdropped on Chancellor Merkel's phones in 2013. The same could apply to remote data collection for tax purposes in other states. Even if a special regime for espionage should be recognized based on long-standing state practice, espionage and remote data-gathering for tax purposes could both be based on the protection principle.[34] States need not only protect their security,[35] but also their tax bases. Furthermore, remote data collection is less intrusive than traditional enforcement measures involving the presence of foreign officials within the territory of a state.[36]

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29. *Compare* generally Oxman, *supra* n. 17, at margin no. 4 et seq.
30. BE: *Code d'instruction criminelle* [Code of Criminal Procedure] art. 88ter: "*Lorsqu'il s'avère que ces données ne se trouvent pas sur le territoire du Royaume, elles peuvent seulement être copiées. Dans ce cas, le juge d'instruction communique sans délai cette information au Service public fédéral Justice, qui en informe les autorités compétentes de l'état concerné, si celui-ci peut raisonnablement être déterminé*."
31. *Compare* Ryngaert, *supra* n. 22, at pp. 50 et seq. and 57 et seq.
32. S. Talmon, *Das Abhören der Kanzlerhandys und das Völkerrecht*, BRJ 1, pp. 6 et seq. (2014); and R. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F.L. Rev., p. 217 et seq. (1999).
33. Scott, id., at p. 217 et seq.
34. On espionage, *see* American Law Institute, *supra* n. 17, at § 412, Reporters' Note 2; and E. Rauch, *Espionage*, in *Encyclopedia of International Law II* p. 115 et seq. (R. Bernhardt ed., 1995).
35. *Compare* G. Sulmasy & J. Yoo, *Counterintuitive: Intelligence Operations and International Law*, 28 Michigan Journal of International Law 3, p. 625 et seq. (2007).
36. However, *see* the restrictive definition of the protective principle, even regarding the mere jurisdiction to prescribe, in American Law Institute, *supra* n. 17, at § 412 (Jurisdiction based on the Protective Principle): "International law recognizes a state's jurisdiction to prescribe law with respect to certain conduct outside its territory by persons

The sending of correspondence for the purpose of enforcing revenue laws can amount to exercising enforcement jurisdiction. A distinction should be drawn between documents of notice that merely involve the supply of information with no threat of penalties in the event of non-compliance, on the one hand, and documents involving a compulsory process or containing a command, on the other hand. The latter category is enforcement jurisdiction.[37] Such steps taken to give effect to tax sovereignty in the territory of another state thus require the consent of that territorial state.[38]

Enforcement action against a resident managing director of a non-resident foreign company requires consent by the state of the company's seat:[39] the director only acts as the legal representative of the foreign company.

1.3.1.3. The rule against foreign revenue enforcement

Under the so-called "revenue rule", a state cannot use the courts of another state to collect taxes or to have other contributions made to a foreign state.[40] This rule has been articulated in common law jurisdictions, but courts in civil law countries generally do not enforce foreign tax judgments either. One explanation of that rule is "that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another … is (treaty or convention apart) contrary to all concepts of independent sovereignties".[41]

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not its nationals that is directed against the security of the state or against a limited class of other fundamental state interests, such as espionage, certain acts of terrorism, murder of government officials, counterfeiting of the state's seal or currency, falsification of official documents, perjury before consular officials, and conspiracy to violate immigration or customs law." Similarly, *see* Kamminga, *supra* n. 17, at para. 13, considering the protective principle "a rather uncertain basis for the exercise of extraterritorial jurisdiction".

37. Mann, *supra* n. 14, at p. 9 et seq.

38. M. Akehurst, *Jurisdiction in International Law*, 46 Brit. Y. B. Intl. L., p. 145 (1974); and *Oroville* (2011-815(SLP)G), para. 18 et seq.

39. DE: Fiscal Court/FG Rheinland-Pfalz, 15 Nov. 2017, 1 K 1763/17, para. 18 et seq.

40. US: Supreme Court, 24 Feb. 1930, 281 U.S. 18, *Moore v. Mitchell*; IE: High Court of Justice of Eire, 21 July 1950, [1955] A.C. 516, *Peter Buchanan Ld. and Macharg v. McVey*; and B. Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty First Century*, 16 Duke Journal of Comparative & International Law 1, p. 79 et seq. (2006). On the scope of the revenue role and on indirect enforcement, *see* US: Supreme Court, 26 Apr. 2005, 03-725, 544 U.S. 349, *Pasquantino et al. v. U.S.*

41. UK: UKHL, 20. Jan. 1955 [1955] AC 491, *Government of India v. Taylor*, para. 510 et seq.; and US: Court of Appeal for the 2nd Circuit, 30 May 2001, 268 F.3d 103 (2nd Cir. 2001), *The Attorney General of Canada v. R.J. Reynolds Tobacco Holdings et al. See also* CA: Supreme Court of Canada, 2 Oct. 1963, [1963] SCR 366, *United States of America v. Harden*, para. 371: "[A] foreign State cannot escape the application of this

Furthermore, the courts of one state should not find themselves confronted with having to review the tax laws of another state in order to treat taxpayers fairly. There is also a separation of powers under the revenue rule:

> Extraterritorial tax enforcement directly implicates relations between our country and other sovereign nations. When a foreign nation appears as a plaintiff in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues and disputes of foreign relations policy that are assigned to – and better handled by – the political branches of government. […] To pass [judgment] upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court.[42]

Finally, it has been considered that it "would be remarkable comity if State B allowed the time of its courts to be expended in assisting … the tax gatherers of State A".[43] The collection of foreign tax revenue thus presupposes consent and should be regulated by treaty law.[44]

However, the picture is changing. Even though treaties that include the sharing of information relating to taxable liabilities or for relief from double taxation are still more common than treaties providing for states to enforce each other's tax law,[45] the revenue rule is not part of more recent treaties or soft law. On the contrary, since 2003, the OECD Model Tax Convention on Income and on Capital contains article 27 on assistance in the collection of taxes. Further, in the European Union, the Mutual Assistance Directive covers the recovery of claims.[46] There is growing awareness that the revenue rule facilitates international tax avoidance and that there should be cooperation in this field.[47]

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rule [the special principle that foreign states cannot directly or indirectly enforce their tax claims here], which is one of public policy, by taking a judgment in its own courts and bringing suit here on that judgment. The claim asserted remains a claim for taxes. It has not, in our courts, merged in the judgment; enforcement of the judgment would be enforcement of the tax claim."

42. *Reynolds Tobacco Holdings et al.* (268 F.3d 103 (2nd Cir. 2001)), p. 120 et seq., para. 37 et seq.

43. *India v. Taylor* ([1955] AC 491).

44. *See also Reynolds Tobacco Holdings et al.* (268 F.3d 103 (2nd Cir. 2001)), p. 120 et seq., para. 42 et seq.

45. *Compare* id., at para. 58 et seq.

46. Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L 84/1 (2010), Primary Sources IBFD.

47. UK: UKHL, 16 Feb. 1989, [1990] 1 A.C. 723, In re State of Norway's Application, under sec. B (Tax gathering) and sec. C (Sovereignty); US: Court of Appeal for the 2nd Circuit, 30 May 2001, 268 F.3d 103 (2nd Cir. 2001), *The Attorney General of Canada v. R.J. Reynolds Tobacco Holdings et al.*, p. 120 et seq., para. 74; and American Law Institute, Restatement of the Law 3rd (1987) § 487 Reporters' Note 2: "In an age when

1.3.2. Nexus and its different requirements, depending on the type of tax (and taxpayer)

As set forth by Baker, there are different nexuses for direct and indirect (particularly consumption) taxes.[48]

There seems to be consensus that consumption taxes should be levied by the jurisdiction where the good or service is consumed.[49] The situation is more difficult with regard to income taxes. There, the residence and source principles apply. For legal persons, as also suggested by Baker, the source principle makes more sense than the residence principle: taxing the worldwide income of a company only because it was incorporated or registered in a certain state (incorporation theory) or finding out where its effective management sits (seat theory)[50] and where it is, therefore, resident, is not evident.[51]

However, it is also becoming more difficult to determine the territorial source of income, that is, the state in whose territory the value is actually created. Source rules were more easily applicable in the brick-and-mortar economy as opposed to the digitalized economy. Consequently, determining the nexus for income tax purposes remains a challenge, and no easy solutions are in sight.[52]

VAT, transaction and sales taxes lie in between consumption taxes (easier nexus – the consumer remains material, not digital) and income taxes (more difficult nexus). Also with regard to VAT, the ECJ has stated that "the taxation of trade between the Member States is based on the principle that tax

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virtually all states impose and collect taxes and when instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete." For more references, *see* Mallinak, *supra* n. 40, at pp. 79 et seq. and 115 et seq. *See also* P. Baker, *Changing the Norm on Cross-border Enforcement of Debts*, 30 Intertax 6, p. 216 et seq. (2002).

48. P. Baker, *Some Thoughts on Jurisdiction and Nexus*, in *Current Tax Treaty Issues: 50th Anniversary of the International Tax Group* pp. 441 et seq. and 453 et seq. (G. Maisto ed., IBFD 2020), Books IBFD.

49. OECD, Consumption Tax Trends 2018, VAT/GST and Excise Rates, Trends and Policy Issues, p. 27 et seq., 1.8 (2018); and OECD, *International VAT/GST Guidelines* p. 16 et seq., para. 1.11 et seq. (OECD 2017).

50. For the real seat and incorporation theories, *see* W. Ebke, *The "Real Seat" Doctrine in the Conflict of Corporate Laws*, 36 The International Lawyer 3, p. 1015 (2002).

51. *See also* Baker, *supra* n. 48, at pp. 441 et seq., 455 and 461 et seq.

52. *Compare* Kokott, *supra* n. 15, at p. 9 et seq.

revenues should accrue to the Member State in which the final consumption takes place".[53]

With regard to sales tax, the US Supreme Court more recently reversed its jurisprudence. Until 2018,[54] US states were not allowed to charge sales tax to sellers who did not have a physical presence as a nexus in the state, such as companies offering mail orders, online shopping and home shopping by phone. In its famous *Wayfair* decision of 2018, the Supreme Court gave up the requirement of physical presence as a precondition for imposing sales tax on out-of-state sellers. A certain volume of sales in the state has now become a sufficient nexus for imposing such tax.[55] The US Supreme Court considers the physical-presence rule neither clear nor easy to apply.[56] Requiring physical presence in the past had led to "serious inequity".[57] Therefore, the Supreme Court openly reversed its case law to now allow for the existence of marketplace jurisdictions without the taxpayers' physical presence. The Court literally held that "[e]ach year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States".[58]

Of course, different types of taxes require different types of links. Nevertheless, the *Wayfair* decision is further evidence of the development towards a broader concept of territoriality or, depending on the terminology, even extraterritoriality.[59] That tendency is not restricted to sales taxes, or even to taxes at all.

53. DE: ECJ, 27 Sept. 2007, Case C-146/05, *Albert Collée, as full legal successor to Collée KG v. Finanzamt Limburg a.d. Lahn*, para. 22, Case Law IBFD; and NL: ECJ, 27 Sept. 2007, Case C-184/05, *Twoh International BV v. Inspecteur van de Belastingdienst*, para. 22, Case Law IBFD.
54. US: Supreme Court, 26 May 1992, 504 U.S. 298 (1992), *Quill Corp. v. North Dakota*; and US: Supreme Court, 8 May 1967, 386 U.S. 753 (1967), *National Bellas Hess v. Illinois*.
55. US: Supreme Court, 21 June 2018, 585 U.S. (2018), *South Dakota v. Wayfair*.
56. *Compare* id., at Syllabus.
57. Id.
58. Id., at p. 10.
59. Different definitions of "territorial" and "extraterritorial" can be divergent; *compare* American Law Institute, *supra* n. 17, at Reporters' Note 1.

1.3.3. The new territoriality

1.3.3.1. Territorial or extra-territorial

The principle of territoriality has been the most basic principle of jurisdiction in international law.[60] There is a constitutional attitude against the extraterritorial effects of legislation in several countries.[61]

The principle of territoriality is also at the basis of the ECJ's recognition of exit taxation. The Court held that, "in accordance with the principle of fiscal territoriality linked to a temporal component, namely the taxpayer's residence for tax purposes within national territory during the period in which the capital gains arise, a Member State is entitled to charge tax on those gains at the time when the taxpayer leaves the country".[62] The same is true with regard to the concept of abuse or CFC taxation, which depends on wholly artificial arrangements without a genuine link to the territory. Taxpayers cannot simply choose a tax jurisdiction with which they do not have a genuine link in order to escape taxation in a state that exercises its tax jurisdiction on the basis of such link.

However, the Internet has substantially altered the concept of territoriality, completely blurring the distinction between territoriality and extraterritoriality.[63] A development towards a broad understanding of territoriality[64] or

60. Id.; and *Oroville* (2011-815(SLP)G), para. 35 et seq.
61. *Compare*, e.g. *Oroville* (2011-815(SLP)G), para. 43 et seq.; and US: Supreme Court, 26 Apr. 2005, 544 U.S. 349, *Pasquantino et al. v. U.S.*, dissent [on other grounds] Ginsburg, Breyer, Scalia and Souter. The presumption against extraterritoriality is now being discussed in the pending US Supreme Court case of US: Supreme Court, 11 Jan. 2021, *Nestlé v. Doe and Cargill v. Doe*. *See also* CE: ECtHR, 12 Dec. 2001, Application no. 52207/99, *Branković*, para. 61: "The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case." *See also* Ryngaert, *supra* n. 22, at pp. 50 et seq. and 60 et seq. However, the US citizenship taxation could be explained by the concept of community allegiance; *compare* R. Mason, *Citizenship taxation*, 89 Southern California Law Review 1, pp. 169 et seq. and 196 et seq. (2016).
62. NL: ECJ, 29 Nov. 2011, Case C-371/10, *National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, para. 46, Case Law IBFD; and NL: ECJ, 7 Sept. 2006, Case C-470/04, *N. v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*, para. 46, Case Law IBFD.
63. M. Szpunar, *Territoriality of Union law in the era of globalisation*, in *Évolution des rapports entre les ordres juridiques de l' Union européenne, international et nationaux: Liber amicorum Jirí Malenonovsky* p. 149 et seq. (Bruylant 2020).
64. On the development from a traditionally narrower to a broader understanding of territoriality, *see* Sternberg, *supra* n. 16, at p. 157 et seq.

towards extraterritoriality or marketplace jurisdiction can now be found in all areas of law, starting with competition law, in which the "effects doctrine" (or "objective territoriality")[65] is firmly established.[66] Accordingly, states may regulate behaviour that takes place outside of their territory but which has effects on their territory. Extraterritorial jurisdiction is also an issue that is becoming more and more important, e.g. in data protection law,[67] financial markets,[68] intellectual property law,[69] commercial law[70] human rights (*Lieferkettengesetz* supply chain act)[71] and environmental protection law.[72] Whether certain new nexuses, such as an address or authorization under the EU proposal concerning a financial transaction tax (FTT), are considered to still be "territorial" in a very broad sense or as extraterritorial

65. Ryngaert, *supra* n. 22, at pp. 50 et seq. and 55.

66. *See* CH: ECJ, 1 July 1972, Case 52/69, *Geigy*, para. 41 et seq.; FI: ECJ, 27 Sept. 1988, Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85, 125/85, 126/85, 127/85, 128/85 and 129/85, *Ahlström et al. v. Commission*, paras. 3 et seq. and 15 et seq.; E2: ECJ, 6 Sept. 2017, Case C-413/14, *–Intel Corp v. European Commission*, para. 40 et seq.; American Law Institute, *supra* n. 17, at § 409, with Reporters' Notes; and Kamminga, *supra* n. 17, at margin no. 4.

67. ES: ECJ, 13 May 2014, Case C-131/12, *Google Spain*, para. 55; and Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1, art. 3 (2016), Primary Sources IBFD. However, *see* FR: ECJ, 24 Sept. 2019, Case C-507/17, *Google LLC*, para. 63 et seq.; and *compare* IE: ECJ, 16 July 2020, Case C-311/18, *Facebook Ireland*.

68. M. Lehmann, *Vom internationalen Kapitalmarktrecht zum globalen Finanzmarktrecht*, in *FS für Herbert Kronke* p. 1061 et seq. (C. Benicke & S. Huber eds., Gieseking 2020).

69. A. Peukert, *Territoriality and Extra Territoriality in Intellectual Property Law*, in *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* p. 189 et seq. (G. Handl, J. Zekoll & P. Zumbansen eds., Queen Mary Studies in International Law 2012): "In a globalized, internet-connected world, however, in which innovations are often the result of cross-border collaboration and the use of inventions, works, signs, etc. occurs everywhere, these basic principles have become subject to fundamental criticism. According to most observers, the territoriality principle in IP is based on an outdated focus on isolated national sovereigns that are less and less able – as a matter of fact and law – to regulate exclusively the conduct of their citizen."

70. B. Schinkels, *Fehlerhafte Produkte aus Fernost auf Amazon Marketplace – für eine Produkthaftung transnationaler Warenhausplattformen als Quasi-Importeuer*, in *FS für Herbert Kronke* p. 1235 et seq. (C. Benicke & S. Huber eds., Gieseking 2020).

71. For example, the US Supreme Court is currently deciding whether Nestlé USA, Inc. and Cargill, Inc. can be sued in the United States for alleged human rights abuse occurring abroad, as Cargill, Inc. and a Nestlé SA subsidiary are accused of knowingly helping perpetuate slavery on Ivory Coast cocoa farms. *See* L. White, U.S. Supreme Court takes up Nestle, Cargill appeals over human rights claims, Reuters (2 July 2020), available at https://www.reuters.com/article/us-usa-court-nestle-idUSKBN24326T. (accessed 20 July 2022).

72. UK: ECJ, 21 Dec. 2011, Case C-366/10, *Air Transport Association of America*, para. 125 et seq.; and DE: ECJ, 23 Apr. 2015, Case C-424/13, *Zuchtvieh-Export GmbH* (on animal transport to third countries).

is a matter of terminology. Claiming extraterritorial jurisdiction, however, needs justification, whereas territorial jurisdiction is the rule. The Explanatory Memorandum on the Proposal for a Council Directive implementing enhanced cooperation in the area of FTT (FTT Proposal) thus underlines that "territoriality principles are fully respected".[73] The residence principle in the FTT Proposal is further supplemented by the issuance principle "as a last resort, in order to improve the resilience of the system against relocation".[74] This is intended as a measure to further strengthen anti-tax avoidance.[75] Accordingly, financial institutions outside the European Union would also have to pay FTT when trading with financial instruments originally issued within the European Union.

1.3.3.2. Market jurisdiction as a new nexus

The concerns and reasons for the US Supreme Court shifting to marketplace jurisdiction also underlie the EU Commission's proposal for corporate taxation on the basis of a significant digital presence for the purposes of the digital service tax and similar national legislations. Indeed, "it is not clear why a single employee or a single warehouse should create a substantial nexus while 'physical' aspects of pervasive modern technology should not".[76] A virtual showroom can show far more inventory in far more detail and with greater opportunities for consumer and seller interaction than might be possible for local stores. Thus, without any doubt, "the continuous and

73. European Commission, Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, COM(2013) 71 final, Explanatory Memorandum, p. 11, sec. 3.2. (14 Feb. 2013) [hereinafter FTT Proposal]. Denying territoriality, *see* Sternberg, *supra* n. 16, at p. 325 et seq. (impermissible extraterritoriality). Art. 4 of the FTT Proposal indeed defines "established in the territory of a participating Member State" extensively. Accordingly, authorization or a permanent address, among other things, are sufficient. The reference to a financial institution "authorized" by a Member State covers, e.g. authorizations by the Member State concerned with regard to transactions operated by third-country financial institutions without a physical presence in the territory of that Member State. However, the person liable for payment of the FTT may prove that there is no link between the economic substance of the transaction and the territory of any participating Member State.

74. Explanatory Memorandum FTT Proposal. Generally, regarding the compatibility of an FTT with the basic freedoms, *see* IT: ECJ, 30 Apr. 2020, Case C-565/18, *Société Générale S.A. v. Agenzia delle Entrate – Direzione Regionale Lombardia Ufficio Contenzioso*, Case Law IBFD.

75. Explanatory Memorandum FTT Proposal, at p. 5.

76. *Wayfair* (585 U.S. (2018)), pp. 9 and 15 et seq. However, the Supreme Court judgment refers first to the situation within a single – albeit federal – state and, second, to the fact that denying marketplace jurisdiction with regard to sales taxes can lead to de facto non-taxation, which entails a competitive advantage for out-of-state sellers.

pervasive virtual presence of retailers today"[77] creates a substantial virtual link for marketplace jurisdiction.

The benefits theory can also be used to support marketplace jurisdiction. Consumption presupposes functioning state structures ensuring the safe delivery and enjoyment of the goods to and by the consumers, respectively.[78] Moreover, the waste that comes along with consumption remains with the country of consumption (namely packaging waste and often short-lived consumer products), which supports jurisdiction under the effects doctrine (*see* section 1.3.3.1.).[79]

Last but not least, Pillar One of the OECD's proposals provide, as a new nexus, for source taxation by market states without a physical presence of the enterprise being necessary. As in more recent national legislation around the globe[80] and the EU proposals for the directives on a digital services tax and digital presence,[81] the OECD's work also contains market revenue thresholds.[82] Such thresholds prevent disproportionate documentation and verification burdens both for taxpayers and for the fiscal authorities. At the same time, they can help small and medium-sized enterprises enter the market under fair conditions.

77. *Wayfair* (585 U.S. (2018)), p. 15.
78. Id., at p. 16 et seq.
79. *Compare*, e.g. American Law Institute, *supra* n. 17, at § 402(1)(b) ("exercises jurisdiction to prescribe law with respect to: … conduct that has a substantial effect within its territory").
80. For example, the Indian Equalisation Levy only applies when turnover or gross receipts from e-commerce supplies or services is at least INR 20 million during the relevant tax year. Similarly, for the law at issue in the *Wayfair* case, which requires USD 100,000 in goods or services in South Dakota or engagement in 200 or more separate transactions for the delivery of goods and services into the state on an annual basis, *see Wayfair* (585 U.S. (2018)), p. 30. Hungary and Poland apply progressive tax rates; *compare* HU: ECJ, 16 Mar. 2021, Case C-596/19 P, *European Commission v. Hungary*, Case Law IBFD; and PL: ECJ, 16 Mar. 2021, Case C-562/19 P, *European Commission v. Republic of Poland*. For thresholds outside tax law, *compare* FR: *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* art. L.225-102-4.-I; and UK: Modern Slavery Act sec. 54(2)(b) (2015) (more than 36 GBP million in yearly turnover) and US: Transparency in Supply Chains Act, Senate Bill No. 657, sec. 3 (more than 100 USD million turnover worldwide).
81. European Commission, Proposal for a Council Directive on the common system of a digital service tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final (21 Mar. 2018) [hereinafter DST Proposal]; and European Commission, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final (21 Mar. 2018) [hereinafter SDP Proposal].
82. OECD/G20, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint* p. 64 et seq., under 3 (OECD 2020); and Ditz & Pinkernell, *supra* n. 3, at p. 417 et seq.

1.3.3.3. New hybrid taxes enhancing market jurisdiction

The appearance of new hybrid taxes is further evidence of the tendency towards marketplace jurisdiction.[83] Several countries, as well as the European Union, are now adopting or planning to adopt income taxes with features normally found in indirect taxes, that is, turnover-based progressive taxes accruing where the goods or services are marketed. The EU Commission has presented two proposals in this context: (i) for a Council directive laying down rules relating to the corporate taxation of a significant digital presence;[84] and (ii) for a Council directive on the common system of a digital service tax on revenues resulting from the provision of certain digital services.[85] While the first proposal regarding taxation on the basis of a significant digital presence is based on the harmonization competence for direct taxes (article 115 of the Treaty on the Functioning of the European Union (TFEU)),[86] the second proposal is based on article 113 of the TFEU, covering the European Union's competence "to adopt provisions for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation". However, it is not evident that the proposed digital services tax is an indirect tax:[87] a turnover-based tax is not necessarily an indirect tax.[88]

83. Regarding marketplace jurisdiction, *see also* R. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 Harvard Law Review 7, pp. 1573 et seq. and 1670 et seq. (2000); M. Devereux & R. de la Feria, *Designing and implementing a destination-based corporate tax* (Oxford University Centre for Business Taxation 2014); A. Auerbach et al., *Destination-Based Cash Flow Taxation* (Oxford University Centre for Business Taxation 2017); J. Sinnig, *Besteuerung der digitalen Wirtschaft in Großbritannien, Italien und Ungarn – ein europäischer Rechtsvergleich*, 6 ISR 11, p. 408 et seq. (2017); and Y. Brauner & P. Pistone, *Adapting Current International Taxation to New Business Models: Two Proposals for the European Union*, 71 Bull. Intl. Taxn. 12 (2017), Journal Articles & Opinion Pieces IBFD.

84. SDP Proposal.

85. DST Proposal.

86. P. 4 et seq. SDP Proposal.

87. *Compare* DE: The Advisory Board to the Federal Ministry of Finance, Response to the EU proposals for taxing the digital economy, p. 3 (2018), available at https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Ministerium/Geschaeftsbereich/Wissenschaftlicher_Beirat/Gutachten_und_Stellungnahmen/Ausgewaehlte_Texte/2018-09-27-digitale-Wirtschaft-anl.pdf?__blob=publicationFile&v=3 (accessed 20 July 2022).

88. *Compare* HU: Opinion of Advocate General Kokott, 13 June 2019, Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, para. 35 et seq., Case Law IBFD; and B. Károlyi, *Progressive Turnover-Based Taxes and Their Legal Repercussions Under EU Law*, EC Tax Review 6, p. 271 et seq. (2020).

Some states have introduced so-called "equalization levies", particularly for e-commerce, with extraterritorial effect.[89] Poland and Hungary, for example, have adopted turnover-based taxes that are progressive, which means that taxpayers with higher turnover pay more, independent of their net income.[90] Hungary introduced a turnover-based tax on advertisements that applies to all advertising in the Hungarian language, irrespective of the location of the advertising. The ECJ did not object to language being a sufficient link for Hungary's jurisdiction to tax.[91]

1.4. Conclusions

The world is moving towards a new international framework for taxation. The power to tax and to allocate revenues is a core element of state sovereignty. However, in order to cope with powerful multinational non-state actors, states should agree on coordinating their taxing powers to set limits on unwanted phenomena, such as fraud, abuse and aggressive tax planning.

Coordinating their tax sovereignty, states adapt tax nexus to the new digitalized economy. There is growing consensus for a broad understanding of territoriality, which is the most basic principle for jurisdiction (nexus) in international law. Marketplace jurisdiction is constantly gaining ground around the globe. Such broad concept of territoriality – the "new territoriality" – means that states can exercise jurisdiction without justification, whereas extraterritorial jurisdiction is not excluded, but requires justification.

Broad territoriality, however, entails more overlapping jurisdiction and, thus, double or multiple taxation.[92] At the same time, multiple taxation and

89. E.g. IN: Finance Act art. 165A.

90. *Compare Vodafone Magyarország* (Case C-75/18); HU: ECJ, 3 Mar. 2020, Case C-323/18, *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, Case Law IBFD; HU: ECJ, 3 Mar. 2020, Case C-482/18, *Google Ireland Limited v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága*, Case Law IBFD; HU: Opinion of Advocate General Kokott, 15 Oct. 2020, Case C-596/19 P, *European Commission v. Hungary, Republic of Poland*, Case Law IBFD (turnover-based advertisement tax); and PL: Opinion of Advocate General Kokott, 15 Oct. 2020, Case C-562/19 P, *European Commission v. Republic of Poland, Hungary*, Case Law IBFD (turnover-based progressive tax in the retail sector).

91. *Compare* HU: Opinion of Advocate General Kokott, 12 Sept. 2019, Case C-482/18, *Google Ireland Limited v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága*, para. 44 et seq., Case Law IBFD, read together with *Google Ireland* (Case 482-18).

92. Therefore criticizing the EU proposals, *see* DE: The Advisory Board to the Federal Ministry of Finance, Response to the EU proposals for taxing the digital economy, p. 2

Notes

Notes

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