



**CERTIFICARSE (DER2015-65374-R)**  
EFECTOS JURÍDICO-FINANCIEROS Y CONTROL DEL IMPACTO SOCIAL  
PARA EL DESARROLLO SOSTENIBLE



MINISTERIO  
DE ECONOMÍA  
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LEGAL-FINANCIAL EFFECTS, AND CONTROL OF THE  
SOCIAL IMPACT FOR SUSTAINABLE DEVELOPMENT

## International Seminar UCM – CertificaRSE Adapting Tax Rules To Global Challenges

IN COOPERATION WITH



Director: Prof. Grau Ruiz

E-print Complutense:

*International Seminar UCM – CertificaRSE*

*Adapting Tax Rules To Global Challenges*



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## Foreword

The International Seminar on “Adapting Tax Rules To Global Challenges” took place in Madrid, at the Complutense University, on the 5th of June 2019. It was organized by the research project CertificaRSE, directed by Professor María Amparo Grau Ruiz and devoted to analyse the “Legal-Financial Effects And Control Of The Social Impact For Sustainable Development” (DER2015-65374-R MINECO-FEDER), with the support of the H2020 INBOTS project on “Inclusive Robotics for a better Society” (G.A. No. 780073) and the official LLM on Advanced Studies of Financial and Tax Law (UCM-UDIMA).

**Ricardo Alonso García**, Dean of the Faculty of Law, UCM and **Miguel Ángel Martínez Lago**, Director of the Financial and Tax Law Area, UCM were in charge of the **opening** of the Seminar.

The **first round table** dealt with incentives for sustainability and their control. The speakers were **Frans Vanistendael**, Tax Law Professor, KU Leuven; **Marta Villar Ezcurra**, Tax Law Professor, Universidad San Pablo-CEU; **Jacques Malherbe**, Tax Law Professor, Université Catholique de Louvain and **María Amparo Grau Ruiz**, Tax Law Professor, UCM.

The **second round table** focused on the tax treatment of digital economy and robotics. The speakers were **María Teresa Soler Roch**, Tax Law Professor, Universidad de Alicante; **Xavier Oberson**, Tax Law Professor, Université de Genève; **César García Novoa**, Tax Law Professor, Universidad de Santiago de Compostela and **Juan José Hinojosa Torralvo**, Tax Law Professor, Universidad de Málaga.

**María Amparo Grau Ruiz**, as Principal Investigator of the CertificaRSE Project and **Juana Pulgar Ezquerro**, Director of the Commercial, Financial and Tax Law Department, UCM, were responsible for the **closing** of this Seminar.

As expected, the high academic quality of the invited speakers led to an extremely enriching debate on these topics with all the participants. Here, I wish to express again, publicly, my gratitude to each of them.

I am also grateful to **José María Coello de Portugal**, Associate Dean for International and Institutional Relations, for welcoming our admired colleagues to the Faculty.

Thanks to **Álvaro Falcón**, as well, for helping me with the logistics and the edition of this Eprint UCM.

After our meeting at the Complutense, by sharing the presentations with other interested researchers with this book of abstracts, we want to offer the opportunity to explore the main ideas and feed the discussion through this Open Access publication.

I hope that the readers will enjoy this electronic document as much as we all did talking about how the current tax rules should face these new challenges.

**Professor María Amparo Grau Ruiz**

**The CertificaRSE team expresses special thanks to the following sponsoring institutions:**

*Asociación Española de Asesores Fiscales*

*Asociación Española de Fundaciones*

*Confederación de Cooperativas de viviendas de España CONCOVI*

*FSC, Forest Stewardship Council*

*Fundación Acción contra el Hambre*

*Liedekerke, Wolters, Waelbroek & Kirkpatrick*

*Observatorio de Responsabilidad Social Corporativa (Observatorio de RSC)*

*ONU - Financing for Development Office, United Nations*

*PEFC, Programme for the Endorsement of Forest Certification Schemes*

*PricewaterhouseCoopers*

*Sostenibilidad & Excelencia, SOANDEX*

*Uría Menéndez Abogados*

More information about the CertificaRSE project: <https://www.ucm.es/proyecto-certificarse/>

More information about the H2020 INBOTS project: <http://inbots.eu>

More information about the UCM-UDIMA LLM in Advanced Studies on Financial and Tax Law: <http://derecho.ucm.es/estudios/master-derechofinancieroytributario>

## **PROGRAM**

### **10:30 h WELCOME**

*RICARDO ALONSO GARCÍA. Dean, Faculty of Law. UCM*

*MIGUEL ÁNGEL MARTÍNEZ LAGO. Director of the Financial and Tax Law Area, UCM*

### **10:40 h ROUND TABLE ON INCENTIVES FOR SUSTAINABILITY AND THEIR CONTROL**

***Some philosophical reflections on sustainable taxation***

*FRANS VANISTENDAEL. Tax Law Professor, KU Leuven*

***Tax incentives to promote solar energy self-consumption***

*MARTA VILLAR EZCURRA. Tax Law Professor, Universidad San Pablo-CEU*

***Treaty anti-abuse measures as a tool for securing sustainable development in a globalized economic environment***

*JACQUES MALHERBE. Tax Law Professor, Université Catholique de Louvain*

***Global Sustainability And Financial Activity: Control Of Tax Incentives To Promote Private Participation***

*MARÍA AMPARO GRAU RUIZ. Tax Law Professor, UCM*

### **12:00 h COFFEE BREAK**

### **12:20 h ROUND TABLE ON THE TAX TREATMENT OF DIGITAL ECONOMY AND ROBOTICS**

***Tax immunity: challenges and risks***

*MARÍA TERESA SOLER ROCH. Tax Law Professor, Universidad de Alicante*

***The design of a robot tax***

*XAVIER OBERSON. Tax Law Professor, Université de Genève*

***A new taxation for a new reality***

*CÉSAR GARCÍA NOVOA. Tax Law Professor, Universidad de Santiago de Compostela*

***Approach to taxation of digital services and robotics in Europe***

*JUAN JOSÉ HINOJOSA TORRALVO. Tax Law Professor, Universidad de Málaga*

**13:40 h CLOSING**

*MARÍA AMPARO GRAU RUIZ. Principal Investigator of the CertificaRSE project*

*JUANA PULGAR EZQUERRA. Director Commercial, Financial and Tax Law Department, UCM*

# Abstracts

# FIRST ROUND TABLE

## Frans Vanistendael

Tax Law Professor prof. Em, KU Leuven

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### SOME PHILOSOPHICAL REFLECTIONS ON SUSTAINABLE TAXATION

Before the industrial revolution human life was indefinitely sustainable. Because farming was the lion's part of economic activity, practically all waste was degradable. The industrial revolution started a different era of consumption of raw materials, energy & production of waste. But until after the report on the Limits of Growth (Club of Rome 1972) there was a general belief that nature was boundless and could sustain unlimited growth. However half a century later there is general awareness that the "developed way of life" is no longer sustainable planet-wide. The two most immediate challenges are global warming & recycling global waste.

The main role of taxation has always been to raise revenue. Steering social behaviour was always a secondary role of taxation. For that reason taxation has never been fully efficient in pursuing behavioural objectives. When climate change and recycling become urgent priorities, these priorities do not change the nature of traditional taxes: income tax, consumption tax, inheritance tax etc.

Only taxes cannot drive behavioural change, but technology can change behaviour: Cfr. Communication by telephone, GSM, PC, IPAD, Iphone. Taxes can only accelerate behavioural change when technological alternatives are available.

Besides technological change we need a worldwide or regional non-tax framework (set by G 20?) of overall targets for climate change and recycling (cfr. Paris climate accord). Within that worldwide framework existing international trade arrangements (EU, EFTA, Nafta, ACP group, ASean, EAC, COMESA etc.) can be used to elaborate regional tax targets & mechanisms to reach these objectives. The main issue is about competitive distortions caused by behavioural change. Therefore it is necessary to design a new Model Convention to avoid double environmental taxation and double environmental non-taxation, and containing rules on environmental charges at source and destination and rules on crediting environmental source charges against charges at destination.

In adapting existing taxes to climate and recycling priorities two major characteristics of taxes should be kept in mind:

- Any special environmental tax or charge must in the end always be paid out of income or wealth. When the environmental tax burden exceeds net-income, or net-

wealth not only the objectionable behaviour will disappear, but all economic activity will disappear.

- Sustainable environmental taxation is to be subject to the principle of the ability to pay at two levels: the international level, between states, and at the national level, between entities and individuals.

- International ability to pay has two aspects: (1) eliminating distortions of competition and (2) financial support to developing countries, requiring an international financing organisation of donors & beneficiaries.

- At the national level the principle of punitive or dissuasive equality should be applied. Punitive or dissuasive equality requires that charges are to be progressive with income, wealth & consumption, not only for individuals but also for entities and also takes account of the availability of alternatives to objectionable behaviour: pushing for home work may be possible for administrative work, but not for assembly line work.

Finally the EU must push for abolishing the unanimity rule for tax measures in the area of environmental taxation, in order to be able to reach the ambitious targets which it has set for climate change and recycling economy.

**Marta Villar Ezcurra**

**Tax Law Professor, Universidad San Pablo-CEU**

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## **TAX INCENTIVES TO PROMOTE SOLAR ENERGY SELF-CONSUMPTION**

The question raised is whether there is a need to promote solar energy self-consumption and the role of tax incentives to meet the goals designed at global, EU and national level.

Today, thanks to the significant reduction in technology costs - solar power is now, frequently less expensive than any fossil-fuel option, without assistance - consumers can produce their own electricity onsite from renewable energy sources (e.g. solar power). In this way, consumers can not only save money but also inject the non-consumed surplus electricity into the grid.

The European Commission has identified best practices to support EU countries to promote self-consumption in a cost-effective way. However, there has been a debate on the best way to make the increase of the photovoltaic production power compatible with the desirable neutrality of public activity (aside from the necessary promotion of the environmental needs). In this regard, the treatment of self-consumption is a key issue for the faster increase in photovoltaic facilities. In fact, the final electricity market shape depends on how self-consumption is treated from a fiscal point of view, as well as for regulated matters including the possibility of selling electricity to third parties through networks at a given price. Article 21 of the EU Directive 2018/2001 is an important legal success by establishing obligations for Member States in order to ensure that self-consumers are entitled to generate renewable energy without being subject to charges and to network charges that are not cost-reflective.

Spain has been one of the pioneering countries in developing the photovoltaic power generation. Since its initial launch, there has been substantial involvement of public incentives in three different ways: tax incentives, direct subsidies and regulated prices for the power generated by photovoltaic investments. Some are of the opinion that tax incentives for self-consumption must be avoided while others believe that faster development and production of photovoltaic technologies require strong support from public institutions. Under the recent Royal Decree 244/2019, now there are no charges and fees for solar self-consumption and the level of taxation is also favouring solar self-consumption.

Within this context, several questions are set forth: (i) If self-consumption is economically feasible and it does not need important grants, would it be a preferable option to increase R&D tax incentives to , because it could have more impact on the general interests? (ii) Is the current scenario compatible with tax principles? (iii) Are additional incentives justified? (iv) Is it a perfect share for solar self-consumption? (v) Why not to fix a specific target at EU and national level? To answer these questions, it is crucial to take into account previous bad experiences in promoting renewables in Spain as well as the best international practices.

The conclusion is that the EU and the Spanish legal system have stated a set of actions to promote solar energy self-consumption. Nevertheless, although there is no a clear picture of the desirable participation of the solar self-consumption in the electricity mix, the 8 percent seems to be a relevant figure. To the author' opinion, it seems necessary to address the tax incentive to the R&D efforts, to revise periodically the incentives in place and to give the appropriate importance to the timing aspects of the incentivation policies.

Valuable information about Professor Villar's line of research on environmental taxation can be found in the following books:



<https://www.e-elgar.com/shop/environmental-fiscal-challenges-for-cities-and-transport>



## Jacques Malherbe

Tax Law Professor, Université Catholique de Louvain

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### TREATY ANTI-ABUSE MEASURES AS A TOOL FOR SECURING SUSTAINABLE DEVELOPMENT IN A GLOBALIZED ECONOMIC ENVIRONMENT

An anti-abuse clause has been introduced in the tax law of many countries.

Can it be applied in a treaty situation?

The OECD answers affirmatively.

The BEPS Plan (action 6) proposes the introduction of an anti-abuse provision in double tax treaties, as well as a preamble stating that treaties do not aim at creating double non-taxation.

Accordingly, the OECD Model Treaty and the Multilateral Agreement signed by most countries provide now for an anti-abuse clause.

The ATAD Directive also directs EU Member States to implement such a clause.

Conventional anti-abuse clauses drafted according to the wording of the Multilateral Instrument or the ATAD Directive can be implemented not only when the purpose of the taxpayer is chiefly fiscal but also when the fiscal goal is one of the principle purposes of the arrangement.

Problems of interpretation are inevitable<sup>1</sup>. The French constitutional Council considers that the replacement of the “exclusively fiscal” motive by the “principally fiscal” motive was an infringement to the principle of legality requiring a precise definition of the behaviour which is subject to sanction<sup>2</sup>.

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<sup>1</sup> ECJ, 26 February 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, N Luxembourg 1, X Denmark A/S, C Danmark I, T Denmark ApS v Skatteministeriet.

<sup>2</sup> Directive 2016/1164/EU of 29 December 2016.

**María Amparo Grau Ruiz**

**Tax Law Professor, UCM**

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## **GLOBAL SUSTAINABILITY AND FINANCIAL ACTIVITY: CONTROL OF TAX INCENTIVES TO PROMOTE PRIVATE PARTICIPATION**

In order to advance in the achievement of the Sustainable Development Objectives, set by the UN Agenda 2030, it is urgent to reorient financial activity, both public and private, at the state level and on a universal scale. To this end, it is important to review the instruments that have traditionally been used in the legal-tax system: extra-fiscal measures -persuasive or dissuasive- and exemption.

It would be constitutional to promote global sustainability and overcome the limitations derived from the scheme of territorially defined competencies in the current international economic order, articulating coordinated fiscal incentives. However, control should be improved by promoting private participation in the pursuit of the general interest beyond borders.

Lessons can be learned from the fiscal measures adopted to promote positive environmental, social and economic governance impacts, which have already been controlled by the Spanish Constitutional Court, the Spanish and European Courts of Auditors and the European Union Court of Justice.

Moreover, the encouragement of corporate social responsibility with the fiscal tool is necessary to achieve global sustainability. However, the normative design of tax incentives -whose definition is proposed because it does not exist in current legislation- must be taken care of, so that they are controllable and effectively serve the extra-fiscal reason that justifies their concession, as recent experiences in comparative law have shown.

Additional information about Professor Grau's line of research on sustainability and taxation can be found in the following book:

**ESTUDIOS**

Para avanzar en el logro de los Objetivos de Desarrollo Sostenible, fijados por la Agenda 2030 de la Organización de las Naciones Unidas, urge reorientar la actividad financiera, tanto pública como privada en el ámbito estatal y a escala universal. Con ese propósito, en esta obra se revisan los instrumentos con los que tradicionalmente se ha contado en el ordenamiento jurídico-tributario español: la extrafiscalidad –persuasiva o disuasiva– y la exención.

A partir de sólidas bases doctrinales y jurisprudenciales, la autora descubre el margen de actuación constitucionalmente posible para fomentar la sostenibilidad global. Construye una propuesta para superar las limitaciones derivadas del esquema de competencias territorialmente definidas en el actual orden económico internacional, articulando incentivos fiscales coordinados. No obstante, advierte de la necesidad de un control eficiente al promover la participación privada en la consecución del interés general más allá de las fronteras. Por este motivo, repasa el control de algunas medidas fiscales adoptadas para promover impactos positivos en materia medioambiental, social y de buena gobernanza económica, realizado por el Tribunal Constitucional, los Tribunales de Cuentas –español y europeo– y el Tribunal de Justicia de la Unión Europea.

Concluye que el estímulo de la responsabilidad social empresarial con la herramienta fiscal es necesario para lograr la sostenibilidad mundial. Sin embargo, el diseño normativo de los incentivos fiscales –cuya definición se propone por no existir en la legislación vigente– debe cuidarse, de manera que sean controlables y sirvan efectivamente a la razón extrafiscal que justifica su concesión, tal como han puesto de manifiesto experiencias recientes en Derecho comparado.

*El precio de esta obra incluye la publicación en formato DDO sin coste adicional (papel + libro electrónico).*

**ESTUDIOS**

# SOSTENIBILIDAD GLOBAL Y ACTIVIDAD FINANCIERA

## LOS INCENTIVOS A LA PARTICIPACIÓN PRIVADA Y SU CONTROL

**MARÍA AMPARO GRAU RUIZ**

PRÓLOGO DE JACQUES MALHERBE

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# **SECOND ROUND TABLE**

## **María Teresa Soler Roch**

**Tax Law Professor, Universidad de Alicante**

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### **TAX IMMUNITY: CHALLENGES AND RISKS**

Tax evasion and tax avoidance (either as tax abuse, tax arbitrage or aggressive tax planning) are concepts related to well known scenarios: impunity and BEPS (base erosion and profit shifting). The tax challenges of Digital Economy mean a further step and a turning point, where expressions like “hard to tax” “Stateless income” or “nowhere resident” lead to a new scenario that can be identified with the concept of Tax Immunity.

The basic idea is that of an economic system impossible to tax due to the failing of the current rules of International Taxation which are unable to breach that immunity. However, this tax immunity may not be absolute; a more detailed approach to that challenge, shows that the main concern is not only about fair and effective taxation (“fair share” by MNEs), but mainly about inter-nation equity; in other words, about the need to set new rules for allocation of taxing rights (“how to share the pie” by Tax jurisdictions). These are the main challenges and different proposals are now on debate at different levels (OECD, European Union, and national legislations). Special attention should be paid to the recent OECD Work Plan (May 2019) with new proposals aimed to face the two main challenges above mentioned. There are however, some risks linked to the different proposals, which can be summarized in the idea of “CEPS” (“concepts erosion and principles shifting”).

**Xavier Oberson**

Tax Law Professor, Université de Genève

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## THE DESIGN OF A ROBOT TAX

The increasing use of artificial intelligence within the workplace is likely to cause significant disruption to the labour market and in turn, to the economy, due to a reduction in the number of taxable workers.

Some experts propose taxing robots as a possible solution to the anticipated problem of declining tax revenues.

In accordance with guiding legal and economic principles, we should explore the various tax models that could be applied to both the use of robots, such as a usage or automation tax, and to robots directly, and the numerous associated issues, such as the definition of robots for tax purposes, the difficulty of granting a tax capacity to robots, as well as the compatibility of robot taxes with international tax rules.

Specific information on this particular topic can be found in this book:



<https://www.e-elgar.com/shop/taxing-robots>

## César García Novoa

Tax Law Professor, Universidad de Santiago de Compostela

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### A NEW TAXATION FOR A NEW REALITY

#### Globalization and BEPS. A tax revolution?

With globalization and the internationalization of the economy taxation is changing. Especially the taxation of transnational companies. On the other hand, the way of doing business changes with new technologies, electronic commerce and the digital economy. We can say that the digital economy is not a part of the new economy. The digital economy is the new economy.

I'm going to talk about the changes in the connection points in the taxation of the cross-border benefits of companies.

Today, it is possible to theorize about a new international tax framework. We should start by remembering that we are living a real revolution in the paradigms of international taxation. This tax revolution is marked by the OECD Plan on *Erosion and Profit Shifting*, known as the BEPS Plan of 2013.

It is necessary to ask whether BEPS is a real tax revolution. In reality, it is a revolution, *ma non troppo*. BEPS does not promote the debate on the distribution of the tax jurisdiction between the State of source and the State of residence. BEPS does not discuss the model based on the prevalence of the State of residence- (Taxation of corporate profits in the country of residence -*worldwide income*-). By contrast, the BRICs countries (Brazil, Russia, India, China) put into question those classic topics. These countries have promoted the principle of *reasonable allocation of profits principle* or *in line with value creation* (in India: *genuine link*).

BEPS not include a reformulation of the distribution of the tax power. The model of *Kemp Commission on Tax Reform* (1996) is not followed. This model proposes the taxation of international income only by the source country (with *progressive exemption method*).

#### Background of BEPS

The background of BEPS is located in the policy failure against tax havens (from the report *Harmful Tax Competition*, 1998).

Currently, a country just needs to sign 12 international treaties of exchange of information to stop being considered a *tax haven*. In the period 1998-2001 there was little progress. Finally, the OECD Blacklist of Tax Havens of 2000 was approved, including 35 tax havens.

In the period 2001-2008 there was a *lukewarm* progress. Later there was a evolution between the years 2009-2010, based on the peer review of the Global Forum on Transparency and Exchange of Information.

At that time, due to the pressure of certain international organizations like the Tax Justice Network, it begins to emerge a trend toward *moralization* of compliance of the tax obligations. It is argued that although tax avoidance is not illegal, it is immoral.

In this context, there is no difference between *tax avoidance* and *tax evasion*. This philosophy is summed up in the words of Denis Healey, British Finance Minister, *The difference between tax avoidance and tax evasion is the thickness of a prison wall*. It is in this historical moment when the concept aggressive tax planning (OECD Seoul Forum 2006) arises, as a reaction against the International tax planning structures (*double irish, dutch sandwich*) of transnational companies.

These strategies include various tax operations. For example, the *cash pooling*: It aims at optimizing the use of surplus funds of all companies in a group in order to reduce external debt. In this way, intra-group loans and fictitious debt are generalized.

Too, the *re-location of intangibles*, which seeks a rationale location at low-tax countries for intangible assets. Also, the strategies preventing the *avoidance of permanent establishment status*: a producer is converted in distributor through restructuring operations (commissionaire signing contracts in its own name like the *contract manufacturer*).

The history of BEPS includes some of the specific tax problems in USA. For example, the additional tax paid by US companies if they repatriate profits before the Trump reform (35 % less credit for foreign tax), tax inversion, use of LLB (Limited Liability Companies), failure of Tax Holidays Policy and deficiencies of transfer pricing regime...

Some of these problems also exist in Europe, like the policy failure about *connecting factors* (residence: *effective management* versus *law of constitution*) - for example, in Ireland-. Another significant challenge comes from the Globalization and digitization of the economy. In Europe there is also a new standard of exchange of financial information. It is evident that tax justice requires automatic exchange of information. Proof of this is that the July 21, 2014, the OECD released the full version of the Standard *Automatic Exchange of Financial Information Tax Matters*. The new standard of automatic exchange of information allows to talk about a possible *international tax regime*.

On the other hand, BEPS does not dispute the major problems relating to *transfer pricing*. It is a particularly important problem in relation to intangibles.

The question is obvious: Is the OECD Model obsolete?. BEPS does not respond to these challenges. It is not contemplated a proportional allocation of tax bases (apportionment).

The document does not pose challenges to the crisis of the Comparable Uncontrolled Price method (CUP). Is it necessary simplifying transfer pricing? Is it necessary to adopt safe harbors?.

BEPS didn't adopt the lessons of certain trends in the judicial decisions of different countries, for example, the sentence GlaxoSmithKline Case (2011) about the separate enterprise principle. The arm's length rule requires rejecting considerations of reasonableness (take into account the functions, assets and risks in the allocation of intangibles among the group companies).

In addition to this, BEPS doesn't propose a more modern concept of permanent establishment. There are several topics that should provide BEPS; for example, a new definition of dependent agent, the commissionaire and the contract manufacturer; a new definition of virtual permanent establishment; a new definition of preparatory or auxiliary activities (for example: logistics center).

Therefore, the major actions of BEPS respond to specific problematic aspects of the different countries of the OECD. For example: the fiscal problem of intangibles affects American companies. These challenges justify the adoption of Action 1, *address the tax challenges of the digital economy* and Action 8: *Intangibles* and the action 4.: *Limit base erosion via interest deductions and other financial payments*. Does the limitation on the interest deduction lead to a double taxation of interests?

### **Crisis of the paradigm in the distribution of international power to tax the benefits of multinational companies.**

As we have said previously, the background of BEPS is also the pressure of certain international organizations.

As we have said also, through the BEPS Action Plan, a trend toward *moralization* of compliance of the tax obligations begins to emerge. It is in this historical moment when the concept aggressive tax planning (OECD Seoul Forum 2006) arises, as a reaction against the International Tax Planning Structures of Transnational Companies (Starbucks; Google, Microsoft, Facebook, Amazon...).

As a consequence of this, the paradigm in the distribution of international power to tax the benefits of multinational companies has been questioned.

In the OECD Model, the power of taxation of the State of residence is the one that prevails. The tax concept of residence of the corporations is regulated for the domestic law. But the taxation in the country of residence is linked with the worldwide income principle.

According to the residence principle, companies shall pay taxes in their country of residence on their world income.

The worldwide revenue is determined by the principle of independence, which is an essential element in the rule of the *separate enterprise*. According to this rule, a subsidiary which is established in another country is considered an independent subject that pays taxes in the State of incorporation.

On the other hand, when the benefits are obtained through a permanent establishment, the profits of a company shall be taxed in the territory where they are obtained and not in the country of residence of the corporation.

In this way, the taxation of the income attributed to the permanent establishment in the State where the establishment is located, becomes a specific form of taxation, and an expression of the tax power of the State where the establishment is located. The concept of *permanent establishment* is a typical notion of International Tax Law. It is a concept that arises within the framework of the Double Taxation Conventions.

Article 5 of the OECD Model Convention includes a definition of *permanent establishment*. Paragraph 1 of Article 5 of the OECD Model states says: *for the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.*

This article establishes a number of conditions that shall be satisfied in order to qualify as a permanent establishment. The principal one is that there must be a fixed place of business (it's the so-called *place of business test*).

The term *place of business* covers any facilities or installations used for carrying on the business of the enterprise whether or not they are exclusively used for that purpose. The place of business is defined as a tangible asset of a substantial nature. In addition, there must be stability.

The basis of the permanent establishment was traditionally the verification of the existence of a *geographical link* between the activity developed and the permanent establishment, in order to demonstrate a qualified connection between the establishment and the territory of the State. Therefore, the idea of a permanent establishment requires a physical presence. From this point of view, any permanent installation fits in the concept of permanent establishment of Article 5 of the OECD Double Taxation Model.

In addition, there is no permanent establishment in preparatory or auxiliary activities. And Article 5 of the OECD Model includes as a permanent establishment the so-called dependent agent.

The problem is that this concept is overcome in the context of the digital economy. The adaptation of international taxation to the digital economy is one of the great challenges of today.

### **The challenges of the digital economy**

Action 1 of BEPS Plan is dedicated to addressing the tax challenges of the digital economy. Action 1 identifies the main difficulties posed by the digital economy in the application of the existing international tax rules to the new business models. The Conclusive Report of this Action 1 was ratified by the Fiscal Affairs Committee.

The Report addressing the tax challenges of the digital economy was finalized at the last meeting of the Task Force on the Digital Economy and then was ratified by the Committee of Fiscal Affairs.

This report includes different tax options to fight against the tax avoidance and face the challenges posed by the digital economy.

Among them are the implementation of a new digital nexus, a withholding tax or the introduction of equalization levies.

There are many difficulties in adapting the *old molds* of the classic concept of permanent establishment to the new realities of electronic commerce and the digital economy. The new trends have been oriented to defend the *ductility* of the permanent establishment concept, and to promote its adaptation to the new reality.

In an economic context characterized by the digital economy, the important thing is not the taxation of the companies in their State of residence. The important thing is that digital companies pay their taxes where value is created. And today, there is a mismatch between the place where the benefit is taxed and the place where the value is created.

Precisely, the BEPs Plan is inspired by the *principle of value creation*.

In the European Union context, the European Commission has proposed on March 21, 2018, new rules to ensure that digital business activities are taxed in a fair way. The measures proposed would make the European Union a global leader in designing tax laws fit for the modern economy and the digital age.

The European Commission made two different proposals.

The first initiative aims to **reform the corporate tax rules** so that profits would be taxed where businesses have significant interaction with users through digital channels.

The second proposal responds to calls from several Member States and consists on the introduction of an **interim tax. That interim tax is known as the Digital Services Tax.** It is a 3 % tax on gross income, which covers the main digital activities that currently are the main source of income for companies in the European Union and that were not taxed. Especially:

- a) Sale online advertising space.
- b) Digital intermediary activities.
- c) Sale of data generated from user-provided information.

The proposal for a Directive laying down rules relating to the corporate taxation of a significant digital presence has a broader scope than the Digital Services Tax, and is designed to introduce a new taxable nexus for digital businesses operating within the European Union.

The purpose of the Proposal is to apply traditional taxes on corporate income to the profits generated by businesses providing certain digital services and having a “significant digital presence” in a Member State.

The notion of “significant digital presence” covers any digital platform such as a website or a mobile application that meets several criteria: revenue, number of users or number of online contracts concluded with users. These criteria define an *economic presence beyond a physical presence*.

In summary, it is necessary to take into account the need to adapt the category of permanent establishment to the forms of commerce that currently use technology.

Today, this requirement is set out under the perspective of avoiding erosion of the tax bases and aggressive tax planning strategies. And this is because the digital economy makes it easier to transfer benefits in multinational groups to lower taxation jurisdictions.

In summary, the topic of permanent establishment requires a renovation. We can propose:

The concept of *virtual permanent establishment* will be limited to those that only provide digital services.

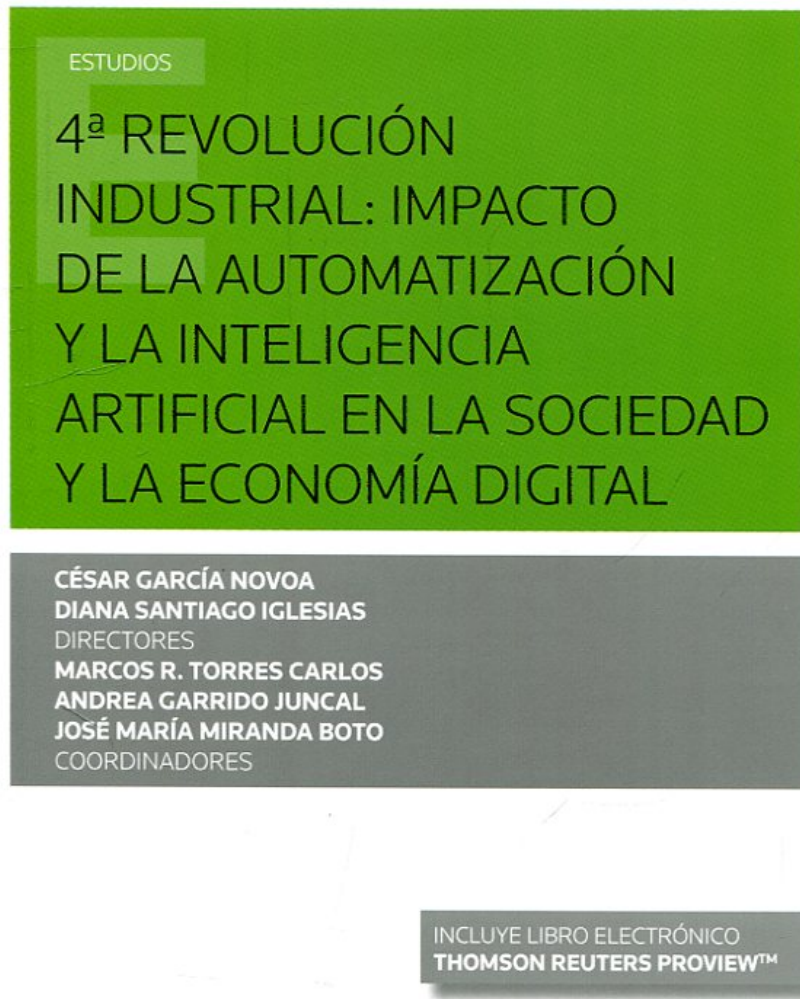
- There must be a threshold based on the number of users captured, given the importance of the users and their data in the new economy.

- A minimum threshold of temporary presence must be foreseen.

- Also a *de minimis rule* or minimum income threshold.

In any case, the need to adapt the category of the permanent establishment to the new economic context is one more example of the demands of changing taxation in our days.

More information on Professor García Novoa's research on the fourth industrial revolution can be found in the following books:



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ESTUDIOS

# 4ª REVOLUCIÓN INDUSTRIAL: LA FISCALIDAD DE LA SOCIEDAD DIGITAL Y TECNOLÓGICA EN ESPAÑA Y LATINOAMÉRICA

**CÉSAR GARCÍA NOVOA**  
DIRECTOR

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## Juan José Hinojosa Torralvo

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### APPROACH TO TAXATION OF DIGITAL SERVICES AND ROBOTICS IN EUROPE

1.- Por lo general, los llamados servicios digitales apoyados en aplicaciones de inteligencia artificial (comercio minorista en línea, publicidad en medios o redes sociales, suscripción a suministros, plataformas colaborativas de intermediación y otras) se prestan por empresas multinacionales, no sólo por su dimensión sino en sentido más estricto, porque actúan en un número indeterminado pero esencialmente múltiple de territorios y, en lo que aquí interesa, de soberanías fiscales.

La singularidad de esta forma de economía reside en que, normalmente, la entidad gestora o intermediaria de la contratación del servicio está situada en territorios o países fiscalmente muy favorables o de baja o nula tributación y, en muchos casos, poco dados o intercambiar información de carácter fiscal. La consecuencia de todo ello es que sus beneficios no tributan en el territorio donde el servicio resulta realmente prestado por el titular del negocio inmediato o del usuario del servicio.

Hace ya algún tiempo que este problema es motivo de preocupación para los Estados afectados al tiempo que es también objeto de análisis por la doctrina científica en la medida en que se produce lo que se interpreta como una erosión no justificada de las bases imponibles estatales, es decir, un fenómeno por el que las entidades consiguen reducir o anular los beneficios imponibles en el territorio en el que los han obtenido. Aun considerando las controversias respecto a la realidad exacta de esta afirmación, lo cierto es que ya en 2013, el plan *Base Erosion and Profit Shifting –BEPS-* de la OCDE (erosión de bases y traslado de beneficios), apuntó como primera de sus acciones la relativa a los desafíos de la economía digital para la tributación de las empresas multinacionales. En 2017, la Comisión Europea emanó un documento relativo a *Un sistema justo y eficaz para el Mercado Único Digital –DSM-* y en marzo de 2018 emanó una *Propuesta de Directiva* relativa al llamado Impuesto sobre los Servicios Digitales (*DST*), que en diciembre de ese mismo año quedó en suspenso por falta de acuerdo de los Estados sobre su procedencia y oportunidad, aunque con el compromiso adoptado de continuar los trabajos en línea con los que está desarrollando la OCDE en un plazo máximo que concluiría como plazo máximo en 2025. En tal sentido, esta organización ha desarrollado un intensa actividad en el primer semestre de 2019, comenzando por una Nota Política en enero (destinada a poner de relieve los desafíos derivados de la digitalización de la economía), continuando con una Consulta pública sobre el mismo tema entre febrero y marzo, que concluyó en un Meeting celebrad en París en el mes

de marzo, todo ello dirigido a y finalmente concretado en el Plan de Trabajo de 31 de mayo, elaborado en el marco inclusivo de 129 países que ha concretado los dos pilares en los que debería apoyarse el futuro escenario fiscal del gravamen de la economía digital. En el primer pilar se explorarán las posibles métodos para determinar el impuesto que debe ser pagado y dónde, así como la parte que debería ser gravada en las jurisdicciones en las que están los clientes o usuarios. En el segundo pilar se intentará arbitrar un sistema que asegure que las multinacionales paguen un mínimo nivel de impuesto.

Nos encontramos, pues, en una situación de incertidumbre que debería resolverse previsiblemente en el marco indicado, sobre todo dadas las iniciativas particulares de algunos Estados, como España –cuyo proyecto de ley ha decaído al concluir la legislatura- o de Italia, que tiene un impuesto de esta naturaleza en vigor desde enero de este año.

**2.-** Los servicios digitales son una consecuencia de la aplicación de la inteligencia artificial a la prestación de servicios, inteligencia que también se proyecta en la producción de bienes. En este sentido, se usa más el término de robótica, como sistema conjunto de sistemas para la producción de bienes y también prestación de servicios (de hecho, la mayoría de las aplicaciones informáticas son también robots). Sin embargo, los retos que plantea la robótica para el Derecho financiero no tienen que ver solamente con la posible fiscalidad de los robots y por supuesto de los beneficios derivados de su intervención en la actividad económica, sino también con la posibilidad de introducir instrumentos desgravatorios e incentivos relacionados con el cambio de modelo productivo y quizá la necesidad de revisar algunos mecanismos de gasto público para subvenir las nuevas necesidades que se presentarán, incluida la financiación de una renta universal básica (Hamon, 2016).

Así, el desarrollo de la robótica se ha asociado a la pérdida de empleo y, consecuentemente, la pérdida de recaudación y de cotizaciones sociales. Algunos destacados magnates de los negocios (Bill Gates, 2016) han pedido directamente un impuesto a los robots; el informe Mady Delvaux (2016-2017) encargado por el Parlamento Europeo dejaba la puesta abierta a ello, aunque la resolución denominada *Normas sobre derecho civil de la robótica* (2017) no se mostraba favorable. Otras instituciones y organismos se han ido pronunciando sobre el tema, pero la doctrina científica no aboga por este tipo de imposición (X. Oberson, C. García Novoa), sino más bien por adaptar el gravamen de la imposición sobre los beneficios (J.A. Fernández Amor) y por utilizar instrumentos fiscales para favorecer la adaptación –y la inclusión, en su caso- de los trabajadores a las nuevas formas de producción robotizadas (A. Grau, 2018).

No obstante ello, gran parte de lo que veamos en el futuro no haya sido todavía investigado; en este ámbito, como en tantos otros, la realidad -la tecnología, en este caso- va marcando el camino.

# Materials

# FIRST ROUND TABLE

**SOME PHILOSOPHICAL REFLECTIONS ON SUSTAINABLE TAXATION**

**KU LEUVEN**



**Reflections on sustainable  
taxation**

**UCM 5 July 2019**

Prof. em. Frans Vanistendael

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**TABLE OF CONTENT**

- The hornet's nest of environmental taxation
- The new era of planet-wide (un)sustainability of human life: managing global warming & global waste
  
- The role of taxation in a sustainable world
- The role of taxation in the face of unsustainability

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## The hornet's nest

- A worldwide welter of more than 5.600 environmental & energy levies and taxes.
- EU energy tax directive, taxes on batteries, plastic packaging, noise pollution, greenhouse gases, water use, mineral extraction, nuclear fuels etc.
- National tax credits for isolation, solar panels, e-bikes etc.

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## The hornet's nest

- Revenue of environmental & energy taxes (EET) in 2014 in OECD countries: 2%, of GDP:
- Mexico 0,06% of GDP -> Denmark 4,1% of GDP
- OECD average revenue CIT: 3% GDP
- EET % share in total tax revenue:
- > 10% -> Dominican Republic, Mauritius, India, Turkey, Honduras, Slovenia, Korea
- < 5% -> Belgium, France, New Zealand, Tunisia, Canada, US, Brasil, Peru, Malawi

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## The hornet's nest

- Can 2% of GDP make the difference?
- In many cases tax does not make the difference, because non-tax factors are more important, but tax may make a difference.
- Cfr. Disappearance of big gas guzzling US cars in EU in the sixties (fuel tax, road tax).
- Cfr. Handicap for electrical cars despite subsidies & high fuel, road taxes for other cars.

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## Era of global (un)sustainability

- What's the difference with the past?
- Until the industrial revolution human life was indefinitely sustainable.
- All waste was degradable (>90% of all activity in agriculture).
- Lifetime of civilisations was calculated in millenia: (China, Japan, Roman empire, Muslim Caliphates)

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## Era of global (un)sustainability

- What's the difference with the past?
- Industrial revolution started a different era of consumption of raw materials & energy & production of waste, until the report Limits to Growth (Club of Rome 1972).

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## Era of global (un)sustainability

### World population growth (millions)

	1850	1950	2019
• Africa	100	200	1.320
• America	60	330	1.044
• Asia	656	1.379	4.584
• Europe+Russia	274	573	743
• Oceania	2	13	42
• Total	1.091	2.497	7.733

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## Era of global (un)sustainability

### World cities 1955 – 2018 (thousand)

• London	8.655 -	10.313	+ 1000
• Tokyo	8.622 -	38.100	+ 1000
• New York	7.800 -	18.593	- 500
• Beijing	4.400 -	20.383	+ 1000
• São Paulo	3.069 -	21.066	- 500
• Mexico	2.945 -	20.998	+ 600
• Cairo	2.400 -	18.771	+ 1000
• Kinshasa	320 -	11.586	- 200
• Lagos	312 -	13.122	- 200

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## Era of global (un)sustainability

- Until the report Limits to Growth (Club of Rome 1972), there was a general belief that, in spite of growing demand on finite resources, nature was boundless and could sustain unlimited economic growth:
- **“Air and water are free goods”.**

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## Era of global (un)sustainability

- Now there is **growing** but **not general awareness** that when the whole world adopts the “developed way of life” human life is no longer sustainable planet-wide.
- The most immediate and fundamental challenges are : **global warming** & **recycling global waste** resulting in two absolute priorities:
- **Carbon free energy & recycling economy**

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## Taxation in a sustainable world

- The **main role** of taxation in a sustainable world without limits is to **raise revenue**. Main taxes are on wealth, revenue, consumption, legal documents and public permits and concessions.
- **Social engineering** has **a secondary role** to revenue raising and is mainly used for business and social purposes. The main **justification** of the tax system is the **benefit principle** and its main **objective** is to achieve **ability to pay**.

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## Taxation in a sustainable world

- Because in a sustainable world revenue raising is the main purpose, taxation never can fully achieve its social engineering objectives. Revenue has priority. Cfr. excises on tobacco, alcohol and petrol. Sugar and fat taxes.
- In an (un)sustainable world revenue is also needed.

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## Taxation in a sustainable world

### Two techniques of social engineering

- Imposing a tax charge on objectionable behaviour, i.e. increasing the price of objectionable behaviour.
- Granting an exemption or a tax credit from a revenue raising tax as a financial incentive.
- However tax must maintain its role of raising revenue.

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## Taxation in a sustainable world

- **Social engineering** in the form of tax charges, or tax exemptions and tax credits, **does not change the nature of the tax**: income tax, wealth tax, consumption tax, gift tax, inheritance tax or customs duties.
- Technical assistance in tax reform advises a simplified tax system: low rates, broad base few exceptions, resulting in small impact for social engineering.

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## Taxation & unsustainability

- Question 1 : Is the main (only?) function of a sustainable tax to eradicate objectionable behaviour (carbon based energy, waste production), and revenue raising only secondary?

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## Taxation & unsustainability

- Tax can (accelerate) change in objectionable behaviour, when technological alternatives are available. Availability of alternatives is essential. Tax alone cannot eradicate objectionable behaviour.
- Cfr. Carbon cars -> electric cars. No electric aviation.

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## Taxation & unsustainability

- Taxation is a very unwieldy instrument to achieve targets: no deadlines no precise results.
- Technology can change behaviour without any tax incentive. Cfr. Fundamental change in communication: telephone – gsm – PC – IPAD – Iphone.

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## Taxation & unsustainability

- We need a worldwide/or regional (not a national) **non-tax framework of overall targets** to be reached based on scientific evidence. Ex. Paris climate accord.
- Within that worldwide framework the structure of regional trade arrangements (EU + EFTA, Nafta, Eurasian EU, ACP group, Caricom, Andean, Mercosur, APEC, ASEAN, Gulf CC, EAC, COMESA) can be used to elaborate regional tax targets & tax mechanisms.

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## Taxation & unsustainability

- Because technology is all important all tax rules in traditional tax systems on R&D for climate change & circular economy should be reviewed so as to facilitate R&D and exploitation of new technologies, subject to international/regional **monitoring**, to avoid distortion of competition.
- Idem for subsidising R&D and exploitation.
- Ex.: Expensing vs. depreciaton, IP boxes, reduced VAT rate for green energy.

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## Taxation & unsustainability

- Question 2: Are sustainable taxes only temporary or are they here to stay?
- When charges are well targeted they end when objectionable behaviour ends. Incentives & subsidies should end when innovation becomes competitive in the market. To be sure special tax regimes and subsidies should always be limited in time (5 years). Cfr. **Sunset legislation** in US.

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## Taxation & unsustainability

- After the transition to a carbon free and circular economy, consumption of energy and general consumption of goods and services will remain subject to tax. Special tax regimes such as lower rates for green energy, IP boxes and expensing in stead of depreciation should disappear.

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## Taxation & unsustainability

- How to avoid that special tax regimes facilitating climate change and circular economy distort competition?
- Design a new model TT to avoid double environmental taxation and double environmental non-taxation. Rules on minimal and maximal charges at source and at destination and rules on crediting taxes at source against specific taxes at destination.

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## Taxation & unsustainability

- Keep in mind that any special tax or charge in the end needs to be financed out of wealth or income.
- **When the tax burden > net-income not only the objectionable behaviour but all economic activity will disappear**, if there is no technological alternative.

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## Taxation & unsustainability

- Within the framework of regional trade treaties/multilateral model TT for environmental levies, a monitoring mechanism and a dispute resolution mechanism should be established to maintain rules of fair competition against free riders.

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## Taxation & unsustainability

- Is sustainable taxation subject to the principle of the ability to pay?
- The broad principle of the ability to pay should also apply to environmental levies within the framework of sustainable taxation at two levels: internationally between states and nationally between taxpayers (entities & individuals).

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## Taxation & unsustainability

- Interstate availability to pay has two aspects: (1) eliminating distortions of competition and (2) aid to developing countries.
- Levies at source & compensating levies at destination, imposed to avoid distortion of competition are to be used to subsidise new technology & best practices in developing countries.
- Financing mechanisms are to be set up within an organisation of donors & beneficiaries.

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## Taxation & unsustainability

- At the national level the context is quite different. Entities and individuals may be deterred by extra charges or pushed to new products by tax incentives, or in state controlled economies by direct government intervention.

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## Taxation & unsustainability

- Principle of “**Punitive or dissuasive equality**”: when charges are applied, the charge must be punitive or dissuasive to all taxpayers, avoiding that one group would be hit and another would be able to “buy out” objectionable behaviour.

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## Taxation & unsustainability

- Punitive or dissuasive equality requires that charges may be progressive with income, wealth or use & consumption, not only for individuals but also for entities.
- When using tax incentives, use credits not exemptions because of the regressive effect.

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## Taxation & unsustainability

- **Punitive or dissuasive equality** also includes to take account of the availability of alternatives to objectionable behaviour.
- Ex.: pushing for home work may be possible for types of administrative work, but not for an assembly line worker.
- Ex.: pushing for cycling over car transportation may be less suitable for senior citizens, or in outlying areas.

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## Conclusion : EU note

- EU directives (Energy efficiency, renewable energy) have set targets for climate change and circular economy by **qualified majority** in 2018.
- The implementation of these EU targets is left to the Member States, deciding on their own.
- Any specific EU tax regime implementing these environmental targets still requires **unanimity** of all Member States -> no EU progress -> **abolish unanimity.**

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**TAX INCENTIVES TO PROMOTE SOLAR ENERGY SELF-CONSUMPTION**



**TAX INCENTIVES TO PROMOTE  
SOLAR ENERGY SELF-CONSUMPTION**

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**OUTLINE**

- I. INTRODUCTION
- II. SETTING THE FRAMEWORK: THE ROLE OF PV ENERGY SELF-CONSUMPTION IN THE ECOLOGICAL TRANSITION
  - THE EU LEVEL - THE SPANISH LANDSCAPE - INTERNATIONAL EXPERIENCES
- III. IS THERE ANY NEED OF TAX INCENTIVES TO PROMOTE SOLAR ENERGY CONSUMPTION?
  - R&D *VERSUS* INVESTMENT - WHAT ABOUT TAX PRINCIPLES?
  - WHICH IS THE GOAL OF TAX INCENTIVES?
  - BAD EXPERIENCES IN PROMOTING RENEWABLES IN SPAIN
  - TIMING ISSUES ON DESIGNING TAX INCENTIVES
- IV. CONCLUSIONS



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## I. INTRODUCTION

### 1. THE ENERGY AS A RIGHT

- With a real content incompatible with the energy poverty

### 2. THE PREMISE

- Under the binding EU target of a share of at least 32% of renewable energy, self-consumption is a key issue for the faster increase in solar facilities

### 3. THE DEBATE ON THE PATHS

- Which is the best way to make the increase of the photovoltaic production power compatible with the efficiency of the electricity market?
- The final electricity market shape depends on how self-consumption is treated from a fiscal point of view, as well as for regulated matters including grants and the possibility of selling electricity to third parties through networks at a given price



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## II. SETTING THE FRAMEWORK: THE ROLE OF PV SELF-CONSUMPTION IN THE ECOLOGICAL TRANSITION

### What is self-consumption of renewable energy?

- Today, consumers can produce their own electricity onsite from renewable energy sources, and consume some or all of it. They can get an extra-benefit injecting the non-consumed surplus electricity into the grid
- The regulation has given to the self-consumption a **relevant role on the energy-mix** for the coming years and has associated this role with the objectives of **environmental sustainability** and **energy-self-sufficiency**
- There is **no specific targets to PV self-consumption for 2030**
  - EU level (Dve) **32%** renewable energy - **32.5%** increase of energy efficiency
  - Spanish level (PNIC 2021-2030) Pw production **337.448 GWh** – **SP 37 GW**



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## THE DIRECTIVE 2018/2001 (I) LAYING DOWN RULES ON SELF-CONSUMPTION

- (...) Policies supporting renewable energy should be predictable and stable and should avoid frequent or retroactive changes (...) Member States should promote cost-effective support policies and ensure their financial sustainability (29)
- With the growing importance of self-consumption of renewable electricity, there is a need for a definition of 'renewables self-consumers' and of 'jointly acting renewables self-consumers'. It is also necessary to establish a regulatory framework which would empower renewables self-consumers to generate, consume, store, and sell electricity without facing disproportionate burdens (...), Member States should be allowed to differentiate between individual renewables self-consumers and jointly acting renewables self-consumers due to their different characteristics to the extent that any such differentiation is proportionate and duly justified (66)



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## THE DIRECTIVE 2018/2001 (II)

- Renewables self-consumers should not face discriminatory or disproportionate burdens or costs and should not be subject to unjustified charges (...) Member States should therefore generally not apply charges to electricity produced and consumed within the same premises by renewables self-consumers. **However,** Member States should be allowed to apply non-discriminatory and proportionate charges to such electricity if necessary to ensure the financial sustainability of the electricity system, to limit the support to what is objectively needed and to make efficient use of their support schemes. At the same time, Member States should ensure that renewables self-consumers contribute in a balanced and adequate way to the overall cost-sharing system of producing, distributing and consuming electricity, when electricity is fed into the grid (69)



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## THE DIRECTIVE 2018/2001 (III)

### Article 2 Definitions

- (5) 'support scheme' means any instrument (...) applied (...) that promotes the use of energy from renewable sources by reducing the cost of that energy (...) including but not restricted to, investment aid, **tax exemptions or reductions, tax refunds (...)** *SEE ARTICLE 4*
- (14) 'renewables self-consumer' means a final customer operating within its premises located within confined boundaries or, where permitted by a Member State, within other premises, who generates renewable electricity for its own consumption, and who may store or sell self-generated renewable electricity, provided that, for a nonhousehold renewables self-consumer, those activities do not constitute its primary commercial or professional activity



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## THE DIRECTIVE 2018/2001 (IV)

### Article 21.2 Renewables self-consumers

- Member States **shall ensure** that renewables self-consumers are entitled:
  - **To generate renewable energy without being subject:**
    - ✓ in relation to the electricity that they consume from or feed into the grid, to discriminatory or disproportionate (...) **charges and to network charges that are not cost-reflective**
    - ✓ in relation to their self-generated electricity from renewable sources remaining within their premises, to discriminatory or disproportionate procedures, and to any charges or fees;
  - **To install and operate electricity storage systems** combined with installations generating renewable electricity for self-consumption **without liability for any double charge, including network charges, for stored electricity remaining within their premise**



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## THE DIRECTIVE 2018/2001 (V)

### Article 21.3 Renewables self-consumers

- Member States **may apply** non-discriminatory and proportionate **charges and fees** in relation to their self-generated RE (...) in the following cases:
  - ✓ if the self-generated RE is effectively supported **via support schemes**, only to the extent that the economic viability of the project and the incentive effect of such support are not undermined
  - ✓ from 1.12.2026, **if the overall share of self-consumption installations exceeds 8 % of the total installed electricity capacity of a Member State**, and if it is demonstrated (cost-benefit analysis) a significant disproportionate burden on the long-term financial sustainability of the electric system, or creates an incentive exceeding what is objectively needed to achieve cost-effective deployment of RE, and that such burden or incentive cannot be minimised by taking other reasonable action or if the self-generated RE is produced in installations with a total installed electrical capacity of more than 30 kW.



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## THE SPANISH LANDSCAPE

- **FINANCIAL AID SCHEME** – compatible with the EU State aid rules (in 2017)
- **RD 244/2019 - NO CHARGES AND FEES** for SC energy (Art. 14 provides a compensatory mechanism– only the net balance is taxable)
- **TAXATION** - **State level** (i) Electricity tax: **no** for SC exceeding 100 kW (ii) Production Tax of 7% (IVPEE): **no** for SC (iii) VTA (SC is **not subject** to VAT) (iv) **Tax incentives for R&D** **Local level**: Tax incentives (**IBI** in 60% of the municipalities 50% rebate - **ICIO** in 42%, around 90% rebate) **Regional level**: tax credits in Valencia and Balears (Personal Income Tax)
- **GRANTS** - at State, Regional and local level

**IS THE COST OF SELF-PRODUCTION LOWER THAN OTHER WAYS OF PRODUCTION?**

**- ARE ADDITIONAL INCENTIVES JUSTIFIED?**



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## INTERNATIONAL EXPERIENCES

- **GERMANY:** PV important level (2014 *German Renewable Energy Act (EEG)*, exemptions on the *EEG Umlage*, “*Standard & Storage*” Program)
- **FRANCE:** Tax credit 30% for the ecological transition (CITE)
- **THE UK:** *Climate Change Levy*, FITs, *renewable obligations*, *contract-for-Difference*
- **THE USA: 49% of SP facilities belongs to SC**
  - ❖ Incentives programs – rebates, tax incentives and mandates are offered by state governments - *Investment Tax Credit ITC* - *Production Tax Credit PTC* - *Energy – Grants* - *Standarts for Public Buildings Green Power Purchasing*.
  - ❖ **California - Hawaii** - generous PV subsidies, 100% RPS and SP tax credit



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### III. IS THERE ANY NEED OF TAX INCENTIVES TO PROMOTE SOLAR ENERGY CONSUMPTION? (I)

Solar PV is now, frequently **less expensive** than any fossil-fuel option, without assistance. Solar PV module prices have fallen by around 90% since the end of 2009 (IRENA, 2018)

- **Tax incentives R&D versus INVESTMENTS**
  - ✓ If self-consumption is economically feasible and benefits from important grants, would it be a preferable option R&D tax incentives to other, cause it has more impact on the general interests?
- **Is the current scenario compatible with tax principles**
  - ✓ The ability to pay and progressivity principles. What about the rest of the consumers?



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### III. IS THERE ANY NEED OF TAX INCENTIVES TO PROMOTE SOLAR ENERGY CONSUMPTION? (II)

- **Which is the goal of the tax incentives? Is it a perfect % share for PV self-consumption ?**
  - ✓ There is a need to increase accuracy for PV and self-consumption
  - ✓ If it is the case, why not to fix the target at EU and national level?
- **Bad experiences in promoting renewables in Spain**
  - ✓ Regulatory changes, litigation processes at CIADI
- **Timing issues on designing incentives**
  - ✓ Overlap of tax benefits, grants, and exclusion of the scope of the main taxes, without any economic impact model. **Does it make sense? There is a need to graduate the tax incentives**



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### IV. CONCLUSIONS (I)

- THE EU AND SPANISH LEGAL SYSTEM HAVE STATED A SET OF ACTIONS TO PROMOTE SOLAR ENERGY SELF-CONSUMPTION **BUT ...**
- ALTHOUGHT THERE IS NO A CLEAR PICTURE OF THE DESIRABLE PARTICIPATION OF THE SOLAR SELF-CONSUMPTION IN THE ELECTRIC MIX, **THE 8% SEEMS TO BE A RELEVANT FIGURE**
- THERE IS A MINIMUM COMPULSORY TAX PROTECTION AT THE EU AND SPANISH LEVEL AS WELL AS OTHER GRANTS AND INCENTIVES FOR THE SOLAR ENERGY SELF-CONSUMPTION BUT **THE QUESTION IS ... IF ADDITIONAL INCENTIVES ARE CONVENIENT**
- THE LACK OF A MODEL AND A CLEAR INDICATION ON THE DESIRABLE INCREASE IN THE SOLAR ENERGY SELF-CONSUMPTION MAKES DIFFICULT TO EVALUATE THE NEED OF ADDITIONAL MEASURES



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## IV. CONCLUSIONS (II)

- CURRENT AVAILABLE DATA SEEMS TO DEMONSTRATE THAT THE MATURITY OF THE TECHNOLOGY ALLOWS THE PRODUCTION OF SOLAR ELECTRICITY AT A COMPETITIVE AND EVEN A CHEAPER PRICE
- TAKING INTO CONSIDERATION THE PREVIOUS STATEMENTS, IT SEEMS NECESSARY TO ADDRESS THE TAX INCENTIVES TO THE **R&D EFFORTS** TO REVISE PERIODICALLY THE INCENTIVES IN PLACE AND TO GIVE THE APPROPRIATE IMPORTANCE TO THE **TIMING ASPECTS OF THE INCENTIVATION POLICIES**



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Thanks!

And enjoy the Seminar



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## Jacques Malherbe

Tax Law Professor, Université Catholique de Louvain

### TREATY ANTI-ABUSE MEASURES AS A TOOL FOR SECURING SUSTAINABLE DEVELOPMENT IN A GLOBALIZED ECONOMIC ENVIRONMENT



Jacques Malherbe  
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#### Double Tax Treaties

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- **States limit their taxing power:**
  - **Exclusive**
  - **shared**
- **Non discrimination rules**
- **Measures against international fraud / evasion**
- **Coordinate tax rules of both States**

## Relationship international law / domestic law

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- **Dualism: two different legal orders**
- **Monism: one legal order**

**Which one has priority?**

- ✓ **UK: DTT transposed in domestic law**  
**No conflict**
- ✓ **France: Treaty prevails**  
**Constitution, art. 55**  
**Cass., Jacques Vabre, 1975**  
**Conseil d'Etat: Nicolo, 1989**
- ✓ **USA: Treaties above State law**  
**Treaties = Federal laws**

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## Abuse of treaties

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- **Treaty shopping**  
**A no treaty with C**  
↓  
**B treaty with C: interposed**  
↓  
**C treaty with B, not A**
- **Rule shopping: change nature of income**  
**Ex: dividend: taxation in source country**  
↓  
**capital gain: taxable in residence country**

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- **1977: domestic anti-abuse rule: not applicable in case covered by treaty, except if express clause**
  - **1992: substance over form doctrine**
    - applicable to
    - conduit companies (1986)
    - base companies
  - **1998: Harmful Tax Competition?**
  - **2003:**
    - **Anti-Abuse rule part of facts to which treaty applies generating taxation**
    - **Interpretation of treaties in good faith according to object and purpose: Vienna Convention on treaty law, art. 31, § 1**
- Vogel: Statute of International Court of Justice: art. 38, § 1**

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- **Application of domestic anti-abuse clause to treaty situations depends on**
  - **text of**
    - **treaty**
    - **national provision**
  - **object and purpose**
  - **relationship between national and international law in the contracting States**
- **Qualification of fact applies to juridical situation**
- **Interpretation: as of now principle of performance in good faith in international law**
- **Taxpayers not parties to treaties**
- **States are free to apply anti-abuse clauses**
- **Anti-abuse rule in treaty**
- **National anti-abuse clause applying to treaties: Switzerland**

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## 1. Preamble of treaty

*“(State A and (State B)*

*Desiring to further develop their economic relationship and to enhance their cooperation in tax matters,*

*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 relief provided in this Convention for the indirect benefit of residents of third States)*

*Have agreed as follows:*

*mention that prevention of double taxation in residence State assumes that income has been taxed in source State”*

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## 2. Limitation on Benefits (LOB) clause

- US Model
- LOB clause provides more certainty
- Focuses only
  - on treaty shopping
  - Not on other forms of abuse
- Does not cover conduit arrangements

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**BEPS Plan – Action 6**

**Against treaty shopping**

**Exclusion of anti-abuse rule if treaty**

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**3. Principal purpose test (PPT): anti-abuse clause in treaty**

*“Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention”.*

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**BEPS Plan – Action 6**

**Against treaty shopping**

**Exclusion of anti-abuse rule if treaty**

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**Minimum standard**

**Preamble +**

**either LOB Clause and PPT**

**or PPT**

**or LOB + restricted PPT**

**or domestic anti-abuse measures**

**Mutual agreement procedure (MAP) to solve conflicts**

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## Compatibility

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### Domestic anti-abuse clause with treaty

- **Clause stating application of anti-abuse clause in treaty situations**
- **Anti-abuse clause gives meaning to a term**
- **Treaty refers for interpretation to domestic law of each country**
- **Anti-abuse clause conform to « guiding principle »**

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### Abuse of provisions of domestic law using treaty benefits

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#### Ex.

- **CFC rules: not prevented by treaty**
- **Thin cap rules: arm's length**

#### Compatibility

1. **ex. Art. 9 authorizes application of domestic provisions**

**Thin cap rule often authorized**

1. **Definition of**

12

Abuse of provisions of domestic law using  
treaty benefits

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**Compatibility**

**1. ex. Art. 9 authorizes application of domestic provisions**

**Thin cap rule often authorized**

**2. Definition of**

- residence
- immovable property
- dividend
- proceeds of redemption of shares above capital = dividends

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New Model Treaty  
Article 29, § 9

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***“Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention”.***

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## Article 29, § 9

- **Subjective element: obtain tax benefit: taxpayer**
- **Objective element: contrary to object / purpose of treaty of:**
  - **provision avoided?**
  - **provision applied?**
  - **treaty in general?**
- **Result:**
  - **deny application of treaty?**
  - **apply other provision of treaty?**
- **Burden of proof**

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## Multilateral Instrument

### Preamble

In accordance with the recommendation contained in the BEPS report on Action 6, article 6, § 1er, the convention imposes on signatory States the obligation to insert in their treaty the following preamble:

*“Intending to eliminate double taxation with respect to the taxes covered by this agreement 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 agreement for the indirect benefit of residents of third jurisdictions)”*

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### Anti-abuse Clause: art. 7

*“Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement”*

- **Competent authority may grant benefit if would have been obtained anyway**
- **Consultation with other competent authority**

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### States may adopt

**general treaty anti-abuse rule**

**or**

**detailed LOB + mechanism against conduit arrangements**

**e.g. because domestic anti-abuse rule sufficient to deal with other treaty abuses**

**or**

**detailed LOB + general anti-abuse rule**

**combines flexibility and certainty**

**does not restrict general anti-abuse rule**

### Restricts scope of art. 1

**eliminates indirect granting of treaty benefits**

**allows disposition by competent authority of purpose**

**is not benefiting of the Convention**

## Qualified persons

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### 9.a. Resident entitled to treaty benefits only if qualified person:

- Individual
- Government
- Company of which principal class of shares is traded on recognized stock exchange
- Charitable institution
- Pension fund
- Company if
  - During ½ days of benefit period residents of Contracting State or qualified persons as above own 50 % of shares

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## Active conduct of business

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### 10.a. Active conduct of business not

- holding company
- supervision of group
- financing of group
- managing investments

#### except if

- bank
- insurance company
- securities dealer

**Income derived from source States  
emanates from business  
incidental to business**

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## Active conduct of business

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### **10.b. Income derived from source States connected person in source State**

**if business in source State is substantial in relation  
with same activity of complementary business  
activity carried on in source State by person or  
connected persons**

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## Equivalent beneficiaries

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### **11. Company entitled to benefits if during ½ of days of benefit period 75 % of the beneficial interests held by equivalent beneficiaries**

### **13. Equivalent beneficiary is person entitled to benefit under domestic law of source State Covered Tax Agreement any other international instrument**

**EB deemed to hold same capital of dividend paying  
company as company claiming benefit**

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## Discretionary relief

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**12. Competent Authority may grant benefit with respect to specific item of income taking into account object and purpose of treaty if principal purpose is not to obtain benefit under Covered Tax Agreement**

**Shall consult with competent authority of Residence country jurisdiction**

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## General anti-abuse clause

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- **Conventions aim at providing benefits in respect of**
  - ***bona fide* exchanges of goods and services**
  - **movements of capital and purposes****Not arrangements made to secure more favorable tax treatment**
  
- **Applies to all limitations on taxation e.g. on**
  - **dividends, interest, royalties**
  - **capital gains from alienation of property in source State**

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## Transactions resulting directly or indirectly in benefit

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**ex. transfer loan from company of country not having treaty with source State to company of country having treaty to lower WHG on interest**

**ex. assignment of right to payment of dividends**

**ex. assignment of usufruct for price equal to present value of dividends**

**ex. building plant in country with which residence State has convention rather than in country economically similar: qualifies**

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## Transactions resulting directly or indirectly in benefit

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**One of the principal purposes**

**ex. changing residence if one of the purposes is to sell property in source State under favorable tax regime or to reinvest under such regime**

**ex. arrangement linked to core commercial activity: benefit granted**

**ex. conduit arrangement with financial institution in other State to invest in bonds in various countries to enjoy treaties of State of financial institutions: benefit denied**

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## Limitation on Benefits Clause

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### General antiabuse clause

**« Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention »**

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## Multilateral Instrument

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### No PPT

#### 1. If detailed LOB

+ rule on conduit companies

Or expression of principal purpose satisfying minimum standard

#### 2. If convention already includes provision excluding its

application if one of the principal purposes of an operation is to obtain the benefit of the treaty

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## Conduit provision

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### Conduit arrangement

ex. Company R owns shares of company S

- Treaty between countries of R and S
- Company T in third State wants to acquire minority interest in S
- S issues preferred shares to R
- T contracts with R to pay amount of issue price and receive after X years redemption price
- In the meantime, R pays yearly amount to T

Conduit arrangement

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## Relationship Treaty clause / Domestic GAAR

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### Attempt to apply a treaty ≠ tax abuse

- Valid economic motives: can one disregard the operation because other motive is to apply convention?
- Contrary to object of treaty: facilitate international commerce
- Competent tax authority: can intervene and reach result

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## Relationship Treaty clause / Domestic GAAR

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### Attempt to apply a treaty ≠ tax abuse

- Application simultaneously of treaty clause and domestic clause
- Treaty provision must prevail

Ex. acquisition by 24 % parent of 1 % of additional of subsidiary to apply reduced withholding rate

- Treaty : no abuse
- Competent authority: may reach some result

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## Relationship PPT / General

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### Domestic anti-abuse clause (GAAR)

- PPT: one of the goals of taxpayer
- GAAR: main or only purpose
- PPT :
  - reasonable to conclude
  - no requirement of artificiality

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## European Law

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- **EU directives:**
  - fiscal objective contrary to purpose and objective of the directive
  - not genuine according to all facts and circumstances
  
- **PPT :**
  - power of the administration to judge whether is conform to object and purpose of treaty
  - not precise
  - not predictable

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## European Law / PPT

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- **Denial of application of treaty**
  - Return to domestic law
  - Other situation
- **No discrimination**
- **Proportionality: no**
  
- **PPT :**
  - one of the principal objectives
  - burden of the proof: administration only to demonstrate that it is « reasonable » to find intention
  - no *prima facie* evidence

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## European Law / LOB provision

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- **Ownership and Base erosion tests exclude companies**
  - owned by other EU MS residents
  - making deductible payments to other EU MS residents
- **Derivative benefits: only reduce discrimination**
- **Stock exchange test: does not necessarily apply to all EU stock exchanges**
- **Consequences not clear:**
  - Not apply treaty
  - Apply other provision of treaty
- **Anti-abuse clauses of directives > anti-abuse clauses of treaty**
- **Loss of revenue: no justification**

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## Anti-abuse directive (ATAD)

2016

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### Includes anti-abuse rule

« 1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law »

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## Anti-abuse directive (ATAD)

2016

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**Does it stay within harmonization required by the establishment or functioning of the internal market?**

- **One of the principal objectives (ATAD)**
- **The essential objective (case law)**
- **Minimum harmonization: differences possible**

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## French Conseil d'Etat (2017)

Verdannet

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- **French resident wants to create French company to acquire buildings in France**
- **Luxembourg company**
  - purchases buildings
  - Resells them at a profit to French company
- **France-Luxembourg treaty: no tax on capital gain**
- **CE:**
  - No substance
  - Sole purpose is to evade taxes
  - No favorable effect on int'l commerce

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**María Amparo Grau Ruiz**

Tax Law Professor, UCM

**GLOBAL SUSTAINABILITY AND FINANCIAL ACTIVITY: CONTROL OF TAX INCENTIVES TO PROMOTE PRIVATE PARTICIPATION**



**“Adapting Tax Rules To Global Challenges”  
International Seminar UCM – CertificaRSE  
Faculty of Law, 5 June 2019**

*Prof. María Amparo GRAU RUIZ  
Complutense University of Madrid  
IP CertificaRSE Project  
(DER2015-65374-R MINECO-FEDER)*



**UNITED NATIONS**

**Transforming our world: THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT**

[Resolution 70/1 adopted by the General Assembly on 25 September 2015]

Sustainable Development Goals



The fairness agenda is much more than the fight against fraud, evasion & avoidance. **Taxation also plays a role in reducing inequalities and promoting social justice**

**Taxation & Corporate Social Responsibility policies can be mutually reinforcing** (i.e. CSR can be used to spread good tax practices, while taxation can promote other areas of CSR)

Public authorities can play a supporting role through a **smart mix** of **voluntary policy measures** and, where necessary, **complementary regulation**

Inject **more openness & TRUST into taxation**  
i.e. incentives for R&D or for smart and green investment

IMP. Cause direct or indirectly (by paying/managing/ruling taxes-enforceability) a **positive impact** (Environmental, Social or Governance) on society (**domestic or abroad**)

Proposal: a new cooperative approach: **quality** tax planning - value created for **sustainability**

**Fine-tuning tax treatment:** more than increasing the tax space & earmarking, or codes on good tax practices

**Transparency: tax benefits** received and **contributions to public goals** made should also be required

Shouldn't **tax treatment for corporations and shareholders** be better adjusted depending on CSR for global ESG criteria?

Improve **certainty** for tax administrations & taxpayers: How can they 'produce' together ESG benefits?

Efficient "cost-sharing" of non-financial goals

Cross-check **tax expenditures budgets** & **CSR reporting**

Take financial sector expertise to fund projects (best practices & exclusions)

according to NGOs references (**certifications**) + Insurance (estimations)

## CONCLUSION

**Fair taxation** is only possible if conceived with global scope  
Amend current elements in the system causing unsustainability  
Allow proper tax consideration with **incentives for controlled ESG**  
**direct contributions** by companies/individuals **worldwide**

## THANK YOU

☐ More information at <https://www.ucm.es/proyecto-certificarse/>



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# **SECOND ROUND TABLE**

**TAX IMMUNITY: CHALLENGES AND RISKS**



**TAX IMMUNITY:  
CHALLENGES AND  
RISKS**

**A new scenario: Tax Immunity**

- *“In this world nothing can be said to be certain except death (and taxes)” (B. Franklin)*
- DE (*“hard to tax” “Stateless income” “nowhere resident”*)
  - Absolute tax immunity?



## The challenges

- Fair and effective taxation (*“fair share”*). Ability to pay (R)
  - Undermining tax competition/ATP
- Allocation of taxing rights (*“how to share the pie”*). Inter-nation equity (S)
  - Looking for new/amended rules
  - The new cornerstone: value creation (market jurisdiction)



## The Proposals

- Fair taxation
  - OECD Work Plan (2019) Pillar II: The GloBE proposals (income inclusion, BE payments)
- Inter-nation equity
  - OECD Work Plan (2019) Pillar I: New nexus and profit allocation rules
  - EU Directive Proposals (2018) short and mid term. Current situation
  - Unilateral initiatives: Digital Services Tax






## The Risks

- *CEPS Concepts erosion and principles shifting*
  - Digital Services Tax: a hybrid concept
    - Agressive tax policy
  - Value creation: an adequate principle?
    - What about single tax principle?
- Cooperation vs competition
  - OECD Work Plan in the right direction?
  - Unilateral solutions: main concerns



## Beyond Tax Immunity

- **AI:** the crisis of the current tax system (controversial)
  - How to get public funds?
    - Less public expenditures
    - New and/or increased taxes
    - Others (*Social Wealth Funds*)
- 

## THE DESIGN OF A ROBOT TAX

### The design of a Robot Tax

International Seminar UCM  
Adapting Tax Rules to Global Challenges  
Madrid, June 5<sup>th</sup>, 2019

*Xavier Oberson*  
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#### Summary

- I. Development of Artificial Intelligence (AI)
- II. Impact on jobs
- III. Towards a “tax capacity” of robots or the use of robots ?
- IV. Potential solutions
- V. The need for an international framework

## I. Development of Artificial Intelligence (AI)

- Industrial robots;
- Robots in the service economy (doctors, bankers, entertainers, lawyers, administrations, agriculture, etc.).

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## II. Impact on jobs

- The impact of artificial intelligence on jobs is controversial. Two schools of thoughts : (i) innovation will create new jobs; (ii) AI will destroy more jobs than it will create.
- Potential triple negative effects : (i) loss of income (salaries, etc.); (ii) increase of additional financial needs (social security); (iii) diminution of consumption.

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### III. Towards a “tax capacity” of robots or the use of robots ?

- Economic perspective (neutrality between robots and humans ?) ;
- Constitutional perspective (the introduction of a new tax should be just objectively justified in accordance with the principle of ability to pay and with the principle of equality of treatment);
- Ability to pay of the robots or of the use of robots?

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### IV. Potential solutions

- Corporate tax :
  - Profits emerging from the use of robots;
  - Taxation of an imputed salary of robots activities;
  - South Korea is studying an indirect method (limitation of deduction).
- Income tax :
  - The theoretical imputed income of robots

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## IV. Potential solutions

- VAT :
  - At a first stage : the supply from robots would be integrated within the enterprise;
  - At a second stage, the robots as a taxable person ?
- Social security;
- An object tax on robots.

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## V. The need for an international framework

- An international framework is necessary (OECD, UN, EU);
- The issues are closely related to the more general issues of the taxation of digital economy;
- The taxation of robots or of the use of robots raises new and delicate questions (characterization, permanent establishment, transfer pricing, etc.).

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Sources:

- X. Oberson, Taxing Robots ? World Tax Journal, Volume 9, Issue 2, May 2017, p. 247 ff.
- X. Oberson, Taxing Robots ? Helping the Economy to Adapt to the Use of Artificial Intelligence, Elgar Publishing UK/USA, May 2019

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**César García Novoa**

Tax Law Professor, Universidad de Santiago de Compostela

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A NEW TAXATION FOR A NEW REALITY



## **A NEW TAXATION FOR A NEW REALITY**

CÉSAR GARCÍA NOVOA. TAX LAW  
PROFESSOR. UNIVERSITY OF  
SANTIAGO DE COMPOSTELA

### **A NEW INTERNATIONAL CONTEXT FOR TAXATION**

- Globalization and the internationalization of the economy.
- New technologies, electronic commerce and digital economy.
- *MORALIZATION OF COMPLIANCE OF THE TAX OBLIGATIONS*
- The confusing concept of *aggressive tax planning* (OECD Seoul Forum 2006).
- **International Tax Planning Structures of Transnational Companies** (Starbucks; Google, Microsoft, Facebook, Amazon...): Double Irish, Dutch Sandwich...

## NEW PARADIGM IN THE DISTRIBUTION OF INTERNATIONAL POWER TO TAX THE BENEFITS OF MULTINATIONAL COMPANIES

- The paradigm in the distribution of international power to tax the benefits of multinational companies has been questioned.
- The OECD Model, based on the prevalence of the State of residence- (Taxation of corporate profits in the country of residence -*worldwide income*-).
- Taxation of international groups: rule of the ***separate enterprise***.

## BEPS: THE ORIGIN

- BACKGROUND OF BEPS:
  - Policy failure against tax havens (from the report *Harmful Tax Competition*, 1998). Need to sign 12 international treaties of exchange of information to stop being *tax haven*.
    - **Period 1998-2001: Little progress.**  
Blacklist OECD 2000: 35 Tax havens.
    - **Period 2001-2008: Lukewarm progress.**
  - LATER EVOLUTION (2009-2010): Peer Reviews of the Global Forum on Transparency and Exchange of Information.

## PROBLEM OF BASE EROSION IN MULTINATIONAL COMPANIES

## MORALIZATION OF COMPLIANCE OF THE TAX OBLIGATIONS

- There is no difference between tax avoidance and tax evasion ?
- *The difference between tax avoidance and tax evasion is the thickness of a prison wall.* Denis Healey, British Finance Minister.
- The confusing concept of *aggressive tax planning* (OECD Seoul Forum 2006).

## MORALIZATION OF COMPLIANCE OF THE TAX OBLIGATIONS (II)

- **-International Tax Planning Structures of Transnational Companies** (Starbucks; Google, Microsoft, Facebook, Amazon...): Double Irish, Dutch Sandwich...
- Traditional strategies:
  - *Cash pooling*: target: optimization and use of surplus funds of all companies in a group in order to reduce external debt.
  - *Re-location of intangible*: Rationale for Intangible Asset Location at Low-tax Countries.
  - *Avoiding status of permanent establishment*: Transforms from being a producer to being distributor (commissionaire signing contracts in its own name)-*contract manufacturing / toll manufacturing...*

## BEPS. REALLY IS A FISCAL REVOLUTION?

- It is a fiscal revolution, *ma non troppo*.
- TAXATION WHERE PROFITS ARE GENERATED
- The debate on the distribution of the tax jurisdiction between the State of source and the State of residence is not contemplated
- BEPS not discuss the model based on the prevalence of the State of residence- (Taxation of corporate profits in the country of residence -*worldwide income*-).

## BEPS. REALLY IS A FISCAL REVOLUTION? (II)

- **IN OPPOSITE:**
- BRICS (*reasonable allocation of profits principle or in line with value creation*): In India: *genuine link*.
- *Kemp Commission on Tax Reform (1996)*: taxation of international income only by the source country. (with *progressive exemption method*).

## BEPS DOES NOT DISPUTE THE MAJOR PROBLEMS RELATING TO TRANSFER PRICING

- ACTIONS 8, 9 y 10. Intangibles
- Does the OECD Model is obsolete?.
- It not contemplated to proportional allocation of tax bases (transaction profit split method).
- GlaxoSmithKline Case (2011): the separate enterprise principle and the arm`s length rule require reject considerations of reasonableness (take into account a license agreement between the companies of the group).
- Crisis of Comparable Uncontrolled Price (**CUP**).
- Simplification; Need to safe harbors?.

## BEPS NO PROPOSES A MORE MODERN CONCEPT OF PERMANENT ESTABLISHMENT (PE)

- Action 6: in many cases, this has led enterprises to replace arrangements under which the local subsidiary traditionally acted as a distributor by *commissionnaire arrangements.... without a substantive change in the functions performed in that country.*

## BEPS NO PROPOSES A MORE MODERN CONCEPT OF PERMANENT ESTABLISHMENT (PE) (II)

- Topics that should provide BEPS
  - New definition of dependent agent, the commissionaire and the *contract manufacturer*.
  - New definition of virtual permanent establishment.
  - New definition of preparatory or auxiliary activities (for example: logistics center).

## PROBLEMATIC ASPECTS ABOUT THE ACTIONS BEPS

- Actions that respond specifically to USA problems:
  - Action 1: *Address the tax challenges of the digital economy (september 2014) and Action 8: Intangibles.*
  - The fiscal problem of intangibles affects American companies
  - Action 4. *Limit base erosion via interest deductions and other financial payments. (september 2015).*
  - The limitation on the interest deduction should be applied the same way to Spanish/European companies? Double taxation of interest?
- Action 2 : *Neutralise the effects of hybrid mismatch arrangements (september 2014).*
- Why more attention to hybrid financial products to hybrid companies, for example LLCs?.

## PROBLEMATIC ASPECTS ABOUT THE ACTIONS BEPS (II)

- Action 3: *Strengthen CFC rules (september 2015).*
- **The problem of compatibility of the CCF clause with the Double Taxation Conventions which follow the OECD model will be definitively resolved?**
- Action 5: *Counter harmful tax practices more effectively, taking into account transparency and substance. (septembre-december 2015).*
- **What is the minimum standard of Abuse? A new GAAR for Europe's Parent-Subsidiary Directive Of JANUARY 27, 2015?**

## PROBLEMATIC ASPECTS ABOUT THE ACTIONS BEPS (III)

- **Action 6:** *Prevent treaty abuse and double non-taxation.*
- **General condemnation of the double non-taxation? What about the tax sparing clause?.**
- **Action 12:** *Require taxpayers to disclose their aggressive tax planning arrangements.*
- **What is the model to be followed? British (disclosure of tax avoidance schemes)/ American Offshore Voluntary Disclosure Initiative (OVDI)? DAC 6?**

## PROBLEMATIC ASPECTS ABOUT THE ACTIONS BEPS (IV)

- ACTION 7: Prevent the artificial avoidance of PE status.
- Only fight against the use of *contract manufacturer* or will be included a test of *mismatch condition* or *tax avoidance condition*, like in the *British Diverted Profits Tax*?

## LEGAL CHARACTERIZATION OF BEPS RULES

- SOFT LAW (non mandatory formulation).

The European Union becomes *soft law* into binding rules.

## BEPS AND THE EUROPEAN UNION. PARALLEL PATHS?

- For example, the concept of *aggressive tax planning*.
- Before in the EU than in the OECD.
- COMMISSION RECOMMENDATION of 6.12.2012 on aggressive tax planning (2012/772/UE).
- Aggressive tax planning consists *in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability*.

## TRADITIONAL CONCEPT OF PERMANENT ESTABLISHMENT

- PE: specific form of taxation, and an expression of the tax power of the State where the establishment is located.
- The concept of *permanent establishment* is a typical notion of International Tax Law.
- Definition in article 5 of the OECD Model Convention.
- Principal condition: a fixed place of business (*place of business test*).
- Meaning *a fixed place*: tangible asset of a substantial nature, with stability.

## TRADITIONAL CONCEPT OF PERMANENT ESTABLISHMENT (II)

- *Geographical link* between the **activity developed** and the permanent establishment.
- **A physical presence.**
- Not in the case of *preparatory or auxiliary activities*.
- Article 5 OECD Model includes *dependent agent*.

## THE CONTEXT OF THE DIGITAL ECONOMY

- Overcome the concept of PE in the context of the digital economy.
- Action 1 BEPS Plan: **Addressing the Tax Challenges of the Digital Economy. Final Report 2015.**
- Options:
  - New digital nexus.
  - withholding tax.
  - Introduction of equalization levies

## DIFFICULTIES. RULE OF VALUE CREATION

- Many difficulties in adapting the *old molds* of the classic concept of permanent establishment to the new realities of electronic commerce and the digital economy.
- **Ductility** of the permanent establishment concept.
- Adaptation to the new reality: substitution of the residency rule by the principle of *value creation*.

## THE SOLUTION FROM THE EUROPEAN UNION

- The European Commission made two different proposals (**Fair Taxation of the Digital Economy**; March 21, 2018).
- A) Reform the corporate tax rules: profits would be taxed where businesses have significant interaction with users through digital channels.
- B) Digital Services Tax.

## DST

- *The Commission considers that the current rules fail to recognise new business models and new ways in which value is created, and acknowledge the role of users in the process.*
- DST is a 3 % tax on gross income.
- Covers the main digital activities:
  - Sale online advertising space.
  - Digital intermediary activities.
  - Sale of data generated from user-provided information.

## SIGNIFICANT DIGITAL PRESENCE IN A MEMBER STATE

- **Several Criteria:**
  - Revenue.
  - Number of users.
  - Number of online contracts concluded with users.
  
  - *Economic presence beyond a physical presence.*

## GENERAL CONCLUSIONS

- A new concept of permanent establishment:
- Limited to digital services.
- User threshold.
- A certain time threshold
- *De minimis* revenue threshold

• THANK YOU VERY MUCH FOR YOUR  
ATTENTION

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**APPROACH TO TAXATION OF DIGITAL SERVICES AND ROBOTICS IN EUROPE**

*Approach to taxation of digital services and robotics in Europe*

International Seminar

*Adapting Tax Rules To Global Challenges*

UCM Faculty of Law, June 5, 2019

Juan José Hinojosa Torralvo

Universidad de Málaga

## OCDE, BEPS

- 2103 Comité de Asuntos Fiscales de la OCDE
- BEPS acción 1; Los desafíos de la economía digital para la tributación de las empresas multinacionales
  - Falta de acuerdo sobre la "presencia digital significativa"
  - Entorno multi-jurisdiccional complejo necesitado de un nivel de cooperación interestatal inexistente (ni en OCDE ni en UE) en 2015
  - Expedientes ayuda Estado a tecnológicas e Irlanda, Brexit, política fiscal USA tiene hoy más alterado el escenario
- Resumen: falta de consenso en BEPS
- 2018: OCDE abril *"Desafíos derivados de las digitalización: informe provisional"* post BEPS:

La vía para gravar los servicios digitales no debe ser la de los impuestos compensatorios

# Antecedentes UE

2017, 23 de septiembre

- **Comunicación de la CE al Parlamento y al Consejo: “Un sistema impositivo justo y eficaz en la UE para el Mercado Único Digital”**
  - Urgencia por encontrar soluciones eficaces y alternativas para someter a tributación los beneficios generados en el marco de la economía digital por parte de las multinacionales

Nuevos **modelos de negocios**:

- **Minoristas en línea**: por el que las plataformas en línea venden bienes o conectan a compradores y vendedores a cambio de una comisión por transacción o venta, y como ejemplo: Amazon, Zalando o Alibaba.
- **Medios sociales en publicidad**: por el que los propietarios de las redes basan sus ingresos en la publicidad mediante el envío de mensajes comerciales específicos a los consumidores, y como ejemplo: Facebook, Xing o QZone.
- **Suscripción**: por el que las plataformas cargan cuotas de suscripción por el acceso ininterrumpido a los servicios digitales, y como ejemplo Spotify, Netflix o iQiyi.
- **Plataforma colaborativa**: por el que las plataformas digitales conectan la capacidad excedentaria y la demanda, utilizando mecanismos de reputación para apoyar el consumo y permitir a las personas compartir el «acceso» a los activos en lugar de poseerlos, cobrando las plataformas una comisión fija o variable sobre cada transacción, y como ejemplo: Airbnb, Blablacar o Didi Chuxing, Booking, eBay.

# Medidas posibles

- Un nuevo concepto de Establecimiento Permanente (EP) virtual a través de la “presencia económica significativa” (PES/DPS)
  - Pero ¿cómo se determina la PDS y cómo se atribuyen los beneficios?
- Retención de salida (sobre el montante de los pagos realizados a proveedores no residentes)
  - Pero ¿cómo involucrar a los consumidores (B2C) en la retención
- Impuesto sobre las ventas: no gravar el beneficio sino la prestación del servicio
  - Fue la opción UE: propuesta directiva DST

## Antecedentes UE (2)

- COM (2018) 148 final, 21 de marzo Propuesta de Directiva del Consejo relativa al

*“Sistema común del impuesto sobre los servicios digitales que grava los ingresos procedentes de la prestación de determinados servicios digitales”*

- Provisional, transitorio
- Compensatorio
- Alternativo

## Aspectos controvertidos

- **Qué quiere gravar** (beneficios de las multinacionales digitales que no se someten a los impuestos societarios) y **cómo lo grava** (¿impuesto indirecto o impuesto directo?)
  - ¿Cambio de paradigma residencia/territorio en la imposición directa?
- Dificultad **de determinar cuáles son los ingresos** imponibles reales y cómo se comprueba su obtención
- Las **soluciones hasta ahora son unilaterales**
- **Problemas en contexto internacional**
  - **Aviso** de senadores USA (Hatch y Wyden) en una carta al Pte Consejo y Pte CE manifestando su preocupación por la propuesta de directiva (18-10-2018): problemas comerciales y doble imposición; dificultad para someter a las empresas asiáticas.

# ECOFIN diciembre 2018

- **Diciembre 2018: ECOFIN**
- **Propuesta:** The Council will be invited to agree a General Approach on the Digital Services Tax Directive.
- **Resultado:** Following a thorough analysis of all technical issues, the presidency put forward a compromise text containing the elements that have the most support from member states. However, at this stage a number of delegations cannot accept the text for political reasons as a matter of principle, while a few others are not satisfied yet with some specific points in the text. That text did not gain the necessary support and was not discussed in detail.
  - **Limitación:** propuesta para reducir su ámbito objetivo a la publicidad on line, suprimiéndose los otros hechos imponible (intermediación y venta de datos)
- **Expectativa:** Ministers examined a **joint declaration by the French and German delegations**. The presidency recommended that the Council working group continues working on the basis of the latest Presidency compromise text and the elements proposed by France and Germany, with the aim of reaching an agreement as soon as possible.

## *Franco-German joint declaration on the taxation of digital companies and minimum taxation*

*"We reaffirm **our determination to establish a fair and effective taxation of large digital companies that will contribute to the modernization of our tax systems.***

*We expect **the OECD will reach an agreement by 2020** on proposals aimed at tackling the challenges raised by the digitalization of the economy and tax avoidance. We will discuss proposals on taxing the digital economy and minimum taxation **also in the G7 and G20**. We are committed to immediately implement an OECD outcome into binding European law.*

*We invite the EU Commission and the Council:*

*-first to **amend and focus its draft directive** for a digital services tax on a tax base referring to advertisement, on the basis of a 3% tax on turnover,*

*-and second to submit **proposals in due course** on taxing the digital economy and **minimum taxation in line with the work of the OECD.***

*We urge the Council to adopt the **legally binding directive on DST without delay** and in any case before March 2019 at the latest. It will enter **into force on 1st January 2021, if no international solution has been agreed upon.** The directive would not prevent Member States from introducing in their domestic legislation a digital tax on a broader base.*

## Situación actual en la OCDE (1)

- Policy Note 23-1-19: Inclusive Framework: examinar y desarrollar las propuestas "without prejudice" basis.
  - CONSULTA PÚBLICA SOBRE LOS RETOS FISCALES DE LA DIGITALIZACIÓN
    - 13 febrero – 6 marzo 2019
    - *Addressing the tax challenges of the digitalisation of the economy*
  - Meeting 13 y 14 Marzo
    - Pilar 1: Propuesta de revisión de localización de los beneficios (*profits allocation*) y reglas de conexión (*nexus rules*); diseño y administración (cargas); valoración general y propuestas sobre:
      - User participation
      - Marketing intangibles
      - Significant economic presence
    - Pilar 2: Visión general sobre la propuesta global anti-erosión; diseño y administración (cargas)
- Therefore the Inclusive Framework agreed that both issues should be discussed and explored in parallel.*
- "For some commentators and members of the Inclusive Framework the work on the tax challenges of digitalisation has revealed some more fundamental issues of the existing international tax framework, which have remained after the delivery of the BEPS package" (Programme of work, 10)

## Los dos pilares

- **Pilar 1: profits allocation and nexus rules**
  - User participation: los usuarios contribuyen a crear la marca y eso no es captado por la norma fiscal /redes sociales, buscadores, plataformas e-commerce)
    - Se necesita modificar las reglas de atribución de beneficios para atribuirlos a las jurisdicciones donde están los usuarios al margen de la PDS)
      - Se propone la utilización del Método Residual de partición de Utilidades
  - Marketing Intangibles: atribuir los beneficios donde se crea el valor (al margen de la presencia física); marcas, nombres comerciales, listas de clientes, información de clientes (no las patentes); gravar todo el ingreso residual (no habitual)
    - Requiere la modificación de las reglas sobre los precios de transferencia y los CDI
  - Presencia Económica Significativa (PDS/DPS): factores que evidencien una interacción significativa y continua con un territorio (jurisdicción), a saber, ingresos, base de usuarios, volumen de contenidos, facturación en moneda local, web en idioma propio, marketing y promoción
    - Método de distribución fraccionario
- **Pilar 2: global anti-base erosion**
  - Regla de la inclusión de la renta (positiva): gravar el ingreso de una filial controlada si el ingreso se grava a un tipo efectivo bajo (undertaxed) en el ERes). Complementaria a reglas sobre SEC/CFC.
  - Regla de exclusión de pagos que erosionan la base: a) rechazar las deducciones o beneficios de un CDI excepto si están gravados a un tipo mínimo y b) otorgar beneficios sólo si el ingreso es gravado suficientemente en ERes

## Plan de trabajo, may 31th 2019

*Programme of Work (129 Inclusive Framework, G20)*

*To present at Fukuoka on 8-9th June 2019*

- *Primer Pilar:*
  - Explorar las posibles soluciones para determinar el impuesto que debe ser pagado y dónde
  - Parte de los beneficios que debería ser gravada en las jurisdicciones en las que está los clientes o los usuarios
- *Segundo Pilar:*
  - Concepción de un sistema que apunte a asegurar que las MNE paguen –en la economía digitalizada pero no sólo- paguen un mínimo nivel de impuesto.
    - Protección de las bases fiscales de los países frente al traslado de beneficios hacia jurisdicciones débiles o nulas.
    - Solucionar problemas subsistentes por la iniciativa BEPS y G”.
    - Acuerdo en enero 2020 e Informe definitivo en diciembre 2020

## Primer Pilar :Revised nexus and profit allocation rules (1)

- New profit allocation rules
  - 1) The development of conceptually underpinned methods for determining the amount of profit and loss subject to the new taxing right, consistent with the principle of avoiding double taxation;
  - 2) The use of simplification measures where appropriate to limit the burden of the new rules on tax administrations and taxpayers alike; and
  - 3) An assessment of the administrability of the features of any proposal, taking into consideration capacity and resource constraints.
    - Modified Residual Profit Split
    - Fractional apportionment

Distribution-based approaches, business line and regional segmentation, desing scoping limitations, treatment of losses

- Modificar la definición de establecimiento permanente (art 5 OCDE ModCon)
- Desarrollo de reglas independientes para establecer un nuevo nexo.

## Revised nexus and profit allocation rules (2)

- Eliminación de la doble imposición
  - The extent to which, under the new profit allocation rules, the clear identification of the relevant taxpayer in respect of the income that is reallocated would allow the existing treaty and domestic law mechanisms for eliminating double taxation to continue to operate as intended. The effectiveness of the existing mechanism for addressing economic double taxation by way of appropriate adjustments under Article 9(2) of the OECD
  - Model Convention and the need for this mechanism to be updated or supplemented in relation to the new profit allocation rules.
- The effectiveness of the existing mechanisms for eliminating juridical double taxation by using the exemption or credit method and the need for those mechanisms to Resolución de controversias (dispute resolution)

## Pillar 2: Global anti-base erosion

- Income inclusion rule
  - Gravar el ingreso de una filial o CFC si este ingreso ha sido gravado a un tipo bajo (complementaria a CFC).
    - Ampliar hasta a un tipo mínimo
    - Usa un porcentaje fijo
    - Switch-over rule: allow the state of residence to apply the credit method instead of the exemption method where the profits attributable to a permanent establishment (PE) or derived from immovable property (which is not part of a PE) are subject to tax at an effective rate below the minimum rate.
- Tax on base eroding payments
  - Undertaxed payments rule (tipos de partes afectados, test para determinar la baja tributación, ajustes, desvíos...)
  - Subject to tax rule (¿modificación de tratados?)

# ROBÓTICA ante DF

- Prima facie:
  - Ingresos: más productividad, más beneficios, más volumen de negocios = mayor recaudación
  - Gastos: beneficios fiscales por inversiones (aparte de las financiaciones directas en empresas, investigación y demás)
- Segundo nivel: la posibilidad de gravar la robotización en sí misma y no sólo los efectos que produce

## GRAVAR LA ROBOTIZACIÓN (1)

- La idea está relacionada con la pérdida de empleo (FREY/OSBORNE, Foro Económico Mundial, WEF, ARNTZ/GREGORY/ZIERAHN, QUINTINI) y consiguientemente:
  - La pérdida de recaudación vía salarios
  - La pérdida de cotización a la Seguridad Social
- Bill Gates (compensar pérdidas fiscales), Benoît Hamon (FRA, crear renta universal básica)
- 2016 y siguientes en PARLAMENTO EUROPEO
  - 2016 Informe Mady DELVAUX (presentado enero 2017): favorable
  - 2017 La Resolución PE "Normas de Derecho Civil sobre Robótica": no favorable
    - Encuesta para conocer opiniones sobre temas éticos, económicos, jurídicos...
    - ¿Informe "El coste de la No Europa en robótica e inteligencia artificial"?
    - 2018 Estudio Think Tank Mesa redonda sobre la Estrategia para la Inteligencia Artificial en Europa, en la que participaba M. Delvaux (pero el texto no la menciona).
  - Alianza Progresista de Socialistas Demócratas ("Informe sobre personas electrónicas): a) que los robots paguen Seguridad Social y b) que las empresas sufraguen los impuestos de los robots
  - 2019 (Think Tank) El Mercado Único Digital Europeo (DSME) Procurar beneficios económicos para los ciudadanos y las empresas
    - Pone el acento en programas de financiación. También se refiere a los derechos de los trabajadores afectados, sin concretar en el ámbito fiscal sobre robots, sino sobre los servicios digitales
  - 2019 (Think Tank) Estudio de Impacto de la digitalización sobre (asuntos) de fiscalidad internacional
    - Se proyecta sobre negocios y plataformas digitales, blockchain, economía colaborativa

## GRAVAR LA ROBOTIZACIÓN (2)

RECOMENDACIONES DESTINADAS A LA COMISIÓN SOBRE NORMAS DE DERECHO CIVIL SOBRE ROBÓTICA

Informe Mady DELVAUX

(2015/2103 INL) 31.05.2016

Presentado el 27.01.2017

K. Considerando que, al mismo tiempo, el desarrollo de la robótica y la inteligencia artificial puede dar lugar a que los robots asuman gran parte del trabajo que ahora realizan los seres humanos, lo que puede resultar por completo los empleos perdidos, cuestión esta que genera interrogantes sobre el futuro del empleo y la viabilidad de los sistemas de seguridad y bienestar sociales y sobre la insostenibilidad continuada de las cotizaciones para los regímenes de jubilación, en caso de que se mantenga la actual base imponible, lo que podría conllevar una mayor desigualdad en la distribución de la riqueza y el poder, mientras que, en el marco de la integración del saber y técnicas profesional para desarrollarlos, cuyos puestos de trabajo se hayan reducidos o eliminados, deberá estudiarse la posibilidad de someter a impuesto el trabajo realizado por robots, o establecer gravamen por el uso y mantenimiento de cada robot, a fin de mantener la cohesión social y la prosperidad;

## GRAVAR LA ROBOTIZACIÓN (3)

- OBERSON, X.: “¿Gravar los robots? De la aparición de una capacidad electrónica para pagar un impuesto sobre robots o el uso de robots”, (*World Tax Journal*, mayo 2017; traducido por *Taxlandia*, 16 mayo 2018).
- GRAU RUÍZ, M.A.: “La adaptación de la fiscalidad ante los retos jurídicos, económicos, éticos y sociales planteados por la robótica”, *Nueva Fiscalidad*, nº 4/2017.
- FERNÁNDEZ AMOR, J.A.: “Derecho tributario y cuarta revolución industrial: análisis jurídico sobre aspectos fiscales de la robótica”, *Nueva Fiscalidad* nº 1/2018
- GARCÍA NOVOA, C.: “La tributación de los robots y el futurismo fiscal”, *Taxlandia*, abril 2018.

## GRAVAR LA ROBOTIZACIÓN (4)

- Pagar la Seguridad Social
- Un impuesto directo sobre los robots (B. Gates)
- Mediante tasas concretas para determinados usos (OBERSON, FERRÉ sí, FDEZ AMOR, no)
- Gravar en la misma medida en que se pierdan retenciones en humanos
- Otorgarles personalidad jurídica específica o uso de robots (retribución imputada), OBERSON

## NO GRAVAR LA ROBOTIZACIÓN

- Modelo coreano (2016)
  - En realidad la penaliza, pero mediante la rebaja de deducciones
- Expectativas de desarrollo:
  - Se crearán más empleos de los que se destruyan (133 M FRENTE A 75 M, según WEF)
- Hacer que las rentas de capital tributen más que las del trabajo
- Gravar los beneficios (Federación Internacional de Robótica IFR y todos los contrarios al gravamen)
- Futurismo fiscal (G. NOVOA)
- Incentivos a la innovación y a la formación (A. GRAU)

Thanks

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