Article

Avoidance of the Permanent Establishment: by the Digital Economy and Tax Cooperation as its Solution

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KEYWORDS:

Data collection, tax avoidance, permanent establishment, tax cooperation, international tax law, global tax governance.

ABSTRACT:

This article analyses the obsolescence of the concept of permanent establishment in the context of the growth of the digital economy.

More precisely, we will see how the quality of permanent establishment is eluded in the data collection trade. The legal vacuum of this new type of business is a problem, as is its international dimension.

Therefore, we will examine the proposed solution of virtual permanent establishment.

In a second part of this article, we will broaden the scope of reflection, considering that tax cooperation must be the means and the solution to counterbalance the structural flaws of the permanent establishment.

We will define the concept in depth to consider how the development of international law and global governance in tax matters can and should be the key to reform international taxation

PALABRAS CLAVES:

Recogida de datos, evasión fiscal, establecimiento permanente, cooperación fiscal, derecho fiscal internacional, gobernanza fiscal mundial.

RESUMEN:

Este artículo analiza la obsolescencia del concepto de establecimiento permanente en el contexto del crecimiento de la economía digital.
Más precisamente, veremos cómo se elude la calidad del establecimiento permanente en el comercio de recopilación de datos.
El vacío jurídico de este nuevo tipo de negocio es un problema, al igual que su dimensión internacional.
Por lo tanto, examinaremos la solución propuesta de establecimiento permanente virtual.
En una segunda parte de este artículo, ampliaremos el alcance de la reflexión, considerando que la cooperación fiscal debe ser el medio y la solución para contrarrestar los defectos estructurales del establecimiento permanente.
Definiremos el concepto en profundidad para considerar cómo el desarrollo del derecho internacional y la gobernanza global en materia tributaria puede y debe ser la clave para reformar la tributación internacional.

MOTS CLES :

Collecte de données, évasion fiscal, établissement stable, coopération fiscale, droit fiscal international, gouvernance fiscale mondiale

RESUME :

Cet article analyse l'obsolescence du concept d'établissement permanent dans le contexte de la croissance de l'économie numérique.
Plus précisément, nous verrons comment la qualité de l'établissement permanent est éludée dans le commerce de collecte de données. Le vide juridique de ce nouveau type d'entreprise est un problème, tout comme sa dimension internationale.
Pour cela, nous examinerons la solution proposée de l'établissement permanent virtuel.
Dans une deuxième partie de cet article, nous élargirons le champ de réflexion, considérant que la coopération fiscale doit être le moyen et la solution pour contrebalancer les failles structurelles de l'établissement stable.
Nous définirons le concept en profondeur pour examiner comment le développement du droit international et de la gouvernance mondiale en matière fiscale peut et doit être la clé de la réforme de la fiscalité internationale.

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1 INTRODUCTION

As it is well known, the concept of permanent establishment contained in the OECD Model Tax Convention (hereafter "Model Convention") entitles a state to tax foreign taxpayer revenues, by allocating taxable incomes pursuant to a physical presence in said state. (Monsenego, 2016; Steenkamp, 2014) Such physical presence constitutes the permanent establishment status. It is thus a fundamental tool in the field of the international tax law. (Bellemare, 2019)

Notwithstanding, the physical presence requirement is becoming less and less determinant, (Cockfield, 2003) in the context of a fast-growing digital economy, as one could say that the definition of permanent establishment adopted in 1977 no longer reflects the conduct of business across borders. (Bellemare, 2019)

This so-called "digital era" is characterized by technologies that significantly increase the speed and volume of information in the economy. (Sheperd quoted in Chen Siew et al.)

Also known as 'Big Data', the data driven economy relies on in the increasing capacity of stocking, thanks notably to the clouding technology and the technical infrastructure allowing to quickly and in bulk exchange de data's. The volume of collected data is also considerably extended by the collection through connected items. Utterly, the data are used to predict customer comportment or tendencies. The personnel data have the most value and are part of the essential of the digital economy, as we fairly can speak of "data economy". (Jacquemin, 2018)

Besides, digitalization allows to dissociate economic activities and profits, facilitating the tax savings.

As stated SOUILLARD

> For example, it has been shown that multinational firms artificially shift profits towards low-tax countries and especially towards tax havens (Dharmapala, 2014; Beer, de Mooij, and Liu, 2020). Given that these firms are major actors in the economy, losses in corporate income tax revenues arising from profit shifting could be substantial. According to Clausing (2016), they might reach $100 billion annually for the US. (Souillard, 2020)

The news business models arisen from the digital economy, as that of the data collection business, also make more difficult to define where the value is created. (Caussade, 2017)

According to the OECD

> A digital business model common in today's digital economy is multi-sided platforms. Examples of multi-sided platforms are Uber, Airbnb, and Amazon Marketplace. These businesses connect 'end users' (i.e., 'the ultimate user of a finished product'72) from different groups, enabling them to trade information, goods, and services between each other. Such platforms facilitate communication, but do not produce anything themselves. Businesses administrating such platforms usually have no responsibility towards end users, the liability lies with suppliers. (OECD, 2018)

The digital economy urges then the need for international tax law to establish a fair repartition of the taxation where the benefits are appeared in the problematical cross-borders operations. (Boulanger, 2013)

On the other hand, the reform of the international should encompass the interest of the states, safeguarding their sovereignty. Therefore, international cooperation in tax

matters must be promoted in the search for solutions to the obsolescence of the effectiveness of the concept of permanent establishment.

2 PERMANENT ESTABLISHMENT IN THE DATA COLLECTION BUSINESS

2.1 ARTIFICIAL AVOIDING OF A PERMANENT ESTABLISHMENT STATUS

The artificial avoidance of the permanent establishment status is a special problem addressed by the OECD in its BEPS report (OECD, 2015) whose goal is to intend to impede for a non-resident taxpayer the status of a permanent establishment in a given state. Basically, the taxpayer ought to avoid the qualification of fixed place of business, that rely on a physical presence (Monsenego, 2016) to crash the permanent establishment characterization.

To this end, the non-resident taxpayer would choose a form of conducting its business in the other state that falls within the exemption of the in the OECD convention of the permanent establishment, by some artificial techniques, such as *inter alia* the splitting of contract in order to crush the temporality threshold in case of a construction worksite or the use of a false independent agent. (Marpillat, 2018)

In addition, in its BEPS Report, the OECD notes that permanent establishment status is avoided primarily using commissioners' agreements and similar strategies, as well as exemptions from specific activities (OECD, 2015b; Legwaila, 2016). The notion of an independent agent is used on the one hand, diverting or distorting its meaning, and on the other hand abusively employing the list of preparatory and auxiliary activities of the Model Convention. (Marpillat, 2016: p. 46)

With the advent of the digital economy, the main problem turns out to be in the obsolescence of the fixity of a commercial installation, implying an establishment in a precise place and a staff dedicated to the activity. Although certain jurisprudence established a link between a person and a foreign company to establish the existence of a permanent establishment, the provisions of the OECD Model of double taxation agreements, as well as its commentaries, do not favour such interpretations. (Caussade, 2017) Furthermore, the criterion of fixity implies a certain rate of permanence, since the installation does not have to be temporary, but used for a certain period. (Malherbe & Schotte, 2001)

2.2 EVOLUTION AND OBSOLESCENCE OF THE CONCEPT OF PERMANENT ESTABLISHMENT

An old version of the principle of permanent establishment can be found at the end of the nineteenth century in a European context. However, after the First World War, the League of Nations sent a group of experts to imagine a mechanism to prevent international double taxation. These experts developed the concept of permanent establishment in 1927, which was adopted in the OECD Model of double taxation agreements in 1963, which was followed by revisions in 1977 and 1992. The League of Nations already supported in 1940 that a permanent establishment should consist of a fixed post, but also reserved the possibility of taxation in the source state for significant sales without a fixed place of business. (Cockfield, 2003; Checa González, 1987)

Little by little, a dilution of the requirement of physical presence has be seen to adapt to the new commercial practices of the second half of the twentieth century: service economy, globalization, increase in the mobilization of capital and other factors of production. Thus, the definition of permanent establishment has been expanded to include even independent agents who regularly hire in the source state. (Bellemare, 2019: p. 746) In fact, each time the OECD re-examines the notion of a permanent establishment, it is to

broaden the concept, to allow the state in which this establishment is located to tax the income generated through it. (Douenias, 2017)

In addition, permanent establishment fictions have been developed to exceed the requirement of geographical and temporary permanence, ensuring that certain temporary and mobile activities are included in the definition of permanent establishment. (Cockfield, 2003: p. 406). In that sense, a gross sales threshold of 1 million USD ensures that source states only impose non-residents if they have a consistent business in it. (Cockfield, 2003: p.414)

That being said, the current definition of permanent establishment has been edited when a physical presence was presumably necessary for the conduct of a business in a given jurisdiction. (Douenias, 2017) Therefore, in the digital economy and its subsequent technological advances, this requirement of physical permanence is not still valid in whole or in part. (Bellemare, 2019: p. 737)

The fixed nature of the permanent establishment is decisive. According to the OECD, the word "fixed" in the definition of permanent establishment applies to the place of establishment in the sense that it must be established in a precise place with a certain degree of permanence. The OECD also considers that the exercise of the activity of an enterprise must be carried out through this fixed place, and that this means that the personnel carry out the activity of the company in the country in which the fixed place of the same is located. (Lavin & Wyatt, 1969: p. 224)

We can summarize the fall into disuse of the definition of permanent establishment with the following words:

> Four decades ago, when the PE definition in the OECD model was last modified, foreign operations were largely bricks-and-mortar businesses. However, the evolution of the virtual world over the past 40 years has led to complex modern business models. Enterprises can now carry out significant economic activities in a country without having a physical presence in that jurisdiction, and their business functions may be spread across many countries. The PE framework has not kept pace with these developments, affording opportunities for the artificial reduction of taxable profits by the dissociation of tax from the location of income-earning business activities. (Bellemare, 2019: p. 728)

In response to the ineffectiveness of the concept, we saw in the jurisprudence the development of the notion of permanent establishment of services, falling on the provision of technical or advisory services. (Bellemare, 2019: p. 731; Legwaila, 2016: p. 823)

As an illustration, we consider the following example. Xa is an independent contractor serving Xb on an arm's length basis. Xa and Xb are not located in the same territory. In addition, Xa should have the exclusive right to supervise, administer, control, direct, acquire, perform all work, duties or obligations necessary under the terms of the agreement. In no case should Xb control Xa's business or its internal management. However, Xb may carry out management activities (limited to quality control activities, inform and provide preliminary training to personnel involved in the provision of services). (Raghavan, 2012)

Accordingly, on the basis of the above case, a foreign enterprise may be considered to have a permanent service establishment in India if it delegates employees or other personnel to India, and such personnel remain in India for more than the period specified in the Model Convention to provide services other than the services included, as defined in the Model Convention. (Raghavan, 2012: p. 19)

In addition, tax jurisprudence and practices, especially in developing countries, tend to consider that a permanent establishment does not require more physical presence, but a

provision of service in a certain period of time with a certain amount of value. (Traversa et al., 2017: p. 72)

With respect to commission agreements and similar strategies, courts in some countries appear to have adopted a broader interpretation of the concept of permanent establishment and independent agent than might otherwise be suggested by the pre-2017 OECD Model Convention. In Italy, for example, the Philip Morris case gave the tax authorities the possibility of applying a broad approach to the form of the interpretation of a permanent establishment. In France and Norway, however, court decisions have stated that commissioners' provisions and similar strategies have not resulted in a permanent establishment. While France and the UK have also challenged these schemes on transfer pricing grounds, this response has had limited success. (Bellemare, 2019: p. 731; IFA, 2020: p.26)

In addition, several jurisdictions often include in their treaties a broader definition of permanent establishment than the Model Convention definition, such as permanent meeting and supervision establishment (India), permanent service establishment (Chile), resource exploration and development (Denmark and Norway) and insurance companies (Australia). (IFA, 2020: p. 27) In the case of AB LLC and RD Holdings LLC v Commissioner of the South African Revenue Services, the concept of permanent establishment was interpreted as meaning that: "a non-resident person may create a permanent establishment even if the foreign person has not created a fixed place of business, but has limited himself to providing services for more than 183 days in any twelve-month period, and this 183-day period doesn't have to be in a fiscal year." (Legwaila, 2016: p. 833)

However, the concept of permanent establishment now seems too restricted to apprehend the set of activities concerning the digital economy. Its definition poses problems that threaten the imposition in the source state to the benefit of the state of residence (even if it is artificial). (Marpillat, 2018: p. 28)

HINNEKENS, for its part, proposed the creation of a virtual permanent establishment where source states would be allowed to impose cross-border profit on non-resident companies, if they do business continuously and significantly in the same state. (Cockfield, 2003: p. 415)

2.3 The legal gap of the cross-border taxation of the collected data

According to the United Nations the digital avoidance of the permanent establishment status can be achieved through the following techniques:

> Migrating services that can be provided in person to cyberspace and keep in-person services at a minimum which gives no rise to PE.
>
> Converting royalties into services fees and avoid withholding tax by transforming technical services or provision of software etc. into services delivered online; and
>
> Monetizing location relevant data created by local customers without any compensation. (United Nations quoted in European Parliament, 2016: pp. 28-29)

The latest case is specifically referring to the data collection business and is the one it will be focused on. The problem here is the following: one multinational company collects personal data of users o compartmental data of users for free through digital supports. Then these data are sold or by any other means valuated in other jurisdiction, mainly for marketing and advertising purposes.

It seems from the prior paragraph that huge chunks of the digital economy would escape the qualification of permanent establishment and its subsequent legal

consequences, as the data collection business is the first resource of such economy. (Augagneur, 2015: p. 465) Also, according to the European Commission: “In 2014 alone, cross-border data flows generated $2.8 trillion in economic value exceeding the value of global trade in goods”. (European Commission, 2017: p. 7)

For the European Commission, this hypothesis does not cause problem at a domestic level if the internal law covers all value creation inside its jurisdiction. Yet, in a cross-borders situation the rules do not cover the user participation, what leads to a potential no taxation of the value creation in any jurisdiction (European Commission, 2018: p. 16)

At the first sight though, one could argue that there is no *per se* illegitimate tax avoidance, whereas it is case of free work, which is the fact for consumer to collaborate freely in the production process of a foreigner taxpayer, for instance, in the sector of data collecting. (Collin & Colin, 2013: p. 2) Neither could one says that it is a premise for artificial avoidance of the permanent establishment status since its OECD definition does not include yet the criterion of the significant digital presence.

However, if the data are freely collected in this business model, that does not preclude the fact that there is counter-performance non-monetary, that could the access to digital contents, and that this data’s have a value comparable to money. (European Commission, 2018)

In a nutshell, the problem lies in the fact that data collected by the multinational firms of the digital sector are not considered at the moment as a new form of taxable financial stream. (Marpillat, 2018: p. 31)

2.4 THE SOLUTION OF THE VIRTUAL PERMANENT ESTABLISHMENT?

The problem of the no taxation of certain large sectors of the digital economy remains strongly linked at the inoperancy of the definition of the establishment permanent to this matter.

Therefore, discussions have times ago been held about the characteristics of the components of the digital economy.

For instance, the question to know if a server can be constitutive of a permanent establishment has been debated in the doctrine. (Vaca Bohorquez, 2016: p. 94) Following the OECD, an electronic equipment such a server has to be fixed (Malherbe & Schotte, 2001: p.229) to qualified as a permanent establishment, what leads to exclude of the said definition any platform of cloud computing. (Collin & Colin, 2013: p. 122)

Furthermore, it appears that a webpage, as a combination of software and data is not deemed to be a “fixed place of business” and then a physical asset that has the capacity to link an enterprise to a specific location. (Vaca Bohorquez, 2016: p. 94)

In the AB LLC and RD Holdings LLC v Commissioner of the South African Revenue Services case, the concept of permanent establishment was interpreted in the sense that: “a non-resident person can create a permanent establishment even if the foreign person has not created a fixed place of business, but has merely rendered services for more than 183 days in any twelve-month period, and this 183-day period does not have to be in a tax year”. (Legwaila, 2016: p. 833)

In the same idea, ones have advocated the proposition of creating a virtual permanent establishment, whose purpose is to habilitate the source state to tax transborder benefits from companies doing continuously and significatively business in their state. (Cockfield, 2003: p. 415)

This fiction would broaden the definition of permanent establishment, including the virtual fixed place of business. The new nexus would be, according to the OECD, the significant digital presence "based on a test for the presence of a virtual permanent establishment." (European Parliament, 2016: p. 43)

This proposal refers to the economic presence of a taxpayers in the state of his client, through an electronic interaction without physical fixed place and aims to extend the application of the permanent establishment concept to the virtual fixed place of business, virtual agency and on-site business presence. (Marini, 2012: p. 31)

Beside the qualitative criterion of the presence of a virtual permanent establishment, a quantitative one will be settled. If the sales of a firm without a traditional permanent establishment in a source state occur to surpass a determined threshold, then it will fulfil this criterion. (Cockfield, 2003: p. 417: Ponomareva, 2019: pp. 2087-2088)

Such interpretation of the virtuality of the permanent establishment was by the way recently recognize in some jurisprudence, (US, 2016) arguing on the significant conducted business without anyway referring to a precise threshold evaluation of it. In the Dell Ireland Case (Tribunal Supremo, 2016) the tribunal decided that the taxable income were the proceeds earned from the sale of products to the Spanish market, (Vaca Bohorquez, 2016: p.98) as it "observed that Dell Ireland had a tax presence in Spain, since the activities performed there (trading, selling, and delivering) were economically significant and thus a "virtual PE" existed in Spain even though Dell Ireland had no physical presence in the jurisdiction." (Bellemare, 2019: p. 730)

On the contrary and in other occasion, it was decided by the Colombian Tax Authorities that in the hypothesis of an "electronic commerce transactions such as hosting services and access to data bases, performed by persons that are not residents", the income was not taxable under Colombian law since the services aren't provided in Colombia. In addition, "in Ruling N° 6256 of 2005, the same Tax Authorities held that electronic commerce transactions performed by nonresidents are not levied with income tax in Colombia." (Vaca Bohorquez, 2016: pp. 99-100)

The idea of the virtual permanent establishment was eventually also proposed by the European Commission in its proposal directive about the digital taxation, in his article 4, where the data collection business is specifically considered as a taxable activity:

> According to Article 4 of the Directive proposal, a company that provides digital services will be deemed to have a taxable "digital presence", i. e. a virtual permanent establishment in an EU member state. The profit will be distributed to the virtual permanent establishment based on economically significant functions, namely its activities through a digital interface associated with data and users. These activities are considered to be economically significant and include collection, processing and sale of user data; collection, processing and display of user content; sale of advertising space on the Internet and third-party content supply to the Internet market (Articles 5(3), 5(5) of the draft Directive). Taxable "digital presence" in a member state shall be recognized if considered to exist in a member state during the tax period, if the business carried on through such period consists wholly or partly of digital services supply through a digital interface and if one or more of the following conditions is met with respect to the supply of those services by the entity carrying on that business, taken together with the supply of any such services through a digital interface by each of that entity's associated enterprises in aggregate:
>
> (a) the proportion of total revenues obtained in that tax period and resulting from the supply of those digital services to users located in that member state in that tax period exceeds EUR7,000,000;

(b) the number of users of one or more of those digital services located in that Member State in that tax period exceeds 100,000;

(c) the number of business contracts for the supply of any such digital service concluded in that tax period by users located in that Member State exceeds 3,000. This approach would expand the PE definition to include digital footprints as a taxable nexus. However, since such activities do not involve any physical assets, this concept is based on such factors as number of active users, revenue, and frequency of contact with customers (which is in line with the Action 1 Final Report) — to measure significant digital presence. (European Commission, 2018)

3 INTERNATIONAL TAX COOPERATION AS THE SOLUTION

3.1 CONCEPT OF INTERNATIONAL TAX COOPERATION

As a preliminary point, it is necessary to say that the fight against tax evasion requires cooperation between the governments of all countries, multinational companies and investors, as well as individuals. International cooperation to improve domestic resource mobilization is also part of the SDGs. (O'Harea, 2019: p. 752)

Whereas, in the past, tax evasion was a domestic activity, favoured by the shadow economy, informal activities, and by inefficient or corrupt tax administrations, it is increasingly becoming global, at least for major taxpayers such as high-net-worth companies and individuals.

Thus, international cooperation is a broad concept that it is the set of actions that try to coordinate policies or join forces to achieve common objectives at the international level. (Insulza 1998: p. 73)

This concept of international cooperation breaks the traditional paradigm of purely economic aid that consists of the supply of goods and services, since it also covers other domains such as international judicial initiatives, peacekeeping missions and international cooperation in the fight against terrorism or drug trafficking. (Thuronyi, 2001: pp. 1641-1682; Benvenisti & Nolte, 2004: pp. 49-77; Hakelberg, 2016: pp.511-541; Alonso & Ocampo, 2015: pp. 73-102; Seer & Gabert, 2011: pp. 88-98, Fitzgerald, 2012; Sandemann Rasmussen, 1999: pp. 395-414; Shah, 1992)

More specifically, international tax cooperation is a form of collaboration that takes place within the framework of international relations, (Koch, 2018: p. 203) seeking to harmonize the policies of international and national institutions in tax matters. (Magraner Moreno, 2010; García Prats, 2014)

Thus, international tax cooperation turns out to be a kind within the concept of international cooperation that is projected to strengthen the efforts and objectives set in tax matters in the international sphere. (López Espadafor, 2016: p. 262)

In addition, it aims to correct those errors or failures of international trade, in a context of economic globalization, growth in the internalization of capital flow, reduction of state intervention and overcoming physical and legislative borders. (Garcímartin, 2011: p.42; López Espadafor, 2016: p.262)

Indeed, the birth of international trade dates to the birth of nations, and its development throughout history has been conceived concomitantly. However, after the Second World War there was accelerated growth in international finance, trade and investment, which has far exceeded the overall growth of the world economy. (Kaitian & Xiao, 2016: 16; Vann, 1998: p. 719)

This fact can be illustrated by the gradual elimination of barriers to international trade through the various negotiating rounds of the General Agreement on Tariffs and Trade. With regard to finance, the elimination of exchange controls in most industrial countries, since the fluctuation of exchange rates in the early 1970s, has been a notable factor that has led to the globalization of global financial and capital markets. (Thuronyi, 1998: p. 719)

In addition, there is a certain geographical dependence on the distribution of tax revenues that can be explained by trade agreements, the efficiency of tax collection may depend on the tax system of neighboring countries. (Alonso, 2015: p. 22. Godin & Hindriks, 2015: p. 45)

However, certain tensions may arise due to the different interests that concur and that determine the course of the economic relations that develop in the international arena.

On the one hand, legal and natural persons carry out commercial and economic activities that go beyond the national level. This also comes into tension with the states in the exercise of their tax sovereignty that find in these activities a scenario of collection of tax revenues. Thus, states are faced with a kind of dichotomy.

In addition, the lack of administrative coordination can lead to situations conducive to capital flight and thus a decrease in the capacity of countries to collect, a phenomenon from which neither developed nor developing countries are exempt.

We then must begin by pointing out that all conventional provisions turn out to be, in most cases, instruments that are framed in the logic of *soft law,* that is, whose binding depends on the willingness of the states to comply with the guidelines, not having a direct binding character beyond good diplomatic relations and the principle of good faith.

Moreover, in addition to states and private individuals, there are also other actors such as organizations or entities of the international government that seek to create spaces for harmonization, cooperation, coordination and collaboration, to strengthen tax collection.

Therefore, international tax cooperation is coordinated in various international structures. Most of them being the following:

> 6. The World Bank and the IMF work with 183 countries on a global basis and are the main providers of bilateral technical assistance in tax policy and administration issues. They are the pre-eminent repositories of expertise in respect of these issues in developing countries. In addition, the concerns that underlie the call for new international co-operation relate directly to their operational mandates. Clearly, the efficiency of their work would be enhanced by deeper co-operation with other interested organizations. This would allow for the exploitation of synergies between them in respect of working methods and expertise and help avoid duplication of effort.
>
> 7. The Committee on Fiscal Affairs of the OECD has a key role in the formulation and pursuit of the international tax policy agenda. Its model tax convention and transfer pricing guidelines are especially influential. While it represents the views of only 30 developed countries, it holds around 60 events a year, primarily on a multilateral and regional basis, which enhance the dialogue with economies outside of the OECD area on such key policy and administrative issues as tax treaties, transfer pricing, international tax avoidance, electronic commerce and exchange of information. Although it has extensive contacts with non-OECD countries and considerable awareness of developing country issues through its non-member programs, the OECD does not represent the views of developing countries.
>
> 8. The UN Ad Hoc Group of Experts on International Co-operation in Tax Matters focuses on international tax issues and meets on a bi-annual basis. The group comprises about 20 representatives of both developing and developed countries and has particular expertise on tax treaty relations between developed and developing

> countries. The experts, who attend meetings in their personal capacity, are not all serving government officials.
>
> 9. A number of regional development banks and other organizations are also active in the tax area. In particular, the Committee of International Organizations on Tax Administration (CIOTA) is a recently formed umbrella group composed of a number of regional and international tax organizations (including the Inter-American Center of Tax Administrations (CIAT), the Commonwealth Association of Tax Administrations (CATA), the Intra-European Organization of Tax Administrations (IOTA), the Centre de Rencontre et d'Etudes des Dirigents des Administrations Fiscales (CREDAF) and the OECD). CIOTA covers more than 140 countries, its primary function being to promote greater coherence in the work programs of the participating tax organizations. (IMF et al., 2002, 2.6-2.9)

In summary, it can be said that tax cooperation can have three levels. First, we have the cooperation that aims to define global rules administered by a global tax organization. Then, there is a level of cooperation that is aimed at establishing intergovernmental or multilateral rules. Finally, at the lowest level, we will find the rules that the actors give themselves. (Deblock & Rioux, 2008)

3.2 INTERNATIONAL TAX COLLECTION AND COOPERATION

The tax collection of domestic resources is the basis of development, both socially and economically. Cracking down on tax evasion is therefore a priority in many governments, especially in developing economies. (Li et al., 2020: p. 384) According to the Economic and Social Council (ECOSOC), greater international cooperation in tax matters allows developing countries to increase their domestic resources to finance their development. (United Nations & ECOSOC, 2012)

The EU also stressed the importance of tax collection, characterizing it as the cornerstone of an efficient and egalitarian tax system. (Andrés Aucejo, 2018: p. 234)

Therefore, the internationalization of the economy causes tax agencies to face more and more the limitation of their executive powers in the matter. Hence, international tax cooperation in administrative matters, in the determination of the tax, but also in its application, becomes crucial. (Rekenhof, 2011: p. 11)

Notwithstanding, we have stated that international tax evasion is a phenomenon that represents a problem affecting the tax collection of states. For developed countries, which have a solid financial system and higher levels of industry, this phenomenon does not affect them so much. But it is a detriment to domestic resource mobilization, especially for developing countries, which translates into multimillion-dollar losses and impedes development. (Alonso, 2015: pp. 23-24; Tax Justice Network, 2020: p. 14)

In this sense, global problems also require global measures that seek to contain the fraudulent reduction of taxes.

Therefore, national tax laws do not enjoy the capacity to have effects in other territories and neither can one go directly to the courts of other states to claim their direct enforcement, regardless of the tax relevance that is granted to economic events that occurred outside that territory. (García Prats, 2001: p. 92)

Likewise, the fact that the same taxable event may interfere with two different tax administrations generates a conflict of interest on them. Consequently, the limit of the collection turns out to be the equality of sovereignty in matters of international rights that states have, the impossibility of being able to exercise their right outside the borders under penalty of generating an international illicit act, (Jestin, 2008) and the increasing absence of

the materiality of their borders. (López Espadafor, 2016: p. 26; Johnson et al., 1979: p. 470; Avi-Yonah & Xu, 2016: p. 12)

On the contrary, the primary purpose of international tax cooperation is to articulate the legal systems to achieve the execution of those tax obligations pending in other jurisdictions, which implies crossing that barrier of sovereignty, when national tax laws do not enjoy the capacity to have effects in other territories. (Virto Aguilar, 2020: p. 20)

The question that then arises is whether there is an objective duty of international collaboration in the field of collection or a principle that succeeds in binding states in this regard. The answer according to international doctrine is that the mutual recognition of states obliges them to cooperate in the enforcement of the tax prerogative. (Virto Aguilar, 2020: p. 20) Therefore, some governments do not see the added value of intensive multilateral tax cooperation and try to manage most of their own fiscal problems unilaterally and bilaterally. (Lesage et al., 2010: p. 158)

For MICHELI, the recognition of the sovereignty of the states that are part of the community determines the need, for all the other states belonging to the community itself, to respect the exercise of the activity of empire of any other state, without having to accept the imperative effectiveness of the specific foreign administrative act. (quoted in López Espadafor, 2016: p. 274)

On the other hand, and in relation to the materialization of the objectives in this matter, it is important to note that:

> While the best solution would be to adopt agreements – whether bilateral or multilateral – devoted entirely to mutual assistance, a more realistic solution could be limited to the inclusion of an optional provision on mutual assistance in the area of collection, in the Model Convention or its commentary, of global scope or limited to the improper obtaining of tax benefits. Currently, nineteen OECD Member States have mutual assistance clauses on global collection in one of their double taxation agreements; the experience accumulated by the most active States could be analysed and, as far as possible, aimed at standardized procedures. (Virto Aguilar, 2020: p. 42)

From the above, there is a clear legal possibility of international assistance and cooperation in the field of collection, such that we can speak of a kind of international tax collection. (Virto Aguilar, 2020: p. 28)

In conclusion, in order to be effective and at the same time dissuasive, the fight against evasion must lead to the recovery of the amounts evaded. The unlawful recovery of debts must therefore be regarded as an integral part of the fiscal control action. To achieve this, the effective exchange of information is paramount and essential. (Dickinson, 2014: p.126; Andrés Aucejo, 2018: pp. 243-245)

In addition, a new holistic vision of tax cooperation must emerge, considering international trade and including not only economic aspects, but also cultural, ethical and environmental. (Andrés Aucejo et al., 2022: pp. 5-22)

3.3 TAX COOPERATION AS THE SOLUTION TO THE DIGITAL TAX EVASION

An interesting case illustrating the limitation of national sovereignty with international law is the relations that EU states are governing with their supranational bodies.

It was therefore envisaged that a project for the harmonisation of direct taxation in the EU would be adopted as an alternative to the adoption of the principle of globalisation at both national and international level by states. However, the European Commission was of the view that there was no need for full harmonisation of Member States tax systems and

that, while they respected European Union law, Member States were free to choose the tax system that best suited their preferences. (Marpillat, 2018: p. 80; Berthet, 2015: p. 67)

The political and economic level of the European Union remains both a means of weight and action, although until now it has not been sufficiently used in fiscal matters, due to a decision-making process that preserves national sovereignty. This raises the question of defining what could constitute Europe's sovereignty and interests in this area. In the case of the EU, one may ask whether, following the introduction of the single currency, direct Community taxation can follow. (Perraud, 2021)

Indeed, Europe is a problem area for international tax planning because there are significant differences in corporate tax rates and in the tax base between countries. (Medus, 2017: p. 36)

According to the Court, the European Community constitutes a new legal order of international law, for the benefit of which states have limited, albeit in small areas, their sovereign rights. The Treaty on the Europan Union is more than an agreement which only creates mutual obligations between Contracting States. The Community regulation therefore also applies to international conventions signed by the Member States.

However, Article 110 TFEU gives Member States a wide margin to draw up their fiscal program and recognises the principle of fiscal sovereignty, the power to tax is recognised as one of its main functions. (Barnard, 2013: p. 284; Tudor, 2015: p. 144)

The Treaty contains tax provisions, which enshrine an express harmonisation competence of the EU in the field of taxation. Moreover, the relatively contained nature of Community harmonisation in the field of taxation does not exempt the Member States from a limitation of their sovereignty in this field by reason of the application of other rules of Community law, which are of a non-fiscal nature. (Traversa, 2010)

Consequently, the competences formally conferred on the EU cease to be the prerogatives of the Member States and therefore limit their sovereignty in the areas concerned. (Traversa, 2010: p. 32)

Following the EU model, the alternative of a supranational tax organisation would be a progressive harmonisation of state tax regimes. (Vazquez, 2017: p. 24) Then, soft law from world governance takes the form of a hard law in the jurisdiction of states. (Andrés Aucejo, 2021 & 2018b) Therefore, we believe that this harmonization before becoming concrete at the global level is implemented at the regional level between states that have a considerable number of economic ties and that consequently found it very necessary.

It is important to note that the mere lack of harmonisation creates great complexity and uncertainty. It also encourages aggressive tax planning, as well as possible and probable losses of tax revenue.

However, some authors consider that harmonization is not necessary unless simple coordination and cooperation is sufficient in order to achieve regulated international taxation. Even more, government networks today promote convergence, compliance with international agreements, and better cooperation among nations on a wide range of regulatory and judicial issues. (Li, 2004: pp. 146-147; Chayes & Handler Chayes, 1995: p.261)

The progress made in transparency, stemming from a global cooperation effort, not only allows tax administrations to have new means to fight fraud, but continues to have a strong deterrent effect, because tax evasion feeds on opacity and encourages actors to continue efforts towards more international cooperation in tax matters. (Perraud, 2021: pp. 74-75; Andrés Aucejo, 2018: pp. 55-60)

Indeed, as EVA ANDRÉS AUCEJO said:

> The fact that [...] a general principle of administrative cooperation in tax matters in the international regulatory framework has not been codified, has perhaps influenced the so called acquis of 'soft law' enhancement to perform an important action to purposes establishing relations of tax cooperation between States in order to prevent tax evasion and avoidance, and to ensure the survival of States. (Andrés Aucejo, 2018b: 67)

Consequently, history strongly suggests that such a radical change in the international tax system is less likely than the continuation of the traditional process of marginal adjustments by different jurisdictions attempting to address specific problems within the existing framework. In this regard, the development of the MLI could be the path by which global harmonization of the taxation of states despite their effective sovereignties will be achieved. (Bird, 2018: 1389; Lesage, 2008: 288-289)

This is important in the international tax context, since the exercise of legitimate sovereignty in the areas of tax enforcement and control may depend at least in part on whether the state appears, before the international community, to be acting responsibly. (Bradley & Bright, 2016: 467)

Therefore, in the processes through which global tax policy is developed, unlike domestic legislation and multilateral treaty-based regimes, states are not formally obliged to take concrete measures. As a result, it is more difficult to assess whether they are converging around consensus positions. The structure of *Soft Law* thus creates a lack of clarity between tax rules and laws that makes it difficult to identify the factors that lead Member States to adopt more autonomy or more cooperation in tax policy. (Christians, 2010: 34)

As SLAUGTHER said:

> These national government officials would never cede power to a world government, although they would certainly recognize that, with respect to some specific problems, only genuinely powerful supranational institutions could overcome the collective action problems inherent in formulating and implementing global solutions. In most cases, however, they would seek to work together in a variety of ways, recognizing that they could only do their jobs properly at the national level by interacting—whether in cooperation and conflict—at the global level. Their ordinary government jobs—regulating, judging, legislating—would thus come to include both domestic and international activity. Over time, they would also come to recognize responsibilities not only to their national constituents but to broader global constituencies. If granted a measure of sovereignty to participate in collective decision making with one another, they would also have to live up to obligations to those broader constituencies. (Slaugther, 2005: 270)

Finally, it should be noted that international organizations currently cannot effectively fix the cross-border taxation problems induced by the digital economy. However, in the case of a minimum tax, a solution favored to impose the digital economy, such an international organization would only be necessary for the coordination of the bases. (Touchelay, 2020)

The OECD indicates that the minimum tax respects sovereign autonomy, as it must be approved by the participating countries, and that it is in fact necessary to protect fiscal sovereignty. (OECD, 2015c: p. 16)

It can therefore be concluded that the solution on the technical plan comes more likely and in a more realistic sense from coordination and cooperation between states, prior to harmonization, recognizing their mutual interests in the fight against international tax evasion, than in the supranational edition of rules. The OECD seems to be undoubtedly the most propitious framework for this development, despite the criticism that may affect this

organization. Indeed, by aggregating the shared fiscal priorities of its member states, the OECD gives these nations the opportunity to adopt a uniform approach. (Andrés Aucejo, 2018b: pp. 68-69) However, these norms can be ignored, and even contradicted, whenever it is perceived that they are replacing the legislator or the interest of the nation, thus safeguarding tax sovereignty. (Verdier, 2009: pp.113-115; Devereux & Vella, 2014: p. 18)

4 CONCLUSION

The digital economy represents nowadays a prominent share of the business activities, which is called to increase more and more in the coming years. Subsequently the traditional principle of the international tax law will be strongly questioned.

As we saw, the digital tax avoidance of the permanent establishment obliterates the concept of the territoriality, meanwhile virtuality is a fundamental characteristic of the digital economy. (Peng, 2017: p. 346) Therefore, the permanent establishment status, relying on the concept of territoriality and the requirement of a physical presence, is easy to avoid in the case of data collection business. Moreover, the volatility and intangibility of the assets and the underlying operations of the digital economy does not seem close from the classical industry and trade, the value creation depending on data collection staying difficult to define and locate. (Caussade, 2017)

The existing solutions to tackle the tax avoidance of the digital data's collection is thus first, the concept of virtual permanent establishment through the digital significant presence, and second the attribution of profit based on the proportion of data's generating users in a jurisdiction on the total amount of data's generating users.

Although it is too soon to estimate if the virtual digital permanent establishment will provide a fair taxation of the cross-border's operations of the digital economy, it appears that it is a first encouraging step into the redefinition of the fiscal jurisdiction and the nexus approach in the age of a digitalized economy.

Notwithstanding, it is not sure that this combination of solutions will properly work, as it superposes, on the one hand the territoriality principle and, in the other hand, the globality principle with the aim of taxing the same revenue.

In any case, the international taxation of the digital economy ought to be adapted as judicial order that present legal vacuum in the tax treatment of some operations can lead to disregard consequence breaching the principle of neutrality, which is one of the recognized principles aiming to guide de state in the taxation process. (Faúndez Ugalde, 2018: p. 167)

According to ANDRÉS AUCEJO: "The last trends on International Economy and Law highlight the relevance of the tax policies in order to achieve a new social and economic global order." (Andrés Aucejo, 2018a: p. 122)

It may be thought that the development of international treaty law in tax matters leads to a positive consensus to solve the problem of international tax evasion facilitated by the digital economy. The question that generates this system is whether cooperation between sovereign States is required or rather an international organization that implements and organizes tax justice. However, we believe that a transactional distribution of taxes can fail if it is not coordinated by a supranational body that captures the necessary tax sovereignty from the States and also allows possible litigation.

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