Taxation, data and destination

An analysis of destination-based taxation from the perspective of tax principles and data protection regulation

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L'économie numérique pose des défis inconnus aux règles d'imposition internationale des entreprises. La thèse contribue à la discussion en cours d'être menée par la communauté internationale des états en proposant et analysant deux différents modèles d'imposition orientés auprès de l'état de destination de services digitaux. Un des modèles étant développé par des économistes en début des années 2000, la « destination-based cash-flow tax », est analysé par rapport à sa conformité aux règles de droit fiscal international et européen ainsi qu'aux standards internationaux de protection de données personnelles. L'autre modèle est proposé par l'auteure et intitulé « digitalized destination-based corporate tax ». Ce modèle est également analysé par rapport à sa conformité aux règles et standards juridiques énumérés. Basé sur la conclusion que ce modèle d'impôt peut être conçu de manière à être conforme à la réglementation existante, il offre une véritable alternative aux autres propositions d'imposer l'économie numérique. Un texte législatif introduisant un tel impôt est proposé en conclusion de la thèse.

The international corporate tax system is faced by unprecedented tax challenges raised by the digitalization of the economy. The doctoral thesis contributes to the ongoing discussion at the international level by proposing and analysing two different tax models based on a taxable nexus in the State of destination of digitalized services. One of the two models, which has been developed mainly by economists in the early 21st century and which is called "destination-based cash-flow tax", is analysed in the thesis regarding its compliance with international and European tax and data protection rules. The other tax model, a "digitalized destination-based corporate tax", is proposed by the author and equally analysed as to its conformity regarding the same set of rules. Based on the conclusion that this model tax can be designed in a way to be compliant with the existing international and European tax and data protection frameworks, the tax offers a viable alternative to other suggestions to tax the digitalized economy. A legislative draft to implement that tax is proposed at the end of the doctoral thesis.

Introduction

The digitalization of the economy raises various new legal questions. International corporate taxation encounters situations it has not known before, being traditionally based on a physical nexus of businesses in their States of residence or source.[1]

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[1] *See, e.g.*, arts 7 (1) and 5 of the OECD Model Tax Convention on Income and on Capital (2017) (hereinafter referred to as "OECD MC").

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With digitalization, physical presence in the borders of States' territories is no longer required to offer goods and services to a given market. Thereby, corporate taxpayers can choose a tax-friendly environment to establish their residence and provide services online to other jurisdictions. This circumstance challenges essentially the tax concepts implemented in double tax conventions ("DTCs") that require at least some sort of physical establishment, such as a "fixed place of business" through which a corporate taxpayer may carry on its business activity in order to generate business income in another State. That State would qualify then as "source State" and is allowed to tax a portion of the business income in accordance with article 7 of the OECD MC.

In the past years and in the framework of the BEPS project, the OECD and its "Inclusive Framework" of 141 countries[2] extensively discussed potential modifications of existing tax rules to adapt these rules to the economic reality of digitalized business models. Most recently, 137 member countries of the OECD Inclusive Framework agreed to a statement on a two-pillar solution to solve the tax issues of the digitalized economy as identified by the OECD in former works.[3] The principal idea retained by the OECD and its Inclusive Framework as of today consists of introducing a taxing right for market jurisdictions where multinational enterprises exceed certain revenue and profitability thresholds. This new taxing right covers all different kinds of business activities including digitalized ones and foresees a taxation of 25 % of the entity's residual profit as defined as profit in excess of 10 % of the entity's revenue.[4] The scope of the new taxing right is thereby much broader than initially planned in the early documentation of BEPS Action 1 on the Tax Challenges of the Digitalized Economy, where the focus lied much more on digitalized businesses.[5] Finding consensus among the large number of participating countries required, however, a broadening of the scope to also include businesses not purely associated with the so-called "digital economy". Furthermore, the negotiating governments urged to find a solution that would integrate in the existing international tax system, favouring thereby net profit taxation within the residence/source State dichotomy implemented in double tax conventions.

[2] As of November 2021, *see* OECD, "Members of the OECD/G20 Inclusive Framework on BEPS", November 2021, published online: https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf (last access: 5 January 2022). Note, however, that not all member countries automatically agree to the OECD publications.
[3] OECD, "Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy", 8 October 2021, published online: https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf (last access: 5 January 2022).
[4] *Ibid.*, p. 2.
[5] *See, e.g.*, OECD, "Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report", 5 October 2015, published online: https://www.oecd.org/tax/beps/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report-9789264241046-en.htm (last access: 5 January 2022); OECD, "Tax Challenges Arising from Digitalisation – Interim Report 2018", 16 March 2018, published online: https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-interim-report-9789264293083-en.htm (last access: 5 January 2022).

The PhD thesis "Taxation, Data and Destination" offers a different approach to solving the tax issues raised by the digitalized economy. The underlying idea is to examine whether and if so, how, destination-based taxation could provide a potential solution to address the tax challenges of digitalized business activities.

I. The issue: characteristics of digitalized business models and requirements for a new (ideal) tax

The OECD highlighted in one of its early reports the specificities of the work mode of digitalized businesses, which characterise them but are not exclusive to these businesses. First, digitalized businesses benefit from a global reach of their activities irrespective of their physical location, which the OECD refers to as "cross-jurisdictional scale without mass".[6] Second, digitalized businesses rely heavily upon intangible assets, including but not limited to intellectual property rights.[7] Third, digitalized businesses rely increasingly on data and user participation, as well as synergies of these two with intellectual property (rights).[8] Especially this latter is of particular importance when it comes to new design ideas of taxing digitalized business models, as States increasingly express the willingness to tax in these place of user data and/or user participation.[9] This, in turn, can result in destination-based taxation, if one defines the place of destination as place of users and/or consumers.

Unlike other business models, the role of users (who may at the same time be customers) plays a particular role for digitalized business models. They do not only deliver essential resources (data) to the functioning of digitalized services and business activities, but beyond that, the mere presence of users can have a beneficial effect to the company by creating network effects that incite more users to use the specific digitalized service. This is, for instance, the case for social media and other platforms, where the increasing popularity of the service also means an increase in revenue for the business as it may better sell advertising space if it is able to provide an essential reach and visibility of such advertising.

Moreover, unlike in other, "historic", business models, remuneration is likely not linear so that the one using the digitalized good or service does not necessarily remunerate it directly. Rather, by using a digitalized good or service, the user provides data that allow the business to sell either the data directly or to evaluate such information and building an additional, payable service based on this.

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[6] OECD, "Tax Challenges Arising from Digitalisation – Interim Report 2018", *op. cit.*, p. 51, paras. 131 ff.
[7] *Ibid.*, p. 52, paras. 135 ff.
[8] *Ibid.*, p. 53, paras. 139 ff.
[9] As evidenced also for example by the European proposal for a digital services tax: European Commission, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM(2018)148 final.

This is exactly the example of online advertising. In addition to the issue addressed in the introduction that the lack of physical presence of the entity itself does not allow States where such entity is present to tax its corporate income, non-linear remuneration lines lead to a lack of value added tax ("VAT") revenues for the State, where users do not remunerate the service directly.[10] Even if advertising businesses are resident in the relevant market State, their transactions with the digitalized entity will not be taxed by VAT, since B2B transactions generally benefit from the right of deduction. The thesis does not address VAT questions in detail or attempt to propose changes to VAT law, but simply states this lack of coverage by value added taxation. The focus lies in proposing modifications to corporate profit taxation.

To address the characteristic elements of digitalized businesses and solve the issue of the "tax gap" both in corporate income tax and VAT in the market State, an ideal tax should respond to certain requirements that the thesis works out based on preliminary observations. Concretely, the following set of substantive requirements should be addressed:

- First, it should, handle the intangibility and lack of physical presence of business operations and assets, which, however, do not prevent a business from taking an active and significant part in a State's economic life.
- Second, it should address the role of users, their data and their active participation in the dissemination of the business' activities.
- Third, it should cover "free" barter transactions and non-linear remuneration models escaping both from corporate profit taxation and VAT.
- Fourth, it should be robust against tax avoidance and should not distort business decisions.
- Fifth and lastly, it should be easy to administer and provide legal certainty.

[10] Users provide something in return for using the digitalized service, so one could argue that the "for consideration" requirement of art. 2 (a), (b) and (c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347 of 11 December 2006, p. 1) is fulfilled. The Court of Justice of the European Union ruled in that respect that the mention "for consideration" must be "capable of being expressed in monetary terms". *See, e.g.,* CJEU, 23 November 1988, C-230/87, *Naturally Yours Cosmetics Ltd v Commissioners of Customs and Excise*, EU:C:1997:339; CJEU, 2 June 1994, C-33/93, *Empire Stores Ltd v Commissioners of Customs and Excise*, EU:C:1994:225; CJEU, 3 July 1997, C-330/95, *Goldsmiths (Jewellers) Ltd v Commissioners of Customs and Excise*, EU:C:1997:339; CJEU, 26 September 2013, C-283/12, *Serebryannay vek EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto'*, EU:C:2013:599; CJEU, 19 December 2012, C-549/11, *Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' v Orfey Balgaria EOOD*, EU:C:2012:832. However, evaluating barter transactions (as would be the case for digitalized entities) under VAT would require a financial evaluation of each transaction, creating massive difficulties not only in the technical determination of the value, but also in terms of administration and enforcement. For further information on the discussion, *see, e.g.,* S. Pfeiffer, "VAT on 'Free' Electronic Services?", *International VAT Monitor*, 2016, pp. 158-164; A. Bal, "(Mis)guided by the Value Creation Principle - Can New Concepts Solve Old Problems?", *Bulletin for International Taxation*, 2018, published online, section 7; J. Kollmann, *Taxable Supplies and Their Consideration in European VAT - With Selected Examples of the Digital Economy*, Amsterdam, IBFD, 2019, section 5.3.2.2.

On top of these substantive requirements, some legal requirements exist that should be addressed by a new tax potentially imposed in the market State:

- First, it must comply with tax-relevant technical rules, such as DTCs, EU law and international trade law (composed of agreements of the World Trade Organisation ("WTO")).
- Second, it must respect user rights where data of users are processed to locate business activity. Data protection standards should be complied with by the new tax rule.

The set of these requirements worked out in the beginning of the thesis build the framework against which the two destination-based taxes are tested.

II. Characteristics of the destination-based tax proposals

Whereas the destination-based cash-flow tax is a model tax developed mainly by economists long before the tax issues entailed by the digitalized economy arose,[11] the digitalized destination-based corporate tax has been designed and proposed by the author specifically to address the new economic reality. The two model taxes are shortly described below.[12]

A. The destination-based cash-flow tax

The destination-based cash-flow tax is a purely theoretical model tax that has been discussed in recent US tax reform proposals,[13] but never been truly implemented. It departs from the idea that the existing corporate tax system is "fundamentally flawed", distorting "real economic activity causing economic efficiency losses, … [being] susceptible to profit shifting, impos[ing] high compliance costs on businesses and administrative costs on revenue authorities, and … [being]

[11] *See, e.g.,* S. Bond and M. Devereux, "Cash Flow Taxes in an Open Economy", *CEPR Discussion Paper No. 3401*, 2002; M. Devereux and R. de la Feria, "Designing and implementing a destination-based corporate tax", *Oxford University Centre for Business Taxation - WP 14/17*, 2014; A. Auerbach and M. Devereux, "Cash Flow Taxes in an International Setting", *Saïd Business School Research Paper 2015-03*, 2015; R. S. Avi-Yonah, "The Case for a Destination-Based Corporate Tax", *International Tax Journal*, vol. 41, 2015, pp. 13-16; R. S. Avi-Yonah and K. Clausing, "Problems with Destination-Based Corporate Taxes and the Ryan Blueprint", *Columbia Journal of Tax Law*, vol. 8, 2017, p. 229; A. Auerbach et al., "Destination-Based Cash Flow Taxation", *Oxford University Centre for Business Taxation - WP 17/01*, 2017; A. Auerbach et al., "International Tax Planning under the Destination-Based Cash Flow Tax", *National Tax Journal*, vol. 70, 2017, pp. 783-802; J. Becker and J. Englisch, "A European Perspective on the US Plans for a Destination Based Cash Flow Tax", *SSRN publication*, February 2017, published online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924313 (last access: 5 January 2022).

[12] For further information, please refer to the thesis that will soon be published in the IBFD Doctoral Series.

[13] GOP Tax Reform Task Force, "A Better Way: Our Vision for a Confident America", 24 June 2016, published online: https://wwwnovococom/sites/default/files/atoms/files/ryan_a_better_way_policy_paper_062416pdf (last access: 5 January 2022).

unstable because it invites states to compete with one another through tax rates and bases."[14]

The destination-based cash-flow tax replaces corporate taxation and covers all activities that are right now tax under corporate income tax. The place of taxation is the place of destination of a business' activities. Concretely, this would be the place of the customer "[without levying] the tax in the place of consumption per se, but in a place where the relevant activity is relatively immobile".[15] Moreover, the place of the customer does not necessarily refer to the place of final consumption, but rather of the residence of the customer.

Instead of assessing a business' net profits, the tax is levied on cash flows, meaning gross revenues as they accrue.[16] This means that revenues are taxed at the location of the business' purchasers and that immediate relief is granted to all types of expenditure in the country where the business incurred expenditure, *e.g.* for its own purchases.[17] Thereby, net cash flows are taxed. Imports are fully taxable, whereas exports are tax exempt.

B. The digitalized destination-based corporate tax

This model tax is developed by the author and designed alongside the substantive and legal requirements set out earlier. It departs from the idea that the intangibility of digitalized business operations does not make one place prevail over another when it comes to justify taxation, which can indeed be an opportunity to shift perspectives and depart from the residence/source State dichotomy. Taxing at destination would first and foremost "fill" the "tax gap" of both corporate income tax and VAT in States that were historically allowed to tax under either or both taxes. Moreover, it would be imposed at a place of relatively immobile factors, meaning factors that can hardly be influenced by the business itself, and at a place where the existence of economic rent is presumed.[18] The digitalized destination-based corporate tax would be levied on top of VAT, but in replacement of corporate income tax for the taxpayers concerned.

Liable to pay the tax would be any resident or non-resident opaque corporate entity that provides digital(ized) goods and services, including goods and services provided through digitalized means, that rely on user data or participation. If a business provides goods and services falling within this definition and others

[14] M. Devereux and J. Vella, "Implications of Digitalization for International Corporate Tax Reform", *Intertax*, 2018, p. 551.
[15] M. Devereux and R. de la Feria, "Designing and implementing a destination-based corporate tax", *op. cit.*, p. 3. *See also* A. Auerbach et al., "International Tax Planning under the Destination-Based Cash Flow Tax", *National Tax Journal*, *op. cit.*, p. 785.
[16] *Ibid.*, p. 785.
[17] M. Devereux and J. Vella, "Gaming Destination-Based Cash Flow Taxes", *Tax Law Review*, 2018, p. 482.
[18] Economic rent is any "return over and above that required to compensate for all risk" (M. Devereux et al., "Residual profit allocation by income", *Oxford Working Paper 19/01*, 2019, p. 23.

falling out of scope, only the revenues attributable to the first provision of goods and services shall be covered by the digitalized destination-based corporate tax. The remaining profits would continue to be taxed under the ordinary corporate income tax regime. The definition of goods and services covered should be understood broadly and refrains from enumerating given services and goods to allow for flexibility of the concept.

The place of destination can be understood in at least four different senses for this type of tax:

- The users' residence (according to a strict interpretation of the notion of "residence", *e.g.* similar to the one provided under domestic tax law in general);
- The users' geographical position when consuming the digitalized service or good relying on user data or participation;
- The users' place of "cultural allegiance", where this is understood as any place to which the person is culturally attached, *e.g.* by consuming digitalized services or content available in a given State's official language, or by being primarily interested in content relating to the cultural setting of a given State (such as national music or shows);
- Any other place of IT equipment where one could locate user data or user participation, such as servers or intangible assets, like databases or software, on or by which that information (data provided by users and resulting from user participation) is processed and/or stored on the side of the business.

The thesis examines the viability of all of this options when tested against the real-life functioning of digitalized business models. Eventually, the first option, user residence, is retained for the digitalized destination-based corporate tax as the most adequate and administrable place to locate destination.

The tax base of the digitalized destination-based corporate would consist of gross business revenues to facilitate the tax' application. In turn, it would need to be levied at a relatively low rate, *e.g.* 2 %, in order to avoid an excessive burdening of the covered taxpayers. Unlike other tax proposals currently discussed in the framework of the digitalized economy tax challenges, the digitalized destination-based corporate tax would refrain from implementing thresholds. Thresholds are not necessary in this scenario, as the tax replaces corporate income tax (unlike digital tax proposals that constitute an additional burden to businesses on top of corporate income tax to be paid).

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III. The definition of destination in the reality of digitalized business models

The doctoral thesis examines some examples of digitalized business models to observe their functioning and see how this is reflected in current international corporate tax rules and how it would be addressed under destination-based taxation. As mentioned earlier, the place of destination is not a clear-cut definition per se. Beyond the variety of options to localise destination, another issue is to localise such destination: for instance, if one retains the place of consumption as place of destination, this place can be located by using various means: geolocalisation tools, delivery or billing addresses, credit card details, SIM card details, etc.

In the doctoral thesis, a closer look is made to some prominent digitalized business models and their concrete functioning, notable e-commerce, digitalized intermediation services and multi-sided markets (namely online marketplaces, online advertising and online gaming), and cloud computing services. These business models vary importantly between each other as regards their functioning, involved actors and remuneration models. Beyond a detailed analysis of the business model as such and its taxation both under current rules and under the two hypothetic destination-based taxes, the thesis also explains in detail the role of user data and user participation in these business models.

The analysis comes to the result that both destination-based tax would and could apply to the business models examined. Tax rules should not be too specific to be administrable but allow for a single solution where businesses rely on hybrid activities involving and mixing several of the above-mentioned business models. Moreover, the term "user" may refer to various groups of actors that merit to be delimited when defining destination. For instance, in intermediation services, users can be both business clients (*e.g.* advertising companies on social media platforms) and private persons consuming the face-giving digitalized service provided by the digitalized business entity (*e.g.* private persons connecting to each other via social media platforms). If any user or customer is retained as potential point of taxation, this would lead to multiple taxation under the destination-based taxes. Therefore, priority or relief rules must be implemented. These rules could either be (i) a relief measure close to the examples of articles 23A and 23B of the OECD MC; (ii) a provision on shared taxing rights at equal parts between all destination States involved; (iii) a priority regime for the destination State in which the payment originates or in which user participation and data occurs exclusively; or (iv) a provision distinguishing different groups of users and customers and giving priority to one group of any other (*e.g.* "seller-users" and "purchaser-users" or "non-professional users" and "professional users").

Beyond that, the user registered with a given digitalized business may not effectively be the person sitting behind the screen and "using" the service at the very moment. Simplifying rules should be implemented in any tax solution to avoid confusion and multiple interpretation results in this respect.

IV. Legal compliance of the proposals

The legal analysis provided in the thesis focuses on the conformity of these two model taxes with double taxation conventions based on the OECD and United Nations ("UN") Model Conventions, EU fundamental freedoms and State aid provisions as well as relevant EU secondary law, and WTO law. Moreover, the author analyses the compliance of a corporate tax nexus based on the location of the corporate taxpayer's users or clients with the EU Charter of Fundamental Rights, the European Convention on Human Rights and the General Data Protection Regulation. The results of the legal analysis are very briefly summed up below.[19]

A. Compliance with double tax conventions

The detailed analysis of all provisions of double tax conventions based on the OECD and UN Model Conventions that might conflict with destination-based taxation results in the conclusion that the two model taxes are unlikely to fall within the scope of application of double tax treaties. This would even be the case for the digitalized destination-based corporate tax, where is comes replacing corporate profit taxation, as the tax is not "substantially similar" as required by article 2 (4) of the OECD MC. If one finds that either of the taxes does fall within the scope of application of DTCs, it will obviously violate article 7 (1) of the OECD MC where the State of destination is neither the business' residence State nor a State in which the business maintains a permanent establishment. Moreover, articles 8, 13 and 21 of the OECD MC would be interfered with by the destination-based cash-flow tax. Articles 12 of the OECD MC and 12A of the UN MC would be interfered with by both destination-based taxes.

This interference would require an adaptation of double tax treaties, as the destination-based taxes can hardly be modified to fall within the system of double tax treaties without losing their essential characteristics. So it would be of interest to avoid the opening of the scope of application of double tax treaties to the destination-based taxes. Otherwise, a multilateral convention might facilitate such adaptation.[20]

[19] For further information and the full legal analysis, please refer to chapters 4 and 5 of the thesis.
[20] If political will exists for implementing destination-based taxation, this should be possible, as is currently also shown by the negotiations on Pillar One of the OECD: OECD, "Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy", 8 October 2021, *op. cit.*, p. 6.

B. Compliance with EU law

Any destination-based tax measure would need to comply with EU law where it is implemented in a Member State of the European Union. Notably, the thesis examines compliance with primary law (rules relating to intra-community good deliveries, fundamental freedoms and State aid rules) and secondary law (VAT Directive[21] and Parent-Subsidiary Directive[22]).

With respect to primary law, destination-base taxation may cause several issues. Notably, the digitalized destination-based corporate tax could interfere with article 110 of the Treaty on the Functioning of the European Union (TFEU) by treating on- and offline activities differently, in case this would principally (directly or indirectly) affect foreign products. However, this is unlikely as the tax would not implement thresholds that would favour taxation of foreign products over taxation of domestic ones. The cash-flow element of the destination-based cash-flow tax, for instance, could interfere with article 111 of the TFEU. This would be the case where business expenses exceeding the gross cash flows of a taxpayer would lead to a refund.

Regarding the compliance of destination-based taxation with the EU fundamental freedoms, three issues are examined in the thesis: the sectoral application of the digitalized destination-based corporate tax (only to some business models but not to all businesses generally), the tax' application to turnover rather than net profits and the border adjustment element of the destination-based cash-flow tax that would lead to a territorially limited deductibility of business costs. In light of the CJEU's case law, the digitalized destination-based corporate tax and its limited objective scope of application should not cause concerns. Also the decision to levy a tax on turnover rather than net profits should not lead to a violation of any fundamental freedom per se. Merely the border tax adjustment of the destination-based cash-flow tax potentially violates the freedom of establishment, the freedom to provide services and the free movement of workers. Such violation could be justified by the balanced allocation of taxing powers and the cohesion of the tax system, but based on the CJEU's case law, the justification would hardly pass the proportionality test.

State aid rules are furthermore unlikely to be violated by the two destination-based corporate taxes. In any case, where the EU decides to implement destination-based taxation for all Member States by an EU legislative act, article 107 (1) of the TFEU would not even apply. Even where one or more Member States decide to implement such taxation by virtue of a domestic legal act, the rules on State aid should generally not be violated.

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[21] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347 of 11 December 2006, p. 1 (as modified).
[22] Council Directive 2011/98/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345 of 29 December 2011, p. 8 (as modified).

With respect to secondary law, notably the digitalized destination-based corporate tax may a priori cause issues. However, it does not violate article 401 of the VAT Directive as it does not constitute a charge similar enough to the VAT to be prohibited. With respect to the Parent-Subsidiary Directive, there may be very special situations that prohibit the levy of the digitalized destination-based corporate tax, where it taxes a company, whose net income is solely composed of covered items by that Directive. In that case, the levy imposed on turnover would need to be paid out of said net profits, which should be exempt by the Parent-Subsidiary Directive. However, only States obliged to provide exemption under the Parent-Subsidiary Directive may violate the Directive, which presupposes that the State operating the levy of the digitalized destination-based corporate tax is the residence or permanent establishment State of the corporate taxpayer.

C. Compliance with WTO law

The thesis examines compliance of the two taxes with the General Agreement on Tariffs and Trade ("GATT") from 1994, the Agreement on Subsidies and Countervailing Measures ("ASCM") from 1994 and the General Agreement on Trade in Services ("GATS") from 1995. First, the prohibition of discriminatory treatment of imports is examined, which should not cause any concern with respect to the digitalized destination-based corporate tax. Instead, it might interfere with the destination-based cash-flow tax due to its border tax adjustment, allowing only domestic charges relating to goods and services imported into the destination State are deductible. Thereby, a distinction between domestic and foreign goods is operated. Such distinction is allowed for in the framework of indirect taxes, for which the destination-based cash-flow tax however hardly qualifies.

Second, the thesis analyses the compliance of the two model taxes with the prohibition of export subsidies. The argument here looks at the inherent functioning of destination-based taxation, which is exactly to exempt exports, and thereby does not constitute a deviation from a benchmark system that otherwise would lead to the collection of government revenue.[23] However, the border tax adjustment mechanism of the destination-based cash-flow tax could again cause concerns here, where it allows for the deduction of business costs only for resident companies, but not for non-resident companies that may only deduct costs incurred in the destination State. This would allow for less tax collection from resident companies compared to non-resident companies, which can hardly be explained by the general benchmark system of the destination-based cash-flow tax and therefore constitutes a deviation from such system. A similar concern can be raised with respect to the limited objective scope of application of the digitalized destination-based corporate tax, which allows for an exemption of exports only in case

[23] Cases where "government revenue that is otherwise due is foregone or not collected" are prohibited by article 1 (1) (a) (1) (ii) of the ASCM.

of certain business activities that it covers, whereas others underlie the ordinary corporate income tax system not allowing for an export exemption. One could argue, however, that this does not violate the export subsidy prohibition where the digitalized destination-based corporate tax qualifies as indirect tax.[24]

D. Compliance with data protection standards

The fifth chapter of the thesis examines the compliance of the two destination-based tax models with European data protection standards, as composed of the Charter of Fundamental Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the General Data Protection Regulation[25]. These rules are examined since the determination of a place of destination requires the corporate taxpayer to collect and process locational data of their customers and/or users. For the digitalized destination-based corporate tax, the different options to localize users are examined in this chapter.

The thesis highlights how exactly these data would need to be collected and processed to ensure compliance with data protection standards. The case law of the European Court of Human Rights as well as of the CJEU in its landmark data protection judgments is critically examined and it is attempted to draw conclusions for the tax questions at stake from these judgments dealing with concerns other than taxation. Generally, the data collection and processing necessary in the framework of destination-based taxation is in line with European data protection standards, where data storage is limited in time and in information so that the information collected do not allow to draw a precise picture of individuals.[26] General and indiscriminate retention of all data in not permitted.[27] Since this is not envisaged with the two destination-based tax models, there should be no

[24] *See* footnote 59 of the ASCM and points (g) and (h) of Annex I to the ASCM.

[25] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119 of 4 May 2016, p. 1.

[26] *See*, in that respect, CJEU, 8 April 2014, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others*, EU:C:2014:328.

[27] *Ibid.*, paras. 62 and 65; Opinion of AG Campos Sánchez-Bordona, 15 January 2020, C-520/18, *Ordre des barreaux francophones et germanophone, Académie Fiscale ASBL, UA, Liga voor Mensenrechten ASBL, Ligue des Droits de l'Homme ASBL, VZ, WY, XX v Conseil des ministres*, EU:C:2020:7, para. 73; Opinion of AG Campos Sánchez-Bordona, 15 January 2020, C-623/17, *Privacy International v Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for the Home Department, Government Communications Headquarters, Security Service, Secret Intelligence Service*, EU:C:2020:5, para. 43; Opinion of AG Campos Sánchez-Bordona, 15 January 2020, Joined Cases C-511/18 and C-512/18, *La Quadrature du Net, French Data Network, Fédération des fournisseurs d'accès à Internet associatifs, Igwan.net v Premier ministre, Garde des Sceaux, ministre de la Justice, Ministre de l'Intérieur, Ministre des Armées*, EU:C:2020:6, paras. 137 ff.; Opinion of AG Pitruzzella, 21 January 2020, C-746/18, H.K. v Prokuratuur, EU:C:2020:18, paras. 55-56; CJEU, 6 October 2020, Joined Cases C-511/18 and C-512/18 and C-520/18, *La Quadrature du Net, French Data Network, Fédération des fournisseurs d'accès à Internet associatifs, Igwan.net v Premier ministre, Garde des Sceaux, ministre de la Justice, Ministre de l'Intérieur, Ministre des Armées and Ordre des barreaux francophones et germanophone, Académie Fiscale ASBL, UA, Liga voor Mensenrechten ASBL, Ligue des Droits de l'Homme ASBL, VZ, WY, XX v Conseil des ministers*, EU:C:2020:791. *See also* M. Cole and T. Quintel (2019), "'Is there anybody out there?' - Retention of Communications Data: Analysis of the status quo in light of the jurisprudence of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR)", in: Weaver, Reichel and Friedland (eds), *Comparative Perspectives on Privacy in an Internet Era*, p. 63 stating: "(…) generalized data retention [is] supposed to be exception[s], not a rule and therefore laws widely allowing such measures are reversing the principle-exception-relation and are prone to be declared violating the ECHR and EU Charter".

issue in respect of data protection. Furthermore, it should be possible to pseudonymize data, thereby not allowing for the identification of users or customers. However, this might raise issues regarding the audit by tax authorities as to the authenticity of such information.

In any case, the relevant data protection frameworks oblige the information of users and/or customers about such data processing, which should be ensured. Also the transfer of data between different authorities of a State is limited, which should be kept in mind when implementing the tax proposals. Effective judicial review for users and customers of the relevant corporate taxpayers should also be ensured in the destination State.

In general, the data protection analysis favours the determination of the place of destination to be the place of residence of users under the digitalized destination-based corporate tax. This information allow the least precise picture of movement of a third person (other than the taxpayer) and are the least intrusive of all options available.[28]

Conclusion

The principal insights of this work concern the viability of destination-based taxation as a solution for the tax problems arising from digitalized business models and the exact definition of "destination" in this context. Both taxes are capable of solving the main issues. Yet, preference is given to the digitalized destination-based corporate tax, as the destination-based cash-flow tax contains elements that are not compliant with the legal frameworks examined, most notably with respect to EU primary law and WTO law.

The new tax proposal of a digitalized destination-based corporate tax comes as a compromise between more radical solutions and can be adopted in compliance with the analysed legal frameworks, where taxation source rules remain linked to user's residence rather than more precise locational data. A concrete legislative draft of the digitalized destination-based corporate tax is attached to the last chapter of the thesis.

Even where another solution, such as the one suggested by the OECD in its Pillar One, will be adopted, the thesis provides relevant insights as to the compliance of market-based taxation with the examined legal frameworks. Notably, the extensive analysis of EU law and the CJEU's case law in that respect, as well as international tax and trade law, can be of assistance when designing concrete tax rules.

[28] With the exception of the last option (IT equipment of the corporate entity on which user data is stored and/or processed), which, however, is not favourable from a tax perspective as it is easy to manipulate by the corporate taxpayer.