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The new tax novel: well-known characters but with volatile citizenship

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La globalizzazione del commercio, la digitalizzazione, la circolazione di grandi quantità di ricchezza imponibile e la facilità con cui oggi si possono attuare pratiche elusive volte a deviare la materia imponibile, hanno fortemente intaccato le rigide definizioni giuridico-fiscali che, ancora oggi, cercano di imbrigliare queste nuove forme di ricchezza altamente mobili. Infatti, non solo le imprese digitali approfittano delle definizioni e degli istituti preesistenti, creati per tassare i redditi prodotti dalla cosiddetta economia tradizionale, per non essere radicate in un determinato territorio; ma, soprattutto, utilizzando i nuovi strumenti digitali, riescono direttamente a nascondere molti segmenti della loro attività. In questo articolo, dopo una rapida rassegna della storia dell'economia digitale, cercheremo di offrire un'ipotetica soluzione alla questione ancora controversa di come tassare questi redditi, altamente mobili.

Trade globalisation, digitization, the circulation of vast amounts of taxable wealth, and the ease with which elusive practices aimed at diverting taxable material can be implemented today, have greatly affected the rigid legal-tax definitions that, even today, attempt to harness these new forms of highly mobile wealth. In fact, not only do digital enterprises to avoid being rooted in a specific territory take advantage of pre-existing definitions and institutions, created to tax income earned by the so-called traditional economy; but, above all, by using new digital-tools, they directly manage to hide many segments of their activity. In this paper, after a quick review of the history of the digital economy, we will try to offer a hypothetical solution to the still controversial issue of how to tax these highly mobile incomes.

Foreword

The original idea presented in this text was studied and wrapped for the Gargnano Conference, organized by the University of Milan, which should have been held before the COVID-19 pandemic crisis: in its original traits, the idea is essentially based on the hypothesis that it is possible – and indeed necessary – to privilege an approach based on the search for a *new nexus* that allows income to be linked to the state in which it is produced. This research was conducted on the assumption that it was still possible, also due to the renewed political spirit, to bend the narrow and formal meshes of the law to achieve the aforementioned goal.
However, as said the health crisis, but also the normal course of time, have upset just these premises, thus making the drafting of this introductory paragraph necessary: in fact, the need to quickly find new resources to face the continuing crisis[1] has led the major national states, as well as almost all the countries belonging to the O.E.C.D., to opt for a different solution from the one set out here[2].
Although introduced after the conclusions drawn in the original version of this paper, these new and highly remarkable changes will nevertheless to be briefly examined, in order to see whether those conclusions, previously reached, still have meaning in this new context – at least in theory – or whether, together with the assumptions underlying them, they should be definitively abandoned.

1. Introduction

Although in recent decades the economy has been required to answer continuous demands and threats – which have contributed to the spread of new theories on the subject –, the traditional economic studies and the related scientific literature are (most) still firmly geared towards identifying the maximisation of the entrepreneur's profit as the ultimate goal to which organised business activity should aim[3].
According to this interpretation, to maintain a constant cash flow into the company coffers if it is not possible to increase the marginal utility resulting from the goods sale, the entrepreneur is led – almost naturally – to reduce operating

costs.
Among the outgoing cash flows which are considered unfavourably in business management, it is not new to include the tax burden that the company will be required to pay to the single states where it carries out its economic activity at the end of its fiscal year.
However, unlike normal management and operating costs, taxation is particularly unpleasant for entrepreneurs themselves who, aware of the possibility of assessing *ex-ante* the results of virtuous company management, taking advantage of rigid creationist schemes, have a natural tendency to minimize this levy[4].
So, any misalignment between the fixity of individual state legislation is an excellent corporate opportunity to be able – legitimately or not – to escape the meshes of the tax authorities of the respective countries.
For this frantic chase aimed at minimizing the tax burden to cease, it would seem necessary, in the application of the hypotheses at the basis of the Coase Theorem[5], to agree on general and common clauses which, starting from the respective aims of the tax system of the individual country, make the individual tax system neutral concerning business choices and, also, aimed at interfering as little as possible in the economic choices and capital allocation of companies[6].
The digital revolution and the technological evolution of the production and distribution mechanisms have enabled, on the one hand, economic operators to access suitable remote markets which would otherwise be unbreachable, with the consequence of making the customer pool even more mobile and depersonalizing; on the other hand, companies have been able to organize their activities by enhancing the value of their *intangible assets* and to transfer the latter ownership rights within groups of companies[7].
This practice has had the effect of making the groups thus constituted the most profitable specifically due to the already low overall cost of the properties and assets holded[8].
If described in this way the phenomenon is of immediate and clear understanding, on the contrary, in practice the situation is complicated by a continuous tension with definitions and institutions that would seem unsuitable for the changing and fast digital business reality.
The combination of activities and the allocation of intra-group resources aimed,

as prior said, at minimizing the fiscal cost[9] takes place through cross-border transfers between related parties within the economic group considered as a whole[10].
These (fictional) transfers are often real international transactions carried out by economic subjects which are subdued to different state jurisdictions. Those, individually, require that their own right tax "*slice*" is guaranteed.
But this new economic consistency is not based on the use of traditional resources[11] – i.e. the income generated by tangible physical assets, which can be localized and well-evaluated because of their particular characteristics –; so consequently, it has to be reconstructed and distributed through the use of fictitious instruments, which are designed and assigned for the sole purpose of identifying and the imaginary "*slice*".
For years indeed, these instruments have been identified out of the stipulation and adoption of bilateral treaties which, even today, constitute the backbone of the current international tax law. Unfortunately, this traditional *paraphernalia* has conducted to a legislative superfetation, in which the digital mesh not only cannot be compressed but finds further loopholes[12].
In doctrine, several voices call for a re-reading – or even a change – of the basic notions of international tax law that derive their origin from those agreements: the concepts of "*permanent establishment*", "*residence of society*", price determination "*at arm's length*"[13], are affected by the past vision of the economy[14].
The first part of this brief work we will focus on the definition and the historical-legal framework of the concept of the permanent establishment, outlining its characteristic features, as originally conceived in the international context, and subsequently implemented and modified in the European one.
The paper will then focus on the definition of permanent establishment that the Italian legislator, autonomously implementing some "progressive" tendencies and thus anticipating the unitarian European intervention, decided to introduce unilaterally into the national system, in order to attract locally the income produced by non-resident digital multinationals.
In the last paragraph we will finally provide some concluding remarks, aimed at offering some possible future developments of the research and possibly suggesting some systemic indications, also valid in the new international context.

2. The common notion of p.e.: Dogmatic and Definitions[15]

As briefly mentioned in the previous paragraph, the studies related to the aggressive fiscal plans have been carried out over time[16], although the advent of digital technology has led to a rapid and abrupt change in the ways in which this result could be and it is actually perpetrated[17].

However, in the first decades of the last century, the allocation of profits and the unbundling of intra-group costs were related to companies that even if articulated on a global scale they had been drawn most of their wealth from the use of geopolitical resources clearly identifiable.

The Compromise of the 1920s[18] addressed and attempted to propose a solution to the problem of the distribution of taxable income, granting to the "source State" the taxation of business income, meanwhile to the "investor's State of residence" the taxation of portfolio income[19].

Despite the years passed, even today this twofold definition is still at the basis of many agreements drawn up at the international level, the so-called bilateral Conventions against double taxation[20].

Nevertheless, the simple allocation in these terms was hardly ever satisfactory.

The State of residence of the company, in fact, in the application of the worldwide taxation principle[21], would have wanted to attract the entire taxable amount, even if the entire economic activity had taken place outside its national borders.

And, in the same way, the State of the source of income would have wanted to tax any economic manifestation generated by the usage of the local resources, even if the exercise of the economic activity was not explicitly manifest in this State.

It was, therefore, left to international organisations to determine which legislative compromise could resolve the tax dilemma as presented above.

The introduction of the permanent establishment, formulated in Article 5 of the Model Convention against double taxation OECD[22], was set up to grant an instrument legitimising the tax collection into the State where the non-resident enterprise carries on a relevant part of its economic activity, even without the necessity of a tangible physical articulation[23].

The permanent establishment (from now on also p.e.) – in its dual definition of a material or personal p.e. – represents, in fact, a mere articulation of the so-called parent company, not autonomous from a legal point of view, but still such as to be fiscally relevant[24].

Due to his fiscal consistency, the state where the permanent establishment is identified has the right to tax the income produced by the latter.

In the international context, moreover, a distinction has also been made between a «*material permanent establishment*» – understood as a fixed place of business, as will shortly be detailed below – and a «*personal permanent establishment*». The latter is a p.e. which operates in the territory of the State on behalf of the foreign enterprise by concluding contracts other than those for the sole purchase of goods[25].

For a tangible permanent establishment to take shape – a case of unquestionable importance if we want to deal with the significant developments caused by the digitalized economy – the mandatory presence of three symptomatic indexes is required: i) objective, i.e. the possibility of identifying a fixed place of business in the State of the establishment of the p.e.; ii) subjective, i.e. the traceability of the transactions made by the p.e. referred to the parent company; iii) functional, i.e. the possibility of providing a set of instructions and functional relations between the parent company and the established branch.

Having verified the existence of these requirements – and therefore identified the p.e. –, the state of the source will be able to subject to competing and/or exclusive taxation the income that is directly attributable to this subsidiary, at this point viewed as a fixed place of business.

For the shrewd reader will be of immediate relevance that applying to the digital world the definition of p.e. currently existing in the legislation inspired by the OECD Model Convention may be difficult, due to the precise limits of that definition by itself: as said, this legal fiction – created to achieve an attractive link between the income produced by an entrepreneur and the territory of the State[26] where such income is supposed to be generated –, cannot ignore the concepts like territorial sovereignty or fixed place of business.

However, trying to identify a fixed place of business where to locate the movements of the intangible assets fluid and very mobile, is a task of extreme complexity: indeed, this research could lead to wonder just which new physical structures make these manifestations of wealth evident, not solving the problem

of how to distribute the possible surplus-value generated.
From this base knowledge it is necessary to understand the action that, on several levels, today try to revolutionize the concept of p.e. or to create new connecting criteria (so-called *nexus*).

3. The new ideas developed in the E.U. context

Starting from the analysis and the results achieved in that international scenario, the European Union has moved along two distinct lines. At one time in the past, the most widely accepted and most suggestive hypothesis, to ensure that income tax was paid where the value was produced, was consolidating and then redistributing, based on three simple criteria (i.e. assets, labour, and sales), the revenue of the international group of companies or of the company operating in several European countries[27].
On the other hand, however, the slow decision-making process, mainly due to the lack of will to adopt such a binding directive, has gradually led the European Commission to dismiss the idea of being able to directly influence income tax, prompting it to consider alternative solutions[28],
In addition to international studies[29], the European Commission has always been able to draw directly on the experiments and judicial experiences already conducted for other types of taxes with a different taxable event[30].
The Commission's active action has led to the formulation of two innovative proposals for directives which, based on previous communications where it was addressed the need for new specific international rules[31], contribute significantly to highlighting new forms of income and taxation rules.
In particular, the Commission has now-a-day chosen to co-ordinate its action to scale up the impact of the new provisions: firstly, by consolidating the previous structure discussed in the OECD; then, starting from this substratum, establishing rules and provisions for «*digital presence*[32]», which aims to reform corporate tax rules so that profits are registered and taxed where businesses have significant interaction with users through digital channels rather than where they make their profits; and finally, creating an *interim* turnover tax on services provided by certain types of digital companies[33].
However, the implications of the latter – although systematically relevant – are

not the subject to this discussion, but moreover are equally going to be outlined in their interaction with the Directive on the «*digital presence*».
As pointed out by the Commission in its own assumption «*the digital economy is transforming the way we interact, consume and do business. Digital companies are growing far faster than the economy at large, and this trend is set to continue* [...] *However, digitalisation is also putting pressure on the international taxation system, as business models change. Policymakers are currently struggling to find solutions which can ensure fair and effective taxation as the digital transformation of the economy accelerates, and the existing corporate taxation rules are outdated to catch such evolution*[34]».
The concerns arising from this scenario led to a strong institutional debate. However, the many discussions have the virtue of underlining that a globally accepted definition of permanent establishment and the related transfer pricing and profit attribution rules should remain pivotal when addressing the challenges of taxation of profits of the digital economy.
The willingness to integrate the already existing notions of p.e. and to include nuances suitable for digital enterprises – and therefore the choice not to distort the current system of taxation which is still anchored on the solid principles of state of residence and state of source – finds inspiration and confirmation in the recent contributions of the OECD: in the modulation of subsequent measures to the BEPS project[35], the same international organization, acknowledging the increasingly relevant character of the digital economy, has nonetheless chosen not to change the standard definitions and set of rules on the permanent establishment, preferring and addressing techniques used to inappropriately avoid the tax nexus, instead.
However, the European proposal introduces a significant additional element: starting – as pointed out – from a consolidated regulatory situation, the Commission proposes to introduce, to establish a taxable nexus in a set jurisdiction[36], the concept of a significant digital presence[37]. The introduction of this simplistic formulation is considered an evolution of the already existing concept of the permanent establishment[38], well known, and applied; at the same time, this innovation led States to uncritically transpose this definition into national legislation for their benefit, without waiting for systematic detailed indications. However, this proposal merely outlines the rules for establishing the

taxable status of a digital company in a Member State; they are essentially based on i) revenues from supplying digital services, ii) the number of users of digital services or ii) the number of contracts concluded for the delivery of a digital service. As said, these general criteria are proxies for determining the "*digital footprint*" of a business in a jurisdiction based on certain indicators of economic activity. However, the innovation is not unprecedented: the idea of identifying a new type of nexus regardless of the actual presence or absence of a permanent establishment is an hypothesis also developed in 2018, on the other side of the ocean.

In the well-known United States Supreme Court case *South Dakota v. Wayfair*[39], the Supreme Court stated that States may charge tax on purchases made from out-of-state sellers, even if the seller does not have a physical presence in the taxing state. Even in the United States, the original concept of *nexus,* based on the fact that a company has some kind of physical presence in the state (such as offices, staff, warehouses, sales agents and so on) could now be integrated with the new type of nexus created by the Supreme Court ruling[40]: the sales tax is due even in the absence of a permanent establishment in the state when sales in that state exceed a certain level or a certain number of orders.

Therefore, it seems possible to assimilate the two experiences which, in different ways and with equally heterogeneous aims[41], have identified an essential component in the taxation of modern and digitized multinational enterprises: those companies benefit from public services and market infrastructures, but do not pay tax there unless they have a significant physical presence as well. Both the initiatives presented so far also demonstrate a willingness to move beyond the concept of fixedness required by the classic definition of p.e., and to embrace, at least in the digital context, a new guiding criterion that disregards material and objective elements and privileges the moment of contact between the user and the company generated using a digital tool, instead.

4. The Italian case, food for thought on digital multinationals? A brief analysis on the new art. 162 d.p.r. 917/1986

However, the absence of a clear definition of «*digital presence*», as well as many

other definitions included therein, as anticipated, limits the scope of innovation.
Among the various European proposals and initiatives[42], the domestic experience is a good starting point.
Indeed, the unilateral application made by the Italian legislator is useful to detail the problems that intervene when the notion of a permanent establishment is identified unilaterally, without noting that, within the current European panorama, the tax intervention of the single state (which generally concerns income taxes) must be coordinated with the work of tax harmonization delegated to the European bodies (which as stated concerns harmonized taxes).
With the Budget law for 2018, the Italian legislator has introduced, in the body of article 162, a new letter (f-*bis*), with which the stable organization also includes *«una significativa e continuativa presenza economica nel territorio dello Stato costruita in modo tale da non fare risultare una sua consistenza fisica nel territorio stesso»*[43].
The ambiguity of the normative formulation, due to the use of blank clauses of difficult practical application and, also, the silence on the point of the *Supplementary Report* to the Budget law, immediately entailed criticism of the provision in question[44].
The unfortunate expressions used by the legislator rather than being the formulation of a new nexus to allocate portions of digital income, identify a new form of anti-avoidance rule, aimed at countering simulated behaviours, design to disguise a different factual and legal reality[45].
Furthermore, it would also seem difficult to apply this notion. In fact, following the principles of international tax law[46], state law prevails only if it provides greater guarantees for the taxpayer: on the contrary, the Italian provision does not appear to have such meaning, precisely because of its blurred boundaries of interpretation and, consequently, could be invoked only against states with which Italy has not concluded a treaty against double taxation.
Moreover, the legislation is also in clear contrast with the VAT legislation, for which it is unthinkable that a *«significativa e continuativa presenza economica»* could integrate a p.e., without the simultaneous presence of technical and human equipment suitable for carrying out the operations[47].
In this regard, for VAT purposes, the existence of a permanent establishment requires the combination of human and technical means that allow the execution

of significant operations so that, for example, the presence of installations used for auxiliary and preparatory activities is never enough[48].
Moreover, the national legislator does not provide any notion of p.e. of the non-resident taxable person; it is especially noticeable when the case-law of the Supreme Court is scrutinized[49]: the Supreme Court, referring to the idea of p.e., directly invokes the combined provision of Article 162 d.P.R. 917/1986 and the Directive 2006/112/EC of 28 November 2006 which replaced the Sixth Directive 77/388/EEC (see Article 9, paragraph 1, where the concept was explicit of «*stable activity centre*»).
As abovementioned, in the Italian legal system, this attraction leads to clear contamination between the profile of direct and indirect taxation: indeed, despite the contrasting pressures, in the opinion of national jurisprudence a tangible physicality of the p.e. cannot be ignored.

5. (only) Hypothetical conclusions

The concept of permanent establishment is still considered to be at the heart of taxation of businesses outside their home country[50]: indeed, the existence of a permanent establishment makes possible to place the income of a foreign business on the territory of a State, thus allowing the latter to tax that income[51].
However, the current legislation[52] on permanent establishment, as noted, does not allow proper regulation of the situation because it exists, on the one hand, the difficulty – if not the total impossibility – to classify the new asset used by digital economics (i.e. websites) as permanent establishment and, on the other hand, the ease, for the parent company, to adopt strategies to allocate servers in low tax states[53].
An example[54] to clarify the difficult situation: in the case of direct electronic commerce, where a non-resident company decides to locate its server in a privileged tax country and uses a website to distribute its products in Italy, income generated in Italy would be taxed in the country under preferential taxation.
More specifically, this last instance makes it clear how the individual state intervention can only grasp some individual aspects of the problem: the difficulty of establishing and locating – and consequently taxing – the income generated by

those using the network highlights the need for greater harmonisation of the various tax systems[55] or, from a collaborative point of view, to provide for specific agreements to identify which circumstances of the internet protocol make them taxable and whether they should be taxed[56].

The considerations reproduced so far, the highlight, on one hand, the awareness of the problem and, on the other, the will (at least declared) to contribute to study and legislate on the phenomenon[57].

They also reflect the idea that – perhaps – it is appropriate to ask ourselves whether it is necessary to introduce a new method of taxation of digital enterprises[58].

Allow me just to make a few brief concluding remarks.

The institution of an Italian digital tax and a special definition of p.e., included in the list of the general provision, highlights the ineffectiveness of unilateral intervention. This is due to a triple order of reasons: in the first place, because the digital tax would yield a tax based on gross revenue, exposing the rule to significant objections of constitutionality for breach of the principle of ability to pay[59]; secondly, because if the non-resident digital multinational were to ascertain a higher amount not subject to taxation, it would seem difficult to proceed with the compulsory collection of that amount, since the latter does not have physical assets that could be attacked.

Finally, the anticipation of unilateral measures, in the current economic situation, could have repercussions on resident companies: the idea of taxing the profits of the web colossuses may clash with the protectionist policies of some countries, in defiance of the principle of cooperation and loyalty that should govern international relations[60].

On the contrary, cooperation between states and a unified approach[61] to the matter must be pursued: following this guideline, the unity of the MNE is not dispersed or fragmented into several underlying units but the MNE is considered as one single enterprise, which should present consolidated financial statements in each State in which it operates, subsequently allocating the share of income generated in each State based on its actual economic presence in each territory[62].

The same mechanism and devices used by companies to make their profits can be readjusted for tax purposes to locate the income.

Many digital businesses use a tracking system based on sending and receiving cookies. Those cookies are small pieces of data sent from a website and stored on the user's computer by the user's web browser while the user is browsing[63]. Cookies were designed to be a reliable mechanism for websites to remember stateful information or to record the user's browsing activity[64].

The types of cookies can be divided and grouped into three different categories, each with its own specificities: technical cookies[65]; profiling cookies[66]; third-party cookies[67].

Well, technical cookies, which are necessary for the sites to function properly – such as displaying information and moving between sites – can in no way provide relevant information to the site owner or the person using the cookie other related functionality.

Indeed, the other two types of cookies – profiling and third-party – do not make sites work properly but only secretly collect information about the use and the habits of the individual searching the internet; in the case of third-party cookies, this collection may take place, without the individual's knowledge, outside the normal navigation of the self- aware chosen site.

As said before, we could then use the already existing regulation in the privacy law for the location profiles relevant here[68]: if a site plants a cookie on a customer's computer, the new *nexus* based on a significant *digital presence* is created in the state where the user is located.

Obviously, it is necessary to add corrective measures to the raw rule thus presented: for instance, one should think of thresholds – referable to the turnover or sales made – to limit the effects of this interaction only if those are relevant.

We could also anticipate the scope of the investigation and intervene to identify how the relevant factors for digital businesses are created and how to evaluate them.

Looking at the problem with different lenses, one can reasonably assume that the relevant data for digital enterprises corresponds to the economic translation of sensitive data which, at the time of their "extraction", have no practical or significant use.

Only when the single data is contrasted and compared with the plurality of raw data collected off a multiplicity of users does it become a creation of an immaterial asset economically relevant for the company.

However, this mass of data may be relevant for the action of companies that sell goods or produce services only if weighted according to the socio-cultural particularities of the individual territory where the data is extracted: the data acquired from individual personalities are mainly relevant due to the cultural preferences that could find an explanation only if the history of the individual national states is concerned[69].

The localization of the incomes and their enhancement have to be carried out, therefore, according to this tripartite scheme: starting from the moment of the extraction of the raw data, in a second time this has to be compared with other relevant data, extracted from the same geographical cultural context, to make the choices of individuals intelligible.

The limitation to only two types of cookies as a prerequisite for the tax, moreover, would overcome the objection that a digital permanent establishment could never be set up if the transactions carried out by the permanent establishment are merely preparatory or ancillary:

the constant and continuous work of profiling to which the individual is, even unconsciously, subjected can be likened to the constant activity of the business finder who, driven by the idea of hypothetical profit, hastens to guarantee the conditions to the parent company in order to conclude as many contracts as possible.

The advent of the internet has undoubtedly brought considerable advantages but also related new questions that – as far as I am concerned – cannot find simple answers in ancestral tools: likewise at the time when man, choosing to use the sea as a new network of communication, decided to regulate the new legal world with innovative instruments, so the new technological discoveries, relying on different means, introduce additional and unusual meanings in need of a positive discipline[70].

1. This is neither the time nor the place to review the numerous initiatives that have taken place over time to contain the negative effects and externalities of the crisis. For an analysis of the actions undertaken, see Oecd (2021), *Tax and Fiscal Policies after the COVID-19 Crisis: OECD Report for the G20 Finance Ministers and Central Bank Governors*, October 2021, Italy, Oecd, Paris, www.oecd.org/tax/tax-policy/tax-and-fiscal-policies-after-the-covid-19-crisis.htm.
2. The new international scenario modelled by the OECD is already well known. Despite the

entry into force of the previous BEPS project, by the international organisation's own admission, that project was not able to remedy – or at least contain – one of the main problems that had led the OECD to adopt the BEPS (acronym for *Base Erosion and Profict Shifting*) approach, namely "*to address the tax challenges arising from the digitalisation of the economy*". Following this admission, the international organisation immediately explored alternative solutions to solve this issue: to date, in line with the search for simple solutions that do not require complex negotiation mechanisms, to ensure that multinational enterprises pay a fair share of tax wherever they operate and generate profits in today's digitalised and globalised world economy, an agreement modelled on a two-pillar solution has been reached. Briefly, the first pillar of the agreement consists in a partial reallocation of taxing rights, for the implementation of which, in the EU, international rules on how to allocate taxing rights on the corporate profits of the largest and most profitable multinationals between several countries will be adapted, in order to reflect the changing nature of business models and the ability of companies to operate without a physical presence.
Instead, the second pillar makes operative two interconnected rules, called GloBE (*Global anti-Base Erosion rules*) which are an *Income Inclusion Rule* (IIR), which introduces an additional tax to a parent entity on income taxed at a lower rate by a controlled entity; and an *Undertaxed Payment Rule* (UTPR), which denies deductions or requires an adjustment to the extent that an entity's income is not subject to a minimum rate. For the original BEPS project see Oecd (2013), *Action Plan on Base Erosion and Profit Shifting*, Oecd Publishing, http://dx.doi.org/10.1787/9789264202719-en. For the new ideas see Oecd (2021), *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): inclusive Framerwork on BEPS,* Oecd, Paris, https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two-htm; Oecd (2021), *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* – 8 October 2021, Oecd, Paris, www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-addressthe-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm; M. P. Devereux, et al., *The OECD Global Anti-Base Erosion Proposal*, Oxford University Centre for Business Taxation, 2020; P. Pistone, J.F. Pinto Nogueira, B. Andrade Rodríguez, A. Turina, *The OECD Public Consultation Document 'Global Anti-Base Erosion (GloBE) Proposal-Pillar Two': An Assessment*, in *Bulletin for International Taxation*, 2, 2020.

3. A. Damodaran, *Applied corporate finance, Fourth Edition,* Wiley, 2014, p. 48: «*the objective in corporate finance is to maximize the firm value*».
4. The comparison is based on the observation that, in most cases, the operating cost is manageable in advance between the counterparties; while the tax burden, typical of authoritarian systems, cannot be negotiated in advance.
5. A free interpretation of Coase's theorem is hereafter provided: if both taxpayers and taxing states were considered perfectly informed, having full and perfect knowledge of the

economic and legal environment in which to operate, tax policy choices would be indifferent: taxing states placed in a situation of perfect competition would behave as price takers of the tax rate rationally established by interstate negotiations; in this scenario, it would be indifferent for taxpayers to choose to locate their activity in a particular state or in another, considering the total homogeneity of the tax burden. In this regard, it should be noted that the theorem in question is subject to criticism, especially regarding the impossibility of eliminating transaction costs and the impracticality of the theorem when more than two persons are involved, see R. H. Coase, *The Problem of Social Cost.*, J. Law & Econ. 3, 1960.

6. D. Schanz, S. Schanz, *Business Taxation and Financial Decisions,* Springer, 2011, p. 4.
7. R. E. Caves, *Multinational Enterprise and Economic Analysis*, Cambridge, 2007; D. Harvey, *A Brief history of neoliberalism*, Oxford, 2005.
8. M. Álvarez-Martínez, S. Barrios, D. d'Andria, M. Gesualdo, G. Nicodème, & J. Pycroft, *How Large is the Corporate Tax Base Erosion and Profit Shifting? A General Equilibrium Approach*, in *CEPR Discussion Papers 12637*, 2018.
9. The reader should remember that in the reconstruction offered here, the entrepreneur will seek to minimize the remuneration of endogenous factors from which he cannot benefit directly (so-called *externalities*). The latter are generally valued and protected by the state.
10. «*that's* [not] *all folks!*» – end of quotation –. The collateral problem, which will also be discussed in the conclusions of this article, also concerns the new definition of the relevant income components: technological tools, in fact, as well as allowing for an ideal localisation of intangible assets, aimed precisely at minimising taxation, pose the significant issues on the definition of the tax base itself. It will be seen, in fact, that very often the new terms adopted to define the subsidiary connection criteria or the indices of significant – and therefore taxable – wealth are harbingers of many doubts. For instance, see S. Dulevski, *Digital Permanent Establishment*, in *Economic Archive*, 4, 2020, p. 52-69.
11. https://www.emarketer.com/content/amazon-dominates-us-ecommerce-though-its-market-share-varies-by-category. The typical example of Amazon gives a clear picture. Apart from being a killing machine – because in any sector it enters, on average, it imposes itself as the leading monopolist –, the company founded by Jeff Bezos, despite its excellent yty-revenues, is subject to little or no tax pressure, or even to special tax treatments aimed at attracting investment by the company in individual states, to the detriment of other nations. See https://www.cnbc.com/2019/02/15/amazon-will-pay-0-in-federal-taxes-this-year.html.
12. The current high number of bilateral treaties in the tax world makes it even more difficult to unravel. For a graphic representation of the event, see R.A. de Mooij, A.D. Klemm, J. P. Victoria, *Corporate income taxes under pressure: why reform is needed and how it could be designed*, International Monetary Fund, Washington, 2021, p. 50.
13. As will be discussed below, the arm's length principle, referred to in the Oecd Model Convention as the only permissible method for determining the tax base of a permanent establishments, has a theoretical basis, well known to tax scholars and economists: in

theory, it allows to levy to the same tax treatment the transactions carried out by companies that are part of an MNE group as they would have if they were acting as independent companies. However, it is obvious that MNE can easily exploit this principle to its advantage by requiring group companies to perform work or activities that independent companies would have no reason to do. So, anticipating the conclusions of this article, it is evident that, concerning digital business, trying to attribute the part of total income to the e.g., that generates that income through the "*separate entity arm's length principle"* could be even more complex - if not impossible -: the digital world allows you to configure your business at will, without being able to find a comparable organization in other enterprises. See Y. Brauner, P. Pistone, *Some Comments on the Attribution of Profits to the Digital Permanent Establishment*, in *Bulletin for International Taxation*, 4/a, 2018; and Y. Brauner, *Value in the eye of the beholder: the valuation of intangibles for transfer pricing purposes,* in *Va. Tax. Rev.* 79, 2008, p. 96 – 103; M. P. Devereux, C. Keuschnigg, *The Distorting Arm's Length Principle*, 2009, available at SSRN: https://ssrn.com/abstract=1462004.

14. P. Hongler, P. Pistone, *Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy*, 2015, available at SSRN: https://ssrn.com/abstract=2586196; R. Petruzzi, S. Buriak, *Addressing the Tax Challenges of the Digitalization of the Economy – A Possible Answer in the Proper Application of the Transfer Pricing Rules?,* in *Bull. Intl. Taxn.* 4a, 2018, available at SSRN: https://ssrn.com/abstract=3746882.
15. It is beyond the scope of the present study to provide a comprehensive review of the vast literature on BEPS. Please refer to S. R. Avi-Yonah, Haiyan Xu. *Assessing beps*, in *Erasmus L. Rev.*, 3, 2017; Y. Brauner, *What is beps*, in *Fla. Tax Rev.*, 16, 2014; A. Cristiani, *beps and the new international tax order,* in *BYU L. Rev.*, 2016.
16. M. Pugliesi, *La tassazione delle imprese di carattere internazionale*, Cedam, Padova, 1930; G. Tremonti*, La fiscalità del terzo millennio*, in *Riv. sc. fin. dir. trib.*, 1, 1998, p. 72 ss.; S. Cipollina, *I confini giuridici nel tempo presente. Il caso del diritto fiscale*, Giuffrè, Milano, 2003.
17. See P. Janský, M. Palanský, *Estimating the scale of profit shifting and tax revenue losses related to foreign direct investment* in *Int Tax Public Finance*, 26, 2019, p. 1048–1103.
18. See T. Rixen, *From double tax avoidance to tax competition: Explaining the institutional trajectory of international tax governance,* in *Review of International Political Economy*, 2011, p. 197-227: «*When it was created in the 1920s and 1930s the sole purpose of the international tax regime was to mitigate international double taxation so that governments could benefit from international economic liberalization… From the 1960s onwards, under-taxation – comprising the related phenomena of tax competition, tax evasion and tax avoidance – became a pressing issue*».
19. G. Marino, *La residenza nel diritto tributari*o, Cedam, Padova, 1999.
20. See previous note 12.
21. S. Dorigo, P. Mastellone, *L'evoluzione della nozione di residenza fiscale delle persone giuridiche nell'ambito del progetto BEPS*, in *Riv. dir. trib*, 3, 2015, p. 35-75; P. Boria,

European Tax law: institutions and principles, Giuffrè, Milano, 2014.

22. R.A. de Mooij, A.D. Klemm, J. P. Victoria, *Corporate income taxes under pressure: why reform is needed and how it could be designed*, International Monetary Fund, Washington, 2021, p. 27 – 28: «*In practice, essentially every country taxes active business income deemed sourced within it—provided that the activity giving rise to the income is sufficiently closely linked to the country under the standards of the current international architecture. This typically requires a degree of physical presence (reflecting its origins in a world of commodities and physical goods, in a predigital age). This is the so-called permanent establishment or nexus concept. Legal incorporation in the country normally would constitute this, as would physical business locations in the country, and certain activities meeting minimum time or degree of activities such as construction work*».
23. In the Italian legal framework, as we will see below, the regulatory definition is nowadays contained in article 162, d.P.R. n. 917/1986 (Consolidated text of law on income taxes), which implements the definition offered by the OECD in article 5 of the 'Model Tax Convention on Income and on Capital'. See A. Gaffuri, *La stabile organizzazione nelle imposte sul reddito*, Giappichelli, Torino, 2021; F. Tundo, *Stabile organizzazione personale e determinazione del reddito secondo le recenti direttive OCSE*, in *Rass. trib.*, 5, 2011, p. 305 ss.; E. Della Valle, *Contributo allo studio della stabile organizzazione nel sistema di imposizione sul redito: profili di diritto interno*, Roma, 2004; Id, *La nozione di stabile organizzazione nl nuovo Tuir*, in *Rass. trib.*, 5, 2004, 1597 ss.
24. See Commentary on Article 5, §4.1.
25. However, the independent agent acting within the scope of their business, or the non-representative agent do not constitute a personal establishment as they are separate and autonomous from the parent company. This simple definition, which was originally sufficiently precise, now appears increasingly blurred, precisely because of the ease with which the Internet now makes it possible to circumvent it. Consider, for instance, a person who, although formally separate from a company, is, in his individual activity, paid by the latter to constantly advertise its products. There is more. In fact, imagine that this person constantly solicits the purchase of those products, at (more or less) regular intervals; and to facilitate the purchase, he or she clearly displays the link to the manufacturers or seller's website, easily reachable by the user through a simple *click*. In this scenario, it is not clear whether these web personalities (so-called *influencers*, *creators* or others, so-called because of the strong connection with the Internet – that characterises their activity –) can, at least in some segment of this activity – for example, at the beginning of a future career, when they associate their name exclusively with that of a certain brand – fall within the definition under consideration here or whether, on the contrary, this activity does not simply constitute a development of the classic marketing activity. For now, there is no solution to this problem, except for some timid idea of subjecting this type of income to a peculiar taxation – as it would seem to happen also in the digital field.
26. Which refers as an entity endowed with territorial authority, which exercises that authority on an original basis, in a stable and effective manner and in full independence from other

entities – *Treccani.it – Vocabolario Treccani on-line*, Istituto dell'Enciclopedia Italiana.

27. The Commission proposed a *Directive for a Common Consolidated Corporate Tax Base* (Proposal for a Council Directive 2016/685/EU on a Common Consolidated Corporate Tax Base of the 25 October 2016), with the dual purpose of «*alongside the anti-tax avoidance function of the CCCTB, the re-launched project would also retain its features as a corporate tax system which facilitates cross-border trade and investment in the internal market*». However, this proposal, in light of the most recent interactions, should be considered definitively set aside: in fact, in the express declaration of the European Commission itself, adhesion to the new proposals and ideas developed at the Oecd «*will replace the pending proposals for a Common Consolidated Corporate Tax Base (CCCTB), which will be withdrawn*» (see the Communication 2021/251/EU from the Commission to the European Parliament and the Council of 18 May 2021 concerning the Business Taxation for the 21st Century).
28. M. Aujean, *Tax Competition and Tax Planning: What Solution for EU?*, in *EC Tax Review*, 2014; Id, *Fighting Tax Fraud and Evasion: in Search of a Tax Strategy?*, in *EC Tax Review*, 2013.
29. See previous note 2.
30. The Commission's work has been carried out mainly regarding indirect taxes, in particular Value added tax (VAT), universally considered to be less exposed to the risk of *harmful tax competition* than direct taxes and especially corporate income taxes. However, even for VAT there are considerable problems of territoriality and related to the search for a new connecting factor that make the sale of a good or the delivery of a service subject to the specific obligations.
31. The Communication 2017/547/EU from the Commission to the European parliament and the Council on A Fair and Efficient Tax System in the European Union for the Digital Single Market adopted on 21 September 2017 stated that new international rules are needed specific to the challenges raised by the digital economy in order to determine where the value of businesses is created and how that value should be attributed for tax purposes; see also, Communication 2018/146/EU from the Commission to the European parliament and the Council, Time to establish a modern, fair and efficient taxation standard for the digital economy of 21 March 2018. Recently, also in the light of the pandemic still going on in the world, the European commission (see Communication 2021/251/EU from the Commission to the European Parliament and the Council of 18 May 2021 concerning the Business Taxation for the 21st Century) has once again stressed the importance of providing specific rules, also at international level, in order to be able to correctly allocate the portion of wealth between the various states and thus «*ensuring fair and effective taxation*». However, the European union, while waiting for a shared sought-after reform of taxation rules and while waiting for the publication of the Oecd's guidelines for the taxation of multinationals' profits, is now nevertheless trying to formalise alternative solutions, aimed at constantly monitoring the scale of the phenomenon («*a first step for a fairer tax system is a greater public transparency on the*

taxes paid by large economic actors. There is a growing demand from citizens and civil society organisations to ensure both more transparency and fairness regarding business taxation, in particular corporate income taxation») and actively combating the most notorious abusive practices («*fight against the abusive use of shell companies – i.e. companies with no or minimal substantial presence and real economic activity – through a new legislative initiative to neutralise the misuse of shell entities for tax purposes*»).

32. P. Pistone, *Permanent Establishment and the Digital Economy*, in G. Maisto, *New Trends in the Definition of Permanent Establishment*, IBFD, Amsterdam, 2019.
33. For the purposes of this discussion, only the Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence of the European Commission 147/2018/EU shall be discussed.
34. Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services of the European Commission 148/2018/EU.
35. Oecd addressed the digital economy in the *Public Discussion Draft: Addressing the tax challenges of the digital economy*, of the 24 March 2014. Those ideas were later incorporated into the current wording of Action 1 of the BEPS project. The report of this action, devoted exclusively to the challenges of the digital economy, states that the current system of rules at the national and international level is not effective in satisfactorily intercepting and attracting to taxation the income generated by large digital multinationals. The commentary on Action 1, after identifying the distinctive traits of the digital economy (which are reported in the body of the work) provides an analysis of some business models of the digital economy, highlighting how, in these new samples, it is possible to structure tax planning operations aimed at avoiding state taxation. To counter this order of operations, the analysis has the merit of highlighting it is necessary to identify forms of taxation that disregard the presence of a taxable presence, identified, in most cases, with a permanent establishment in the territory of the State in which the digital multinational operates. However, the action of the OECD and the additions of the BEPS project have always privileged the detail of the existing rules, with the aim of sterilizing the effects of the distorted use of the form of the permanent establishment. A. A. Paula Dourado, *The EU antitax avoidance package: moving ahead of BEPS?*, in *Intertax*, 44, 2016.
36. The European Union therefore seems to have followed the indications that, even before the compilation of the final BEPS project, some Authors, critical of the too broad definitions that had been discussed in the international arena, perspicuously indicated as the main path to follow. See Y. Brauner, *What the BEPS*, in *Fla. Tax Rev.*, 16, 2014, p. 79: «*a clear statement of the necessary tie between value creation and tax jurisdiction would be a desirable first step*».
37. Article 4, paragraph 3, Proposal 2018/147/EU of the European Commission, *cit.*: «*A "significant digital presence" shall be considered to exist in a Member State in a tax period if the business carried on through it consists wholly or partly of the supply of digital services*

through a digital interface and 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 [...]».

38. W. Schön, *One Answer to Why and How to Tax the Digitalized Economy*, *working Paper of the Max Planck Institute for Tax Law and Public Finance*, 10, 2019, available at SSRN: https://ssrn.com/abstract=3409783 or http://dx.doi.org/10.2139/ssrn.3409783
39. *South Dakota v. Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc.* also in https://www.law.cornell.edu/supremecourt/text/17-494. See also, J. Inscore, *The Amazon Argument: An Examination of South Dakota v. Wayfair and a Discussion of its Implications*, in *Campbell L. Rev.*, 41, 2019.
40. To be thorough, there are also some states that adopted a different type of nexus called "*click-Through*" and "*affiliate nexus*". They are new concepts of nexus that arose, before the cited Supreme Court ruling, to subject online sales to the sales tax: when a customer is directed to an *e-commerce* site through a link or an affiliate program, then *nexus* is created.
41. O. Marian, *U.S. International Tax Reforms under the Trump A libations*, in *Campbell L. Rev.*, 41, 2019.
    To be thorough, there are also some states, in order to stop this hemorrhage, that have adopted a different taxation system, introducing unilateral DST (digital service taxes) which, however, in accordance with the new international agreements, will have to be revoked once the new Oecd measures come into force.
42. Pending shared action and pending a measure with the force of law, individual member states have chosen to introduce unilateral measures aimed at hitting the profits of large digital multinationals. See P. Lampreave, *Spain Has Approved the Digital Service Tax: The Controversy Is Served*, in *Kluwer International Tax Blog,* 2020, available at SSRN: https://ssrn.com/abstract=3824117.
43. Art. 162 – Stabile organizzazione – d.P.R. n. 917/1986 (Consolidated text of law on income taxes): «1. *Fermo restando quanto previsto dall'articolo 169, ai fini delle imposte sui redditi e dell'imposta regionale sulle attività produttive di cui al decreto legislativo 15 dicembre 1997, n. 446, l'espressione «stabile organizzazione» designa una sede fissa di affari per mezzo della quale l'impresa non residente esercita in tutto o in parte la sua attività sul territorio dello Stato.*
    2. L'espressione «stabile organizzazione» comprende in particolare:
    a) una sede di direzione;
    b) una succursale;
    c) un ufficio;
    d) un'officina;
    e) un laboratorio;
    f) una miniera, un giacimento petrolifero o di gas naturale, una cava o altro luogo di estrazione di risorse naturali, anche in zone situate al di fuori delle acque territoriali in cui, in conformità al diritto internazionale consuetudinario ed alla legislazione nazionale

relativa all'esplorazione ed allo sfruttamento di risorse naturali, lo Stato può esercitare diritti relativi al fondo del mare, al suo sottosuolo ed alle risorse naturali;
f-bis) una significativa e continuativa presenza economica nel territorio dello Stato costruita in modo tale da non fare risultare una sua consistenza fisica nel territorio stesso».

44. See A. Gaffuri, *La stabile organizzazione nelle imposte sul reddito*, Giappichelli, Torino, 2021, p. 238: «*il nuovo precetto – introdotto in modo troppo frettoloso, senza adeguate riflessioni – presenta molteplici aspetti problematici, che ne rendono irta di difficoltà l'applicazione. Innanzitutto, il tenore letterale è eccessivamente vago e impreciso. Non si sa in che cosa consista la significativa e continuativa presenza economica*». Id, *La stabile organizzazione nelle imposte sul reddito*, Giappichelli, Torino, 2021, p. 239: «*si cerca di mutare la definizione di stabile organizzazione per farvi rientrare qualcosa che palesemente, secondo i canoni tradizionali, stabile organizzazione non è*».
45. Id, *La stabile organizzazione nelle imposte sul reddito*, Giappichelli, Torino, 2021, p. 244: «*in definitiva,* [...] *la norma è stata scritta frettolosamente e malamente e ha una collocazione sbagliata all'interno dell'apparato di regole tributarie internazionali. Inoltre e soprattutto mancano tutti gli indispensabili criteri di riferimento per la sua corretta e precisa applicazione*».
46. V. Ukmar, G. Corasaniti, P. Dè capitani di Vimercate, *Diritto tributario internazionale. Manuale*, Padova, 2012; P. Boria, *European Tax law: institutions and principles*, Giuffrè, Milano, 2014; C. Sacchetto, *Principi di diritto tributario europeo e internazionale*, AA. VV. (a cura di C. Sacchetto), Giappichelli, Torino, 2016.
47. F. Spina, *Per individuare una stabile organizzazione l'accertamento dev'essere condotto soprattutto sul piano sostanziale*, in *Il Tributario*, 2018, note to Cass. civ. 6 June 2018, n. 14753.
48. See Valued Added tax committee, Working Paper no 791/2014. To date, in fact, although some authors have acknowledged some openings in the opposite direction (see R. De La Feria, *On the Evolving VAT Concept of Fixed Establishment*, in *EC Tax Review*, 5/6, 2021, pp. 201-206 and the Community forces are favoring the possibility of setting up a "virtual p.e." – as said –, the European Court of Justice, questioned on the subject, has not yet definitively abandoned the well-trodden path, anchored to the firm principles of "fixity" and the presence of adequate territorial and human resources. For the most recent approach see Court of Justice, judgement 3 June 2021, C-931/19, ECLI:EU:C:2021:446 (*Titanium Ltd v Finanzamt Österreich*) at paragraph 42: «*in accordance with the Court's settled case-law, implies a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of given services. It thus requires a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis* [...]. *In particular, a structure without its own staff cannot fall within the scope of the concept of a 'fixed establishment'*».
49. Cass. civ, sez. V, 14 July 2018, n. 19616; Cass. civ., sez. V, 19 September 2019, n. 23355; Cass. civ., sez. V, 4 December 2019, n. 31609.

50. L. M. Cidália, A. C. dos Santos, *Tax Sovereignty, Tax Competition and the Base Erosion and Profit Shifting Concept of Permanent Establishment*, in *EC Tax Review*, 5, 2016, p. 296-311; W. Schoen, *Ten Questions about Why and How to Tax the Digitalized Economy*, in *Bulletin for International Taxation*, 4/5, 2018.
51. W. Cui, *The superiority of the digital services tax over significant digital presence proposals*, in *National Tax Journal 72.4*, 2019: p. 846: «*The concept of "nexus" is either a pre-requisite to the allocation of taxing rights or at least an indispensable concept for making statements about profit attribution*».
52. M. Kobetsky, *History of tax treaties and the permanent establishment concept*, in *International Taxation of Permanent Establishments: Principles and Policy*, 2011 (Cambridge Tax Law Series, pp. 106-151), Cambridge University Press. «*the current international tax treaty system still reflects the principles and structures developed in the 1920s by the League of Nations, despite the effects of globalization. These principles were developed in a world economy in which international trade was in tangible items and international communication was slow*».
53. As far back as the late 1990s, it was already argued that if the European Court of Justice did not drop the human resources element from the fixed establishment concept, the tax system would be «*slowly committing suicide*»; B. Terra, *BTW en het elektronische handelsverkeer, Weekblad fiscaal recht*, 1998, at 1049, cited in P. Pistone, *Fixed Establishment and Permanent Establishment*, in *International VAT Monitor*, 11/3, 1999.
54. A. De Luca, *La stabile organizzazione nel commercio elettronico: spunti per una revisione delle soluzioni adottate dall'OCSE*, in *Dialoghi di diritto tributario*, 9, 2004, p. 1171 ss.; A. Tommassini, A. Tortora, *Stabile organizzazione ed esterovestizione nel commercio elettronico*, in *Fisco (Il)*, 28, 2006, p. 4334 ss.; S. Mascia, *Service permanent establishment and e-commerce*, in *Dir. prat. tribut. internaz.*, 1, 2015, p. 494 – 500.
55. Yet, in 1998, the O.E.C.D. published a report on harmful tax issues, in which it made explicit reference to the «*race to the bottom*», a distorting practice of competition and economic markets: this practice consists in reducing corporate tax rates or guaranteeing concessions for specific types of income (first income deriving from financial activities), in order to attract external capital and stem the outflow of internal capital. The so-called «*race to the bottom*» seems, today, still one of the causes of the main asymmetries and distortions in force in the various legal systems, a cause that affects the effectiveness and effectiveness of international tax law. This practice, already stigmatized in the 1998 Oecd report mentioned above, must be countered by starting from general agreements aimed at stopping the reductions in rates and the subsidies on corporate tax. However, it is known that, in the world, there are different tax systems, due to the diversity of the level of development and the multiplicity of the same, which make the prospect of a non-asymmetric tax system difficult or extremely burdensome. see S. Cipollina, *Profili evolutivi della c.f.c. legislation: dalle orgini all'economia digitale*, in *Riv. dir. fin. sc. fin*, 2015, p. 356 ss.
56. R.A. de Mooij, A.D. Klemm, J. P. Victoria, *Corporate income taxes under pressure: why*

reform is needed and how it could be designed, International Monetary Fund, Washington, 2021, p. 49: "*double tax agreements can be used by multinational enterprises to minimize taxes – mainly, but not only, by lowering cross-border withholding tax rates on royalty, interest, or dividends – by establishing "conduit" companies instead of investing directly in the final host country*".

57. Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence of the European Commission 2018/147/EU of 21 March 2018, where is stated: «*In a broader context, it should be emphasised that the proposal for a Common Consolidated Corporate Tax Base (CCCTB) would be the optimal solution to ensure fairer and more efficient corporate taxation within the EU. However, the CCCTB with its current scope would not offer a structural solution to some of the important challenges in taxing businesses of the digital economy. This is because the CCCTB has a limited scope (it is mandatory only for large multinational companies) and because the definition of a permanent establishment in the CCCTB follows the one currently applied internationally*».
58. A. Denaro, *La Direttiva sulla base imponibile comune per l'imposta sulle società (CCCTB) vs Modello OCSE di convenzione fiscale: una coesistenza possibile?*, in *Fisco (il)*, 18, 2012. Nonetheless, it should be noted that even before the revolution brought about by the Oecd with the 2021 declarations, the debate on the correct method of taxing digital multinationals was already fervent and fuelled. Among the ideas, see Y. Brauner, A. Baez Moreno, *Withholding Taxes in the Service of BEPS Action 1: Address the Tax Challenges of the Digital Economy*, in *WU International Taxation Research Paper Series*, 14, 2015, available at SSRN: https://ssrn.com/abstract=2591830 or http://dx.doi.org/10.2139/ssrn.2591830, for a discussion on the benefits that a withholding tax on income earned by multinationals; the already mentioned W. Cui, *The digital services tax: a conceptual defense*, in *Tax L. Rev*. 73, 2019; W. Cui, *The superiority of the digital services tax over significant digital presence proposals*, in *National Tax Journal 72.4*, 2019: pp. 839-856, to applaud the DST (digital service taxes) and criticise the new attempts to set up an SDP (significant digital presence); Y. A. Reuven, N. Fishbien, *The Digital Consumption Tax*, in *Intertax*, 5, 2020, pp. 538-543, https://kluwerlawonline.com/journalarticle/Intertax/48.5/TAXI2020048, for the introduction of a new type of tax; A. B. Moreno, Y. Brauner, *Taxing the Digital Economy Post BEPS... Seriously*, in *Colum. J. Transnat'l* L. 58, 2019.
59. G. Gaffuri, *L'attitudine alla contribuzione*, Giuffrè, Milano, 1969; E. Giardina, *Le basi teoriche del principio di capacità contributiva*, Giuffrè, Milano, 1961.
60. See Y. Brauner, *Agreement? What Agreement? The 8 October 2021, OECD Statement in Perspective*, in *Intertax*, 1, 2022, p. 5: «*agreement completely disregards the focus of the post-BEPS work on the digital economy. It applies generally with no specific attention to the problems presented by this economy*».
61. In line with the BEPS project, the OECD has recently launched a new public consultation on the identification of a new link «*for the companies falling within the perimeter a new link is created, not dependent on physical presence but largely based on sales*». More than

305 comments were submitted to this "*call for papers*".
As anticipated in the previous note 2, it would seem the OECD has nevertheless chosen to adopt a new approach. This new idea, as mentioned, is based on a two-pillar approach: alongside the classic measures and lump-sum levies which should, hopefully, increase the tax levy without complicating the already existing scenarios, new concepts and ideas are however introduced which, in various measures, they innovate the fiscal scenario. However, the sudden change in the method chosen by the OECD was not welcomed by all the doctrine. Indeed, according to Y. Brauner, *Agreement? What Agreement? The 8 October 2021, OECD Statement in Perspective*, in *Intertax*, 1, 2022, p. 3: «*portraying multinationals as the enemy and the sole culprit for the state of the international tax regime appears to be a populist move attempted to camouflage the failure of BEPS to deliver a reform that would make the international tax regime fairer and more legitimate*».

62. The «*formula apportionment*», a theory already known in the «*compromise of the Twenties*», which technical superiority was immediately recognized but, due to the resistance of the States, never found a general shared application – R. S. Avi-Yonah, *Unitary Taxation and International Tax Rules*, in *Law and Economics Working Papers*, 2013, p. 83, available at http://repository.law.unimich.edu/law_econ_current/83; Id, *Advanced introduction to international tax law*, Edward Elgar Pub, 2015, and see also, S. Picciotto, *International Business Taxation*, *a Study in the Internationalization of Business Regulation*, Cambridge, 1992; Id, *Towards Unitary Taxation of Transnational Corporations*, in *Tax Justice Network*, 2012.
63. From a technical IT point of view, a cookie is nothing more than a simple text file that is stored on the surfer's computer. See Cookie Law, Premessa, 1. Considerazioni Preliminari, https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/3118884: "*i cookie sono stringhe di testo di piccole dimensioni che i siti visitati dall'utente inviano al suo terminale (solitamente al browser), dove vengono memorizzati per essere poi ritrasmessi agli stessi siti alla successiva visita del medesimo utente. Nel corso della navigazione su un sito, l'utente può ricevere sul suo terminale anche cookie che vengono inviati da siti o da web server diversi (c.d. "terze parti"), sui quali possono risiedere alcuni elementi (quali, ad esempio, immagini, mappe, suoni, specifici link a pagine di altri domini) presenti sul sito che lo stesso sta visitando*".
64. The activity pursued through cookies, once unregulated, is now regulated in detail in Regulation 2016/679/EU of the European Parliament and of the Council of 27 April 2016 concerning the protection of individuals with regard to the processing of personal data, as well as the free circulation of such data and which repeals Directive 95/46/EC (General Data Protection Regulation), for the relevant privacy profiles.
65. Cookie Law, Premessa, 1. Considerazioni Preliminari, a. Cookie Tecnici, https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/3118884 quelli utilizzati al solo fine di *"effettuare la trasmissione di una comunicazione su una rete di comunicazione elettronica, o nella misura strettamente necessaria al fornitore di un servizio della società dell'informazione esplicitamente richiesto dall'abbonato o dall'utente a*

erogare tale servizio" (cfr. art. 122, comma 1, del Codice).

66. Cookie Law, Premessa, 1. Considerazioni Preliminari, b. Cookie di profilazione, https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/3118884, "*volti a creare profili relativi all'utente e vengono utilizzati al fine di inviare messaggi pubblicitari in linea con le preferenze manifestate dallo stesso nell'ambito della navigazione in rete*"
67. Cookie Law, Premessa, 2. Soggetti coinvolti: editori e "terze parti", https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/3118884 "*un ulteriore elemento da considerare, ai fini della corretta definizione della materia in esame, è quello soggettivo. Occorre, cioè, tenere conto del differente soggetto che installa i cookie sul terminale dell'utente, a seconda che si tratti dello stesso gestore del sito che l'utente sta visitando (che può essere sinteticamente indicato come "editore") o di un sito diverso che installa cookie per il tramite del primo (c.d. "terze parti").*"
68. The necessity, declared by the European Commission, to go beyond the limits of the Oecd's work corroborates this: at international level, the ongoing work that States are called to perform can lead to a mediated solution that, although accepted by many members, is nevertheless too general or not adaptable to individual national situations. The mediation work, however, is far from over: «t*he Commission will therefore propose a new framework for business income taxation in Europe (Business in Europe: Framework for Income Taxation or BEFIT). BEFIT will be a single corporate tax regulation for the EU, based on the key features of a common tax base and the allocation of profits between Member States on the basis of a formula (formula apportionment)*» (once again, see Communication 2021/251/EU from the Commission to the European Parliament and the Council of 18 May 2021 concerning the Business Taxation for the 21st Century).
69. In this sense, the innovative reconstruction of M. Verisglioni is underlined, effectively summarized in the article *'Liquinomics' and 'Double-rate VAT': a discussion about «value-creation»*, in *Riv. trim. dir. trib.*, 1, 2020, on the side-lines of the conference on *Taxation and value creation*, which had taken place on 24 January 2020 in Milan, at the Catholic University, on the initiative of the Association of Tax Law Professors.
70. As correctly pointed out by M. Keen, *False profits: avoidance by multinationals and competition between governments are forcing a rethink of the international tax system*, in *Finance&Development*, 54, 2017, p. 10: "*[T]he League of Nations did not have a Facebook page. Its staff didn't Google or order online from Amazon. A century ago, foreign direct investment involved tangible things like railways and oil wells. Royalties meant charges on coal and the like, not payment for the use of brand names or patents*".