The digital economy and Australia's corporate tax system
Treasury Discussion Paper - October 2018

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Summary

1. The concerns as outlined in the discussion paper of the Australian Treasury department are shared by the participant and addressed in this contribution through three general concerns :

(A) How to avoid the risk of reimbursing taxes, trade sanctions and litigations by taxing through intangible criteria of presence?
(B) How to avoid loss of business and tax bases caused by intangible/digital activities?
(C) How to avoid loss of effective collecting corporate tax income caused by intangible/digital activities?

2. Before addressing the 10 questions in the discussion paper the Australian Treasury department presented to the public, the participant pleads for adopting these measures:

(A and B) Adopting non-tax law that aims to secure payments, guaranty quality services (consumer protection) and privacy (personal data, fake news, hate mails) given new technologies and concepts that form risks. In order to enforce so a tangible presence on the providers that offer such services within the Australian territory. When the Australian resident users exceed on a yearly base either 5.000 transactions, 50.000 users or 6.750.000 views on a website of that provider.

(B and C) A general non-refundable tax of 3 % on all corporate cash flow originated from or related to the Australian national territory with a threshold of 2.400.000 AUD (about 1.500.000 EUR). Except on cash flow from the sale of some fixed assets.

(C) A reporting system of all national payment providers with regard to business beneficiaries that withholds 3 % on payments that exceed the threshold or on

[1] https://circabc.europa.eu/sd/a/a6bcce72-6615-4dfd-8503-d22716b16658/715353c8-ac9d-4e50-968a-e7bc9f69911b_20171123_memo.docx
[2] Free of charge see in English version section of the website www.lauwers-seutin.be, please select knowledge center, white papers 'Taxing digital economy in 2018 trough non-tax law compliance'

all payments if already been subjected to this tax at the start of the fiscal year. A yearly listing to the Treasury department of digital data with 'barter' qualities.

(A) How to avoid the risk of reimbursing taxes, trade sanctions and litigations by taxing through intangible criteria of presence?

3. A tax treaty has the binding effect of a combined act agreed upon by two or more national parliaments. It so needs consensus to alter. Unilateral measures that single out certain business models may give cause to retaliations or indemnities, not only by violating of the taw treaty but also under other international law such as trade treaties. An ambulatory interpretation of tax treaties in search of intangible criteria of presence for taxation purposes is likely to give cause to litigation if made unilaterally.

The Convention of Vienna on the law of treaties of May 23rd 1969 [3] offers a legal base in the event of litigation on the compulsory effect of tax treaties over national law and how national law can or cannot alter the meaning of the wording of a tax treaty. This Convention applies to treaties concluded after January 27th 1980 after it was adopted by most industrialized countries and by Australia in particular[4].

Under articles 26 and 31, § 1 of the Convention parties should perform and interpret the treaties in good faith *in accordance with the ordinary meaning to be given to the terms of the treaty* and *in the light of its object and purpose*. A special meaning shall be given to a term if it is first established that the parties so intended (article 31 § 4).

Most and for all, article 32 of this Convention restricts supplementary means of interpretation such as the *intent* of the national parliaments at the time when the treaties were negotiated and adopted, to the cases where the terms of the treaty lead to a result *which is manifestly absurd or unreasonable* or when the meaning of those terms is *ambiguous or obscure*.

These rules of interpretation may prove to be an obstacle against applying intangible criteria of taxation as criteria that may have been *intended* by the national parliaments if they had existed as tools of income. Is that situation 'manifestly' absurd or unreasonable?

4. A strategy that waits a consensus on the level of the OECD for implementation of intangible criteria of presence in a new OECD model tax treaty is not legally binding and applies only to tax treaties negotiated afterwards. It takes for that an explicit clause in the existing tax treaty that stipulates that a new OECD model will automatically resort effect.

If awaiting OECD initiatives is a part of the national tax policy that relates to taxing digital activities it would then make sense to verify if such a clause is included in all tax treaties. While awaiting countries may so work to adopt addendums that insert such clauses.

But countries willing to do so may as well agree immediately to adopt an addendum between them that clearly states intangible criteria of taxation on their national territory.

[3] Vienna Convention on the law of treaties, May 23rd 1969, into force since January 27th 1980.
[4] Australia accessed on June 13th 1974 to this treaty.

It is however unlikely that countries that harbor the 'winners' of sole tangible criteria of taxation will be inclined or can be persuaded to collaborate to such an end, either before or after the new OECD model is agreed upon.

5. Qualifying intangible forms of presence such as cookies and data on the resident's tool of communication (computer, laptop, mobile, i-watch etc..) activated within the national territory as a tangible presence for tax treaties purposes is debatable and may violate in the participant's opinion article 32 of the Convention.

Historical arguments that stress the will to allocate taxing power where value is created for implementing intangible criteria of taxation mag so lead to litigation under the combined violation of the tax treaty and the Convention of Vienna on the law of treaties of May 23rd 1969. If not implementing these criteria is then deemed 'manifestly' unreasonable by the Courts, such strategy may pass. But such case law would take years with great uncertainty.

6. In a ruling of June 21st 2018 the Supreme Court of the United States[5] reversed two prior rulings[6] dated from 1967 and 1992 that had stated that a State cannot consider a seller had a physical presence in that State if the customer had ordered the delivered goods from a catalogue present in that State. In substance this ruling considers that in present time it has become manifestly unreasonable to forbid States to tax through intangible criteria. Forty-one States, two Territories and the District of Columbia asked to reverse the standing rulings.

The State of South Dakota complained not being able to impose on remote resellers based in other States a reporting obligation and paying sales taxes. In 2016 the State of South Dakota adopted an Act in order to address the 'seriously eroding sales tax base' and 'causing revenue losses and imminent harm.. through the loss of critical funding for state and local services'. This Act aimed at a threshold of 100.000 USD or over 200 transactions of delivery of services or goods yearly in order to qualify the remote seller as having an physical presence in the State for tax purposes.

A litigation sprang and by lack of presence of one building or even one single employee of the remote sellers, the South Dakota Supreme Court applied the standing rulings of the Supreme Court of the United States and considered a violation of the rights of the remote sellers. The case was so brought before the Supreme Court of the United States.

The Supreme Court of the United States considered that : '*the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States'.* And came to the conclusion that today physical presence is no longer required to create a '*substantial nexus*' in a State. Furthermore, the Court found that the requirement of physical presence was intended to avoid economic discrimination of remote sellers, but that today this requirement enhances and even invites to economic

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[5] Supreme Court of the United States, case 17-494, South-Dakota v. Wayfair inc., June 21st 2018, https://supremecourt.gov/opinions/17pdf/17-494_j4el.pdf

[6] *National Bellas Hess, Inc. v. Departement of Revenue of Illenois,* 386 US 753 (1967) *; Quill Corporation v. North Dakota*, 504 US 298 (1992).

discrimination and distortion of an even playing field between remote sellers and sellers established in the State.

Although the change of rules on physical presence requirements lies within the Congress, the Supreme Court of the United States reminded it is the guardian of the constitution, and must so check on constitutional default rule that violate the principles of the constitution.
The Court considers that if economy had been then as it is today, namely that up to 10 % of all transactions is presently linked to e-commerce, it would not have rendered the two prior rulings. Given the fact that the debated act requires a minimum threshold or a minimal number of transactions conducted, the compliance cost for such remote seller was deemed equitable. On the other hand, physical presence requirement is now deemed '*an artificial and anachronistic rule that deprives States of vast revenues from major business*'. The States can so exert their lawful sovereign powers to correct this manifestly unreasonable situation.

7. The United States of America, which would be the most affected country when it's companies where to be singled out for national tax law purposes, have not ratified this Convention. There is an ongoing discussion if parts of this treaty could be considered binding for the USA under general rule of law criteria as established in the Supreme Court of the United States rulings.

In any event, the countries that joined the Convention are nevertheless bound to it with regard to their national law. This adds to the legal uncertainty in enforcing national tax law that seeks intangible criteria of taxation within the national territory.

8. The following considerations were made by the Unites States Treasury Secretary M. Steven T. Mnuchin in a public statement of October 26th 2018 of the Spanish embassy[7]:

> '*We believe the issues are not unique to technology companies but also relate to other companies, particularly those with valuable intangibles (..) I highlight again our strong concern with countries' consideration of a unilateral and unfair gross sales tax* <u>*that targets our technology and internet companies*</u>*. A tax should be based on income, not sales, and should not single out a specific industry for taxation under a different standard.'*

In order to avoid the argument of discrimination that foreign based companies are singled out, what may lead to trade sanctions and litigations under the law of treaties, if it recommendable to apply the same taxes to both resident and non-resident companies. Critics from the United States of America on the choice of tax and how it is collected could then be addressed with reference to need the address a manifestly unreasonable situation as pointed out in the ruling of the Supreme Court of the United States.

9. This declaration by the United States embassy in Spain is linked to a Spanish draft of law on taxing digital services. Spain has opened up on October 28th 2018 a public

[7] https://es.usembassy.gov/secretary-mnuchin-statement-on-digital-economy-taxation-efforts/

consultation on this draft of law[8]. This draft of law seeks intangible criteria of taxation with regard to digital services that can be accessed through tools of communication located within the Spanish territory at the moment of access.

The draft says it will not apply to companies that offer their own good or services on the internet and so mainly focuses on the *intermediaries* in e-commerce. When adopted in this form, this law is likely to trigger litigation and become the first major test-case for this type of taxes under both the law of treaties and the European Union law.

10. Spain may feel to some extent confident about this draft of national law after the ruling of December 20th 2017 of the European Court of Justice that found that Uber is not a mere intermediary between providers of transport services and their clients, but a direct provider of the service of transport of people in the Spanish territory and should therefor comply with Spanish national criteria that apply to all providers of such services[9].

This same ruling of end 2017 has triggered the participant to write in spring 2018 a whitepaper[10] that analyses under various European Union law the implementation of non-tax law by a Member state that may require for compliance purposes a tangible presence if not already physically present in the national territory.

Adopting non-tax law that requires various forms of tangible presence of providers of digital activities to national residents may proof to be another way around the restriction of the Convention. Each compulsory law that aims to protect a legitimate interest, should by definition be better protected if non-residents providers were compelled to have an office on the national territory for compliance purposes. Reason requires that such compliance is only triggered when their level of business surpasses a certain level. Such initiatives could not be sanctioned under tax treaties or trade treaties unless these treaties contain a specific and explicit clause that forbids to impose a physical presence. Applying the same compliance on both resident and non-resident competitors also aids towards an even playing field.

11. Australia has a population of roughly 25 million. The State of South Dakota has roughly 890.000 inhabitants. When scaling up the criteria of 200 transactions a year that was withheld as an intangible criterion by the State of South Dakota, one could consider over 5.000 transactions to be a relevant sized activity for the whole of Australia to require an office for direct contact and litigation purposes by Australian clients.

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[8] http://www.hacienda.gob.es/Documentacion/Publico/NormativaDoctrina/Proyectos/Tributarios/ANTEPROYECTO%20LEY%20IDSD.pdf ;http://www.hacienda.gob.es/Documentacion/Publico/NormativaDoctrina/Proyectos/Tributarios/MAIN%20APL%20IDSD.pdf

[9] Court of Justice of the European Union, Asociación Profesional Élite Taxi v. Uber Systems Spain SL, 20 December 2017, C-434/15

[10] Free of charge see in English version section of the website www.lauwers-seutin.be, please select knowledge center, white papers 'Taxing digital economy in 2018 trough non-tax law compliance'

Another criterion, by lack of sufficient transactions concluded, may be the maintaining of at least 50.000 users (accounts for news-sites etc..) that relate to residents within the Australian territory. The suggested number of 125.000 accounts represents 0,5 % of the Australian population or 1 on each 200 Australians as a relevant size.

Finally, one could consider as relevant the number of views that a website originates from IP addresses that can be linked to the Australian territory. If 0,5 % of the Australian population consults weekly a site, the relevant number of views of 6.670.000 yearly enforces then the company behind that website to have an office or representative available within the Australian territory in order to allow these viewers to more effectively exert their rights.

12. Non-tax law compliance that relates to protection offered by European Union law to Union citizens can be, next to addressing fake news, hate messages or enhancing effectiveness of consumer protection, more specific areas that offer tools to identify, quantify and control collected data for non-tax law purposes such as ([11]) :

Privacy (data protection) :

(A) Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ, L 119, 4 May 2016,

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

Electronic payment services :

(C) DIRECTIVE (EU) 2015/2366 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, *OJ*, L 337/35, 23 December 2015,

Electronic provided services :

(D) DIRECTIVE 2006/123/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on services in the internal market, OJ, L 376, 27 December 2006, p. 36,

(E) DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ, L 178, 17 July 2000, p. 1.

[11] For a more extensive analyze see the white paper referenced under footnote 2

13. This option requires a general review of the Australian legislation that aims to protect Australian citizens, and an update into the free data-era of the effectiveness. One could think of posted pictures of children or adolescents without their own or their parents' consent, cruelty on animals etc..

Next to enhancing a better even playing field between competitors, a better protection for the citizens, such goal of effectiveness of protection may justify the need for a relevant enough sized provider of such services, to be physically present on the Australian territory. This in order to provide direct access to the provider's system (terminal linked to a server abroad) for national law enforcement purposes and private claims that seek to remove false or insulting data by the national Courts orders.

(B) How to avoid loss of business and tax bases caused by intangible/digital activities?

14. Taxes that are not equally paid by competitors distort the even playing field and may so result in loss of business and employment. Next to the loss of tax income that is a direct form of damage that could be addressed by adopting new tax law, this is the second form of damage to the national interests that can create a more permanent damage.

New business models that can in a legal way eliminate or reduce costs better supplant less efficient business models. However, public interests become involved when those new business models seek in addition to avoid to pay the taxes the supplanted business model was effectively paying. Such an effect on public interests was clearly taken in consideration by the Supreme Court of the United States to reverse its standing ruling in the case *South Dakota vs. Wayfair Inc.* that was mentioned in section (A).

15. Such relevant business models can be described as[12]:

- Companies that offer both free and paying digital services to **users** form the two first relevant business models.
- Companies that sell **goods for the digital economy would typically include high percentages of royalties or patent rights in their price** or **mainly offer goods through digital activities** form the third relevant business model.
- Companies that **mainly offer services through digital activities** form the fourth relevant business model. **Digital trading and web-based tools of payment activities** form a sub category of that relevant business model.

16. In the field of indirect taxes, such as value added taxes or sales taxes and custom duties, tax treaties do not apply. Tax treaties aim at direct taxes. If a country could qualify a tax as an indirect tax, it can more effectively address aggressive tax engineering for e-business concluded through websites based outside the national territory.

The initiatives of the European Commission with regard to taxing digital services in general by the turnover when certain thresholds are met, try to frame these initiatives as indirect taxes. It is debatable if these considered indirect taxes do not have the effect of direct

[12] For a more extensive analyse see the white paper 'Taxing digital economy in 2018 trough non-tax law compliance' as referenced

taxes. Even if these taxes were considered as indirect taxes, they are still perceived as singling out companies based in the United States and may spark trade retaliations if and when adopted. A consensus within the European Council in adopting such measures it partially debated for this reason by countries like Germany. A similar concern may apply for Australia.

States must however seek to adapt their tax systems to these new business models. The distortion exerted does not only relates to exiting business out of the national territory but also reduce the taxable profit on the business that remains in the national territory. Their intangible nature considerably enhances Basis Erosion and Profit Shifting. In a similar tax of 3 % as the indirect tax is levied as a non-refundable direct tax, an even playing field would be restored between all relevant competitors and trade retaliations may be avoided.

17. As for e-commerce that still relates to physical shipment of goods into the national territory, the Council of the European Union decided on 5 December 2017 to review VAT rules[13].

Coming into effect on **January 1st 2019** both telecommunication services and electronically supplied services to non-taxable persons are located where that person lives. Coming into effect on **January 1st 2021** goods and all services that involve shipment are located where they are delivered to the client.

If the seller of these goods is not established or has no fixed base in the European Union, that seller and the intermediary appointed by the seller must, prior to the shipment into the European Union (Community), declare :

(a) name;
(b) postal address;
(c) electronic address and websites (of the seller) ;
(d) VAT identification number or national tax number.

Records must be kept by both the intermediary and the provider for control purposes. The consideration (8) of the VAT Directive reminds that '*Where the records consist of personal data, they should comply with Union law on data protection.*'.

The relevant business models in goods and paying services without a fixed base in the European Union are addresses through indirect tax for dislocation of the digital activity through activity (offering) or income (collecting). Adopting similar criteria in the field of indirect taxes may result in an 'easy win' for Australia against loss of revenue provoked by these business models.

18. As for the other relevant business models, the disruptive effect on both basis erosion and even level field between competitors can be to some end met when addressed by implementing non-tax law compliance as suggested under section (A). By triggering a

[13] http://www.consilium.europa.eu/en/press/press-releases/2017/12/05/vat-on-electronic-commerce-new-rules-adopted/

physical presence, that provider falls within the scope of the national reporting and taxing power under the law of treaties. Another less safer strategy is to rely on how judges will deem it becomes increasingly 'manifestly unreasonable' to exclude intangible criteria of taxation under the existing tax treaties.

The present section suggests a non-refundable withholding tax on generated cash-flow in order to avoid trade retaliations and litigations and have a better collection of corporate taxes in general with limited compliance costs for both administration and companies in doing so.

- Such tax is to be equal for all companies and fixed establishment and levied on the value of all cash-flow originated in Australia. In order not to hamper investments, an exception may be considered for cash-flow that was obtained from the sale of tangible fixed assets used to produce services or goods. Such exemption must then be requested in the filed tax return that relates to the year when the price was perceived.
- The tax rate could be 10 % of the normal Corporate tax rate or a flat percentage such as 3 %, or the same % as an indirect tax on singled out digital activities that not falls within the scope of this direct tax.
- The tax base is the reported cash flow in the tax return filed the previous year.
- Each quarter of that gross amount of cash flow becomes quarterly due (0,75 % if the tax is set at 3 %).
- When filed the tax return for the year the 3 % was paid, this 3 % can be deduced from the corporate tax that must be paid but can never be reimbursed.

For example :

100 AUD income (year – 2) reported in the year before (year – 1) triggers 3 AUD minimal Corporate tax debt payable in the on-going year (year 0). Each quarter 0,75 AUD becomes payable in the ongoing year (year 0). The tax return filled for the on-going year in the next year (year + 1) will lead to a tax debt or not. If the tax debt is lower than the paid tax, no refund or setoff is possible.

19. Since the cash flow has already been reported in a filed tax return the compliance cost for the ongoing year is kept to a minimum. Through the requirement of a threshold of minimum 2,4 million AUD income originated in Australia the company or fixed establishment should be able to pay 72.000 AUD spread over 4 payments of 18.000 AUD each.

The suggested threshold of 2,4 million AUD corresponds with 1,5 million EUR. European commission has suggested that for BEPS purposes compliance costs, a threshold of 750.000 EUR could be considered. The participant doubles this amount as the threshold for the perception of a non-refundable levy on corporate cash-flow.

20. Earlier stage bankruptcies or fraud schemes can be sooner detected so they create lesser havoc towards other economical agents (clients / suppliers). The sort of fraud that plans to let companies go bankrupt instead of paying their taxes will be less rewarding.

Such tax considerably enhances an even playing field from a BEPS perspective. This system will discourage the most excessive sort of tax engineering because there will be no refund. It will lower distortion between small and medium business and multinational groups. This tax may discourage seats of incorporation to be dislocated for sole tax shopping motives.

On the long run, the race to the bottom between countries for corporate income tax rates may be halted. Since the tax is effectively paid in Australia, the other country with lower tax rates would suffer either a loss of tax basis (when the tax paid in Australia is considered a cost) or of income (when the tax paid in Australia can be deduced), forcing it to review low corporate tax policy in order to maintain the level of corporate tax income. The higher the tax rate the more effective it can be considered in fighting against off-shore entities.

(C) How to avoid loss of effective collecting corporate tax income caused by intangible/digital activities?

21. Income in legal currencies can be dividend in two relevant categories:

- Payments made from bank accounts with banks that fall under the national financial regulator authority.
- Payments made from bank accounts with banks that don't fall under the national financial regulator authority.

22. The first type of payments can be subjected to an effective 3 % withholding by the bank in the wiring of a financial transaction that debits a national bank account and credits a national or foreign corporate bank-account.

For that purpose, all done payments must be reported by the processing bank with their beneficiary corporate bank-account to the national financial regulator. As soon as the combined recorded payments from national bank accounts to the same beneficiary corporate bank account surpasses a threshold, the national financial regulator notifies by mail that corporation (when available), the national banks and card-issuers and the treasury administration that for the remainder of the fiscal year a 3 % levy must be applied on all further payments to the accounts of that corporation.

The corporation can request a refund of the levy if they prove they do not fall within the threshold as described under section (B) (sale of tangible assets for production purposes). In order to ease the compliance cost for all parties involved, a code can be given by the financial regulator to a national or foreign corporation's bank account that automatically triggers the levy when wiring money to it. Such code can be automatically triggered if the year before the company surpassed the threshold or at the beneficiary's own request or at the request of the treasury department.

23. The second type of payments relates to foreign bank accounts owned by Australian residents, or payments from non-resident to non-resident for value created within the Australian territory. This value relates to income from datamining of personal and other data retrieved from the Australian territory and publicity for on an Australian public.

As for the foreign bank accounts owned by Australian residents, Australia has the authority to request reporting from its residents. As for the non-resident to non-resident transactions, there can be no reporting obligation if none of the two non-residents is deemed to have a fixed establishment within the Australian territory. This can be amended to some extended by the measures as discussed under section (A) that seek to impose a minimal physical presence for non-tax law compliance purposes when a relevant activity is present.

The fixed establishments of foreign companies can be requested, such as resident branches of a group, to report their worldwide income, the part of that income that derives from activities that fall under the scope of the levy, their number of worldwide users and their number of national users, and record the relevant documents for control purposes.

24. These measures do not single out a specific type of business, small business are exempt and do not suffer the compliance costs, compliance formalities are kept to a minimum, effective taxation is maximized, and some part of the tax distortion both national and foreign competitors suffer from aggressive tax planning by their competitors is amended.

25. The participant raises a question that relates to payments. What to do with e-barter transactions (crypto-currencies, tokens limited to one website) in which the participants do not consider legal currencies or bank accounts?

In the participant's view bitcoins need far to extensive amounts of energy to create and to transfer for the purposes they are said to serve. If not created otherwise, to mine, keep or transfer them should be outlawed as a polluting activity in the fight against climate change.

As for tokens and other digital data to barter with that don't require such extensive amounts of energy, at some moment in time there will be a trade against legal currencies through a bank account. At that moment general tax law is triggered. While awaiting such moment, and for purposes of containing fraud and money-laundry practices through such digital data, countries can require their residents to report their stock of tokens or other digital data they can use for bartering.

A yearly list of reportable digital data can be drafted by the tax administration or the financial regulator. Such list may also incite citizens to deal with trusted cryptocurrencies platforms and make them less vulnerable to fraudsters of all sorts one can encounter on the internet.

(D) QUESTIONS AND ANSWERS

1. ***Is user participation appropriately recognized by the current international corporate tax system? If not, how should value created by users be quantified and how should it be taxed?***

The participant referrers for further motivation to the white paper he wrote on the subject[14]; he finds that present corporate tax law is inadequate to address certain business models and answers the subsequent question on how to tax by copying out of that whitepaper. The terms European Union and Member state can be read as Australia.

*"**1) Free users and services**.*

This business model relates to all companies that are mainly interested in the worldwide merchandising (1) of the users of their websites and the data collected from them (2). In order to improve collecting this data they offer their users free access to data or services (3).

For means of taxing business models the likes of Google, Facebook, Twitter, Skype or more in general all forms of free access (1) through digital interfaces (2) to digital information or communication (3) with a commercial intent for the provider (4), three steps seem logical to determine a realistic assumption of a profit tax base created by the worldwide commercializing of the number of users or their collected data obtained inside a Member State or the European Union :

a) determine the number of users in the European Union for a given period (or in the Member State) in the worldwide number of users of a commercial group that reports worldwide income to its shareholders that is substantially obtained from merchandising users and data collected from users,

b) the GPD per capita of the European Union (or the Member State) is multiplied with the number of users in the European Union (or the Member State), and so are the nationals GPD's per capita of the worldwide users, and the compared result is represented as a percentage,

c) that percentage is multiplied with the reported worldwide cash flow and gives the gross profit tax base that is assumed to be allocated in the European Union (or the Member State).

Such assumed gross profit tax base is clearly oversized for it does not take into account worldwide expenses and will lead to excessive taxation if not adjusted by ways of a profit margin. This profit margin gives the assumed net profit tax base and is best fixed as a low profit margin.

For tax compliance burden purposes, it would be preferable that the allocated worldwide income is determined on a European level as a whole. The European Commission could so levy European taxes on that worldwide income obtained from users located in the European Union. That own income for the Commission can be used in turn to address the impact of Brexit on the European budget or to reduce, to some extent, the rising contributions of Member States to the European budget for urgent challenges such as defense, border control or immigration.

If these companies have no Permanent Establishment present by choice, a direct tax measure that seeks to create a virtual Permanent Establishment would violate the tax treaty rights of these companies.

In the third section of the article the question is examined if through non-tax requirements such as data protection, criminal investigation, fake news containment.., a physical presence can be

[14] Free of charge see in English version section of the website www.lauwers-seutin.be, please select knowledge center, white papers 'Taxing digital economy in 2018 trough non-tax law compliance'

demanded from all companies that have such a business model. These requirements of presence may in turn give cause to a Permanent Establishment criterion.

***2) Paying users**.*

This business model referrers to paying websites such as Netflix, or in general all access offered through digital interfaces (1) to digital information or communication (2) that requires payment (3). Various information sites such as newspapers websites, television-channels on web,.. have this business model.

Companies with this type of business model are taxed by classic means on the collected fees of the paying users in the Member State. But allocation tools of collecting income can hamper the profit tax base for the Member State where these paying users reside.

Paying users, like free users, also give cause to data mining and advertising all over the world. So the cash flow that is obtained from advertising, or data mining related to users, should be determined in the overall income.

Free business models could be tempted to avoid taxes by rather symbolic subscription fees. Some business models mix both free and paying users.

The first allocation problem is the allocation of collecting the fees of the users.

Delocalization of collecting income can be addressed by recipient reports to the Member State of fee payments originating from that Member State. Such tax law obligation would also require a Permanent Establishment.

The second allocation problem is the allocation of the digital service itself outside the Member State in order to reduce or annihilate the profit tax base on fees collected in the Member State. This problem relates to BEPS and CFC regulation for those providers who have a Permanent Establishment.

The companies that don't have a Permanent Establishment may be subjected to the same non-tax requirements as the business model of free users and services.."

2. Is the value of intangible assets including 'marketing intangibles' appropriately recognized by the current international corporate tax system? If not, how should value associated with intangibles be quantified and how should it be taxed?

The participant finds the qualification of marketing intangibles to be an accounting standard problem that should be addressed on that level. This being observed; the value a balance sheet gives to intangible assets could best be determined by their potential to lead to effective income. If unclear and while awaiting effective income, they best relate in the participants view to accounting standard that relate to 'research and development'. This best expresses the uncertain nature of income that is to be derived from them. Once income is generated on a steady base, it can be assimilated to a form of patent right to apply the accounting standard rules on how to monetize patents on 'marketing intangibles' in order to come to a tax base.

The question is also how to monetize a ‘stock’ of digital data conceived as crypto-currencies or barter tokens that only can by acquired through crypto-currencies. Other instruments for evaluation may be considered than those applicable for goods for their main way of exchange is barter since no legal currencies are involved. In the existing balance sheet, the stock of digital data which had a cost at moment of acquisition can best be considered as intangible and therefor resort as ‘rights or claims on clients’ rather than goods, and be booked at their acquisition cost until traded for other digital data at higher value. The difference in acquisition value (increase of value) could then constitute a normal tax base. When less value was obtained, a loss must be taken in account for the tax base. When ultimately liquidated, only the margin between the latest acted acquisition through bartering and the amount of legal currencies perceived would constitute the tax base. Like this fraud and sudden high taxes that may lead to bankruptcy are best avoided

3. Are the current profit attribution rules ‘fit for purpose’? If not, how should profits be attributed?

This question relates to BEPS, CFC’s and other OECD findings in this matter. The participant has no specific comment on the OECD findings, other than that digital activities provide opportunities to accelerate the know problems of base erosion and profit shifting in corporate taxes. The presented solutions by the OECD do only apply to resident companies or fixed establishments. Without a physical presence the base erosion of profit shifting cannot be addressed. The participant referrers to section (A) of his comments and in particular to the concept of ‘manifestly unreasonable’ situations that are so triggered.

In order to reduce base erosion and profit shifting the participants proposes a minimal withholding of corporate tax that is levied on gross income originated in the national territory as pointed out in section (B) of the participant’s comments. How to levy most effectively such a tax is pointed out in section (C) of the participant’s comments.

4. What are your views on allocating taxing rights over residual profits associated with: (i) user contribution to ‘user’ countries, or (ii) ‘marketing intangibles’ to market countries?

Under the existing tax treaties such allocation could be considered if upheld in court as addressing an ‘manifestly unreasonable’ situation. All taxing power goes at present to the provider of the intangible asset that is presented for sale (data such as publicity to users and personal date from users). The only tangible element is the perception of the income paid for this intangible data exchange. On the other hand, if the sole criterion of taxation becomes the sole source of data, the provider may also consider this to be ‘manifestly unreasonable’. A balance between both legitimate interests should be found.

A consensus on OECD level is mandatory to introduce a balanced taxation through such intangible criteria. While awaiting such new standards, national tax measures should best not single out intangible criterions of taxations in their tax policy, and develop a common tax policy for all business that deals with the specifics of intangible criterions.

The question of ‘spliting the tax power’ arises when the intermediary collects his income outside of the territory the relevant data was retrieved from (mining) or delivered to (publicity). Using a relevant sized activity as criterion of taxation, combined with a low tax percentage (10 % of the normal countries tax rate, the % of indirect taxes on activities that not fall within direct taxes, the % of a general withholding tax on corporate income etc..), seems to be balanced taxation between the country that originated the wealth-resource (clients (publicity) and their data (mining)) and the country that harbors the successful provider that can lure that other country’s clients to his website. It seems logic that the main taxation power under corporate tax then remains with the country were employment and investment is triggered, for this country is the best placed to have a tax policy that is adapted to the needs of this type of business. It is that country’s sovereign choice if that paid foreign tax is considered a mere cost or can be deduced from national taxes.

5. ***Should existing nexus rules for determining which countries have the right to tax foreign resident companies be changed? If so, how?***

Nexus rules should take in account intangible criteria of taxation in order to express the general rule that taxation should happen where value is created. The criterion of producing goods and services that was applied in an industrial economy has become obsolete after the transition to a service and even unreasonable at present in an increasingly intangible (digitalized) economy. In this intangible economy, the main tangible elements that remain for a large portion of the economy are the location of production (the server of the provider) and the location of the consumer.

Were before the location of production (machines, heavy industry, office buildings for employees, storage) was the most stable factor of the two, the consumer has become now the most stable criterion for purposes of tax policy and taxing power in that section of the economy.

So, the location and actions of the consumer on the national territory should trigger the right to tax the income derived from those actions that relate to intangible activities. The more tangible the activity remains (goods etc..) the more taxing power can remain with the producer.

Small intangible activities face investment costs. The best placed country to boost such investments is the country of the investment (location of servers). Once a certain level of intangible activity is reached abroad, the income that can traced back to the activities in that foreign country becomes taxable as if production was partially physically dislocated to that country by putting up servers and or terminals there. So, finally, both criterions of consumption and production come together through a legal fiction if no servers or terminals are physically present.

As to the question how to tax when confronted with intangible activities that have achieved a relevant size, the participant referrers to his views under section (A) and the example of calculation indicated under question # 1.

6. ***From a tax perspective, do you consider that the digitalised economy is distinguishable from traditional economy? If yes, are there economic features of the digitalised economy that present special challenges in the context of taxation? How are these features relevant for assessing the costs and benefits of various models of taxation?***

See my answer under question # 5 to motivate a partially negative and a partially positive answer to that question. As to the question what business models can be single out and how best to tax them, the participant referrers to his views under section (B) and for further reading to his white paper, section (II), p. 14 to 19.

7. ***Can and should any changes to the international nexus and profit attribution rules be ring-fenced to apply only to highly digitalized businesses? If so, how?***

Digital business as such no does not exist. The bulk of business uses data. The problem is that business itself has become more intangible than before. Changes to the international nexus and profit attribution should therefore be as wide as possible when defining the intangible criteria of taxation. By doing so, singling out of business models does not occur. Trade retaliations and tax litigation are so best avoided.

8. ***Are there changes other than to nexus and profit attribution rules that should be made to the existing international corporate tax framework and/or Australia's tax mix to address the challenges presented by globalisation and digitalisation?***

- It is recommended to review tax treaties in anticipation to a consensus in the OECD.
- It is recommended to review indirect taxes and to adapt them to the challenges of e-commerce in the way the European Union decided.
- It is recommended to review all Australian legislation that relates to protecting security, safety and rights of Australians and their goods, and adopt requirements of physical presence when the foreign based activity in those areas of protection surpasses relevant levels.
- It is suggested to levy a non-refundable minimal corporate income tax.
- It is recommended to levy a non-refundable minimal corporate income tax that equals the burden of indirect taxes if digital business models are singled out.
- It is suggested to centralize all payments from national bank-accounts to the corporate bank-accounts of a same beneficiary for the effectiveness of taxation of digital activities.
- It is suggested to anticipate the challenges presented by digital data conceived as crypto-currencies or other forms of barter tokens by an inventory the residents yearly file.

9. ***What does the experience of other countries that have introduced interim measures or that are contemplating them mean for Australia?***

Australia is spearheading such measures. Spain is considering a specific tax on digital services. By adopting tax rules that equally apply on both resident and non-resident sellers, without singling out one type of business the risks of trade retaliations and litigation could

be kept to a minimum while addressing effectively the loss of both business and corporate tax.

10. Should Australia pursue interim options ahead of an OECD-led, consensus-based solution to address the impacts of the digitalization of the economy on the international tax system*?*

Australia can adopt tools to address effectively a large part of the revenue-loss and it would be in the best interest of Australia to do so in a way without risking :

- litigations triggered by violation of tax treaties,
- trade retaliations triggered by singling out certain types of business.

The OECD consensus on adopting intangible criteria of taxation that is required for the remainder of the effort on stopping the revenue-loss, will still have to be implemented in the existing tax treaties. While awaiting the OECD consensus it is advisable to start negotiations for amending the existing tax treaties by inserting a clause that future OECD models will automatically apply.