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Tax Fairness in the Context of the Digital (Industrial) Revolution 4.0*

Sprawiedliwość podatkowa w kontekście rewolucji cyfrowej (przemysłowej) 4.0

ABSTRACT

The principles of taxation are one of the most important issues underlying tax systems as such. In spite of this fact, recently the scientific debate has been moving in a different direction and these seemingly straightforward issues have not received much attention. In our opinion, this is not correct, all the more so now that tax law (as well as other branches of law) is subject to many changes caused by the phenomena brought about by the digital (industrial) revolution 4.0. One such principle is that of tax fairness. It can be said that the literature on this principle is of a high standard. What impacts (if any) does the digital economy have on the substance and attributes of fair tax burden? Are the proposed changes at the level of the European Union aimed at limiting the arbitrariness of the tax authority? These are also questions that we will try to answer in this paper, which aims to verify the

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following hypotheses: 1) the digital economy is a significant factor influencing the established and underlying principle of taxation, which is tax fairness; 2) the digital services tax is one of the instruments at the European Union level that can be used to achieve tax fairness across member states in period which can be described as the digital (industrial) revolution 4.0. In order to fulfil the set aim and to verify these partial hypotheses, we used analysis, synthesis and a historical method, which were used in combination. The results of our research can stimulate scientific debate and contribute to the updating of the already established and generally accepted by the scientific community general theoretical knowledge.

Keywords: digital economy; principles of taxation; tax fairness; digital services tax

INTRODUCTION

Legal principles form an essential component of law as a normative system created by the state or the state institutions. They form the foundations of the branches of law, penetrate into individual legal institutions and find their expression in them. The principles shape the nature and character of a particular branch of law. This is also true of the principles of tax law and the principles of taxation, which are certain determinants in the law-making process and the application of law.

Legal principles have a certain historical context and have been more or less influenced by time and various external factors. The social relations that are the subject of legal regulation in the various branches of law are changing and evolving rapidly due to the phenomena of the digital (industrial) revolution 4.0.[1] The digital (industrial) revolution 4.0 can be understood as the period when media content, hardware and platforms shift from analog to digital formats.[2] The changes are not only visible in *lex scripta*, but also in *lex non scripta*. It is therefore essential for legal scholarship to address the issue of the impact of the digital transformation on legal principles.

It is the dynamism characteristic of tax law that is significantly accelerating the changes in terms of these regulatory ideas as well. The paper discusses the fundamental principles of taxation, with particular attention to tax fairness. Tax fairness (as well as other principles of taxation) is the result of tax theories that have been propounded by a number of eminent lawyers and economists, but it doesn't have only theoretical meaning as we will show in the text below.

[1] R. Funta and P. Plavčan (*Selected Legal Aspects of Protection of Undistorted Competition in the Digital Economy*, "Studia Iuridica Lublinensia" 2022, vol. 31(1), p. 26) also point out the dynamics of the digital economy.

[2] M. Daubs, *Digital Revolution*, [in:] *SAGE International Encyclopedia of Mass Media and Society*, ed. D.L. Merskin, California 2019, pp. 471–475.

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A number of questions arise in the context of the impact of the digital (industrial) revolution 4.0 on the elementary principles of taxation, namely on tax fairness, which can be described as a fundamental and basic principle of taxation. What impacts (if any) does the digital economy have on the substance and attributes of tax fairness? Are the reform instruments that are increasingly being discussed at the level of the European Union (EU) institutions heading towards the implementation of tax fairness?

We will try to answer the outlined questions in this article. Due to the breadth of the examined issue, we will focus our attention on the area of taxation of digital services. Digital services represent various types of (digital) services provided to their recipients using electronic means at a distance.[3] It is necessary to add that it is very difficult to define this term, and therefore even the legal acts that we have subjected to further analysis contain only purposeful definitions, the use of which is basically narrowed only for the needs of that legal act and cannot be considered as generally applicable.

The reason of choosing this area of taxation of digital (industrial) revolution 4.0 phenomena to our research is the existence of several national or international initiatives (EU and OECD) in the tax area, which can be subjected to some research, taking into account our preferred tax fairness. As we will point out further on, tax fairness is a given argument/reason in the case of several initiatives to adopt specific legal acts. Therefore, it is necessary to verify these statements of top representatives of the EU as well as individual states, also with regard to the attributes of tax fairness.

In view of the above facts, we set the goal of this paper to verify the following hypotheses:

H1: The digital economy is a significant factor influencing the established and underlying principle of taxation, which is tax fairness.

H2: The digital services tax is one of the instruments at EU level that can be used to achieve tax fairness across EU Member States in period which can be described as the digital (industrial) revolution 4.0.

The literature on general theoretical issues such as the principles of taxation and tax fairness is of a very high standard. There are lots of publications in both law and economics in which eminent authors have formulated fundamental ideas that can be built upon in the 21st century.[4] By contrast, the issue of the digital (in-

[3] K. Katterbauer (*Digital Services Tax*, "IALS Student Law Review" 2020, vol. 7(2), pp. 14–27) states that digital services are a fact that has significantly changed the world economy and at the same time represents a challenge for the existing tax regulation.

[4] More broadly, see e.g. V. Babčák, *Daňové právo na Slovensku a v EÚ*, Bratislava 2019, p. 51; M. Bujňáková, *Právne princípy v tvorbe a výklade daňového práva*, "Právny obzor" 2002, vol. 86(3), pp. 282–286; M. Bakeš, M. Karfíková, P. Kotáb, H. Marková, *Finanční právo*, Prague 2006, p. 191; A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warszawa 2004, p. 142.

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dustrial) revolution 4.0 is still unexplored, although some progress can also be seen in this area. This is also true in relation to many of the phenomena that the digital (industrial) revolution 4.0 (digital services, crypto-assets, collaborative economy, etc.) entails, about which there is quite intense debate.[5]

In order to fulfil the set aim and to verify these partial hypotheses, we used analysis, synthesis and a historical method, which were used in combination. The application of analysis allowed us to clarify the broadest range of phenomena related to the taxation of the digital (industrial) revolution 4.0 phenomena. Using synthesis, we were able to formulate our own opinions and proposals in *de lege ferenda* terms. Using a historical method, we sought to clarify the broader historical context of the proposed adjustments to the taxation of digital services, allowing for a better understanding of the research question.

In order to objectify the results of the compliance assessment of adopted or proposed measures, we have established evaluation criteria. The first of them is the extent to which the taxpayer participates in the use of public goods, then it is the assignment of income to a certain tax jurisdiction for taxation purposes, and finally it is the determination of the personal scope of the relevant measure. The results of our research can stimulate scientific debate and contribute to the updating of the already established and generally accepted by the scientific community general theoretical knowledge.

FUNDAMENTAL PRINCIPLES OF TAXATION

Modern tax systems[6] must reflect certain requirements formulated by the science of tax law, which can be referred to as the principles of taxation. If a tax system meets such requirements, it can be described as "modern".[7] The principles of taxation can be defined as "guiding ideas that have taken shape over a long historical

[5] More broadly, see e.g. M. Radvan, Z. Kolářová, *Airbnb Taxation*, [in:] *The Financial Law Towards Challenges of the XXI Century: Conference Proceedings*, eds. P. Mrkývka, J. Gliniecka, E. Tomášková, E. Juchniewicz, T. Sowiński, M. Radvan, Gdańsk–Brno 2020, pp. 481–494; K. Červená, M. Sabayová, *Sharing Economy in the Slovak Republic (Selected Aspects)*, "Financial law Review" 2021, vol. 24(4), pp. 163–176; A. Popovič, J. Sábo, *Taxation of Robots and AI – Problem of Definition*, "Financial law Review" 2022, vol. 25(1), pp. 1–16; M. Radvan, *Taxation of Instagram Influencers*, "Studia Iuridica Lublinensia" 2021, vol. 30(2), pp. 339–356.

[6] We understand the tax system as an umbrella term for the system of taxes collected and imposed in a state, then the system of authorities involved in tax administration, and finally the system of methods, means and instruments used in tax administration.

[7] Ideas about the modern tax system vary. There is no catalogue of attributes that such a tax system should fulfil, but this issue has been intensively addressed by authors since time immemorial. More broadly, see B.J. Ramage, *Modern Taxation*, "The Sewanee Review" 1896, vol. 4(3), pp. 312–325.

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period, which should guide the law-making bodies in the formulation of tax law and the executive and regulatory bodies in its implementation and application".[8] Tax principles are relevant not only in substantive law but also in procedural law.[9] As we have already stated, the fundamental principles of taxation were and still are the result of theories of taxation which have been propounded in the course of historical development by various eminent personalities of the time.

Regardless of who is credited with primacy in the formulation of a certain principle of taxation, one can agree with the fact that "in their essence, they have always reflected actually established and applied payments of taxes (primarily to the state budget), a certain degree of generalisation of the knowledge gained from their application, and their social and related consequences and effects on the population".[10] It can be clearly deduced from the above that tax principles and their perception are determined by a number of factors, which may be of a different nature.

Respecting the fiscal function of tax law, it can be noted that tax legislation will always be aimed at protecting the economic interests of the state or other public entities (e.g., municipalities or cities), where taxes constitute a significant budgetary revenue. On the other hand, there is also the social aspect of tax law, which is manifested in a number of its institutions and which takes into account the social situation of the taxpayer. This is where the tax principles find their concrete expression.

The idea of an effective and, at the same time, fair tax system is very difficult to achieve, and it can be said that it is not even practically possible. However, measures must be taken to make the tax system as fair and effective as possible.[11] In general, there is a substitution relationship between these two categories. This means that if we want to achieve the greatest possible tax fairness, it will be at the expense of effectiveness.[12] The opposite is also true – the more effective the tax system, the more tax fairness suffers. It is therefore essential to strike a balance between these categories.

Without categorising the individual principles of taxation into specific groups, we consider the most important ones to be the principle of tax fairness, the principle

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[8] V. Babčák, *op. cit.*, p. 51.

[9] Principles are an integral part of tax proceedings, but also of tax administration more broadly. More broadly, see M. Bujňáková, *Zásady a princípy daňového konania*, "Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza" 2016, vol. 91(18), pp. 11–23.

[10] V. Babčák, *op. cit.*, p. 51.

[11] A. Kicová, *Daňová spravodlivosť*, [in:] *Daňové právo a jeho rozvoj v národnom a medzinárodnom kontexte*, Košice 2010, p. 5.

[12] The so-called Laffer curve, created by Arthur Laffer, which illustrates the relationship between the tax rate and the tax revenue, is well known to the professional and scientific community. The task of states is therefore to search for the Laffer point, which represents the level of the tax rate that means the highest possible revenue for the state, but at the same time is also acceptable to the taxpayer.

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of avoidance of double taxation, the principle of neutrality of taxation, the principle of simplicity and clarity of taxation, the principle of effectiveness of taxation, the principle of tax elasticity, the principle of certainty of taxation, and the principle of minimum costs of tax administration.[13] Reference can also be made to a 2014 OECD document entitled "Addressing the Tax Challenges of the Digital Economy", which identified neutrality, efficiency, certainty and simplicity, effectiveness and fairness and, finally, flexibility as fundamental principles of taxation.[14]

Although the views of authors[15] vary, it can be noted that there is a rare consensus in the scholarly literature that tax fairness can be described as an established principle of taxation. It is this principle that will be given closer attention below, also in the context of the digital (industrial) revolution 4.0. We consider tax fairness to be the underlying principle of taxation, and many of the forthcoming tax reforms are justified by achieving, or at least approaching, this desired category.

TAX FAIRNESS AS THE UNDERLYING PRINCIPLE OF TAXATION

Justice is a category that can be understood in different ways, and this is demonstrated by several approaches or perspectives on this concept. [16] The same is true of tax fairness, which is a subcategory of justice as such. Every state strives to create a fair, effective and socially acceptable tax system. In order for the state or other public entities to function properly, it is essential that taxes fulfil their purpose (provide revenue for public budgets), but they must also be respected by society. States should make efforts to find the so-called Laffer point.

If the level of tax burden is disproportionately high, this would have a disincentive or even a retarding effect on taxable entities in relation to the activities from which they generate taxable income. This is also why it is essential to strike the above-mentioned balance between effectiveness on the one hand and tax fairness on the other. Of course, the optics through which the state and the taxpayer view tax fairness differ. Nevertheless, we consider tax fairness to be a fundamental pillar of the tax system.

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[13] V. Babčák, *op. cit.*, p. 51.

[14] OECD, *Addressing the Tax Challenges of the Digital Economy*, https://read.oecd-ilibrary.org/taxation/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report_9789264241046-en#page1 (access: 10.8.2022).

[15] More broadly, see e.g. M. Karfíková, R. Boháč, M. Kohajda [et. al.], *Teorie finančního práva a finanční vědy*, Prague 2018, pp. 34–42.

[16] The concepts of law and justice in a general sense have been addressed by a team of authors led by A. Bröstl, who summarized the views on these indefinable categories of various prominent legal theorists such as Kelsen, Radbruch, Perelman, and others. More broadly, see A. Bröstl [et. al.], *Teória práva*, Plzeň 2013, pp. 25–27.

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The specificity of tax fairness (compared to other tax principles) is that its essence is rather ethical and moral. The principle of tax fairness can also be described as a prerequisite for a functional tax system. There is no such thing as a fair tax system, but what is essential, as we have already stated, is that the tax system should be as fair as possible and that each taxpayer should contribute to the payment of public goods in a fair and adequate manner.[17]

The way in which the principle in question is implemented into tax legislation also influences the relationship of taxpayers to the various taxes imposed and collected in a particular state. At the same time, it is an important factor influencing the level of tax-law awareness in society and the respect for the tax system by individuals and society in general. It must therefore be given adequate attention, not only in theory, but especially in the law-making process.

The approaches presented in relation to the principle of tax fairness have changed and evolved throughout history. Adam Smith, one of the representatives of English classical economics, formulated four tax canons, among which he ranked the principle of (tax) fairness.[18] According to him, the subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is in proportion to the revenue which they respectively enjoy under the protection of the state.[19]

Smith's doctrine crystallized from the principle of paying tax according to the benefit and the principle of paying tax according to the taxpayer's ability. The Benefit Principle considered it fair for each subject to share in public expenditure to the extent that he himself benefited from the consumption of such public goods.[20] The Ability to Pay Principle, on the other hand, is based on taxation according to the taxpayer's ability to pay and is independent of the determination of expenditure.[21] Smith has been followed by other authors and it can be said that these principles are still relevant today.[22]

Historically, two basic views of tax fairness have evolved. These are horizontal and vertical tax fairness. Horizontal tax fairness expresses the requirement to tax

[17] A. Kicová, *op. cit.*, p. 5.

[18] The tax canons according to Smith were, in addition to justice, the principle of certainty, the principle of convenience, and the principle of efficiency. More broadly, see The Smith Institute, *Fair Tax: Towards a Modern Tax System*, http://www.smith-institute.org.uk/wp-content/uploads/2015/10/FairTaxTowardsamoderntaxsystem.pdf (access: 13.11.2022).

[19] A. Smith, *Pojednání o podstate a původu bohatství národu*, Prague 1958, p. 310.

[20] The Benefit Principle is usually associated with John Locke and Thomas Hobbes' concept of social contract.

[21] More broadly, see V. Babčák, *op. cit.*, pp. 44–45.

[22] For the complexity, it should be added that the authors' preconceived notion of tax justice differed, which is natural. David Ricardo, the author of *Principles of Political Economy and Taxation*, or John S. Mill, who expressed tax justice with the principle of equal tax sacrifice, were among such important personalities in the past.

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the same tax objects in the same way. The essence of vertical tax fairness is that the taxpayer with higher income or more assets should also pay proportionately higher taxes.[23] Thus, in general, the essence of horizontal tax fairness is that taxpayers with the same ability to pay will pay the same tax and, conversely, the essence of vertical tax fairness is that those with greater ability to pay will pay higher taxes.[24]

The impact of the industrial (digital) revolution 4.0 may lead us to consider new perspectives on tax fairness, and also in this respect we can build on earlier theories. The phenomena brought about by the digital economy are forcing the scientific community to revisit established knowledge and to review it in the context of today's times. The principle of tax fairness is no exception, and this is where special attention needs to be paid.

NEW PERSPECTIVES ON TAX FAIRNESS IN THE CONTEXT OF THE DIGITAL (INDUSTRIAL) REVOLUTION 4.0

Tax fairness tends to be an argument for adopting many announced changes to tax legislation, whether at national or EU level. But is this really the case? Is the principle of tax fairness really the impetus for the adoption of new legislation in the context of the digital (industrial) revolution 4.0? Is it not rather a pretext for introducing new tax instruments to safeguard the fiscal interests of public entities? To answer these questions, it is necessary to look at the issue from a broader perspective.

As a result of globalisation and the development of international trade, it has been possible to identify an increase in the number of entities doing business in more than one state.[25] In the EU Member States, this has been reinforced by the fact that national borders no longer constitute an obstacle to the exercise of the individual freedoms guaranteed by EU primary law – the free movement of persons, services, labour and capital – within the single internal market.

To that end, individual companies either have established branches directly in the Member States concerned or else have carried out their business activities in their territory without the need for a physical presence.[26] This phenomenon is all the more evident in what we have referred to in this paper as the industrial (digital) revolution 4.0. This is particularly, but not exclusively, the case for large technology

[23] R.A. Musgrave and P.B. Musgraveová (*Veřejné finance v teorii a praxi*, Prague 1994, p. 207) refer to this as the requirement of greater sacrifice.

[24] A. Kicová, *op. cit.*, p. 2.

[25] M. Kačaljak (*Výbrané trendy vo výbere daní a možnosti ich právnej reflexie na Slovensku*, Bratislava 2017, p. 92) states that globalisation and digitalisation are significant megatrends that also have a substantial impact on tax collection in the world.

[26] In the tax context, this phenomenon is also referred to as a lack of business presence. See W. Cui, *The Digital Services Tax: A Conceptual Defense*, "Tax Law Review" 2019, vol. 73(1), pp. 69–111.

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companies such as Google, Meta (formerly Facebook), or others.[27] It is therefore a definitive departure from the so-called brick-and-mortar industry.[28]

In principle, the digital economy "is related to the rapid emergence and penetration of information and communication technologies in all areas of human activity, which also requires new perspectives on the factors influencing the development and success of the economy".[29] Building on this idea, it can be added that the emergence and penetration of information and communication technologies are also leading to new perspectives on what can be considered fair in taxation. The fact that the physical presence of an entity in the state where it carries out its business activities is no longer necessary leads to various creative (and sometimes even speculative) conduct in an attempt to minimise tax liability.

From the point of view of the above-mentioned views of renowned economists, this can certainly not be considered fair; on the contrary, it is conduct that is unfair in relation to other taxpayers who pay their taxes properly and thus create the necessary material prerequisite for a well-functioning state and its budgetary management. The desired goal of the digital (industrial) revolution 4.0 should therefore be (and allegedly is) to tax profits where value and profits are actually generated. It should therefore disregard physical presence, which, as we have also said, is no longer necessary for business activity.

The issue must also be seen through the prism of the individual states. What model of taxation is fair from the point of view of the state and the government authorities? The budgets of many states have suffered precisely because the conduct of digital giants and the use of more favourable tax systems have led to the transfer of profits to other countries (referred to in the scientific community as tax havens or havens without taxes). Therefore, it can be concluded that implementation of the requirement – taxing profits where value and profits are actually generated – into legislation would also be fair from the state's point of view. To materialise this requirement in the application practice and to truly achieve tax fairness, it is necessary to work with two concepts, which are the tax nexus and the genuine link.

Some authors liken the tax nexus to conflict-of-law rules.[30] It can be broadly defined as "a rule of tax law that determines to which tax jurisdiction a taxpayer,

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[27] More and more international companies are starting to adopt a business model that is referred to as the "data-driven business model". As many as seven of the world's top eight companies apply this business model. See UNCTAD, *Digital Economy Report 2019*, https://unctad.org/system/files/official-document/der2019_en.pdf (access: 13.11.2022, pp. 33–37.

[28] J. Kokott, *The 'Genuine Link' Requirement for Source Taxation in Public International Law*, [in:] *Tax and the Digital Economy: Challenges and Proposals for Reform*, eds. W. Haslehner, G. Kofler, K. Pantazatou, A. Rust, Alphen aan den Rijn 2019, p. 9.

[29] J. Papula, J. Papula, Ľ. Cibák, Z. Papulová, *Manažérska ekonomika*, Prague 2017, p. 22.

[30] P. Huba, J. Sábo, M. Štrkolec, *Medzinárodné daňové úniky a metódy ich predchádzania*, Košice 2016, p. 104.

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property, income or part of the income of a particular taxpayer is subject".[31] The concept has so far been regulated primarily by the OECD Model Tax Convention on Income and on Capital. However, the Convention is no longer so relevant, also in view of what we have already stressed in several places in this paper, namely that physical presence is not necessary in the conduct of various activities. It is sufficient if the recipients of such services have the necessary technical equipment. However, this does not automatically mean personal computers alone, but mainly mobile devices through which individuals are almost continuously connected to the Internet.[32]

As Baez and Brauner point out, physical presence evolved as the primary trigger for the right of the state, within the framework of fiscal sovereignty, to impose and collect taxes. They also add that the permanent establishment articulation represented a fair compromise between source and residence claims for tax jurisdiction.[33] In the context of the industrial revolution, the application of the original concept could be said to be inconsistent with the principle of tax fairness. That is why the tax nexus is now taking on a completely different dimension.

Multinational enterprises (abbreviated as "MNEs") are equipped, both in terms of personnel and facilities, to provide services at the same time in different locations, irrespective of geography and the need to set up permanent establishments.[34] However, it should be added in the same breath that legislation that would link the creation of tax liability to the mere fact that an MNE provides digital services in the territory of a particular state (even without the need for a physical presence) would in itself be unfair and inadequate.

Here we come to the genuine link requirement, which has been articulated by doctrine,[35] as well as case law of international judicial authorities. For tax purposes, a genuine link can be thought of as a link that creates an entitlement for a state to tax certain foreign situations that it would not normally be entitled to tax. The said question was also dealt with by the Permanent Court of International

[31] M. Štrkolec, *Daňové právo a jeho reflexia na nové javy v ekonomike*, [in:] *Taxation of Virtual Currency and Digital Services: COVID-19 and Other Current Challenges for Tax Law. Reviewed Proceedings of Scientific Papers*, eds. M. Štrkolec, A. Vartašová, M. Stojáková, S. Simić, Košice 2021, p. 377.

[32] *Ibidem*.

[33] A. Baez, A. Brauner, *Withholding Taxes in the Service of BEPS. Action 1: Address the Tax Challenges of the Digital Economy*, [in:] *WU International Taxation Research Paper Series*, eds. E. Eberhartinger, M. Lang, R. Sausgruber, M. Zagler, E. Kirchler, Vienna 2015, p. 4.

[34] A very important aspect in relation to the taxation of MNEs will be the exchange of information, which has been addressed by A. Szakács (*Výmena informácií v súvislosti so zdaňovaním digitálnych platforiem*, [in:] *Bratislavské právnické forum 2021: Aktuálne výzvy pre finančné právo*, eds. A. Szakács, T. Hlinka, M. Mydliarová, S. Senková, M. Kohounová, Bratislava 2021, pp. 53–59).

[35] S. Gadzo, *The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal*, "Intertax" 2020, vol. 46(2), pp. 194–209.

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Justice[36] in its judgment of 7 September 1927, referred to as *Lotus*, with the view that the case involved a genuine link between a company and the territory of a state for the purpose of providing diplomatic protection.[37] Reference may also be made to the judgment of the Court of Justice of the European Union in case C-482/18 *Google Ireland*, which dealt specifically with close connection for tax purposes.[38] The Court of Justice concluded that the connection to the use of the country's official language provided a sufficiently reasonable link. It will be interesting to see what direction further case law from the judicial authorities will take.

Failure to apply the genuine link requirement could lead to unjustified extraterritorial reach of the tax liability.[39] This would also lead to an unsustainable extension of the tax burden and could have a particularly adverse or even devastating effect on the MNE's business activities. Also in the interest of preserving and fulfilling tax fairness, it will therefore be necessary to formulate very sensitively the indicators embodying the genuine link requirement (see below).

In the light of these facts, we have to conclude that hypothesis H1 – the digital economy is a significant factor influencing the established and underlying principle of taxation, which is tax fairness – has been confirmed. Another of the attributes of tax fairness comes to the fore, which is the requirement that profits should be taxed where value and profits are actually created, regardless of the taxpayer's physical presence. It is natural, therefore, that earlier eminent economists and legal theorists did not take this fact into account in presenting their ideas on the principle of tax fairness. This is an issue of the present day, and new perspectives on this important category are therefore justified while respecting the tax nexus and the genuine link requirement.

INDUSTRY 4.0 TAX REFORMS – DIGITAL SERVICES TAX AND TAX FAIRNESS

The specificity of digital taxation is that this area includes tax policies that are aimed at taxing businesses using digital technologies, whether through a special tax rate, an adjustment of the tax base or through a specific tax-law

[36] It was the first global international court created by the League of Nations and thus became the predecessor of the International Court of Justice operating within the United Nations.

[37] The Permanent Court of International Justice also used the term "genuine connection". See judgment of the Permanent Court of International Justice of 7 September 1927, Series A – No. 10.

[38] See judgment of the CJEU of 3 March 2020, Case C-482/18, *Google Ireland*, ECLI:EU:C:2020:141.

[39] S. Gadzo, *op. cit.*, pp. 194–209.

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instrument.[40] Given the specificities of the phenomena of the digital (industrial) revolution 4.0, such as crypto-assets, digital services or sharing economy, governments and EU officials are looking for solutions to the current unflattering state of taxation of these phenomena or the income derived from them.[41] It is the achievement of tax fairness that is the justification for many of the reform steps, but as we will point out below, it is questionable whether the proposed changes will actually achieve tax fairness or, on the contrary, they will contribute to deepening tax unfairness.

A number of digital taxation initiatives target income from digital services, which is our primary focus in this paper. On the one hand, the taxation of income from digital services is dealt with at the level of individual states seeking temporary, unilateral solutions to the issue, but on the other hand, we have the EU and the OECD, which prefer a common and coordinated approach to the issue, which is natural and one can agree with such an approach.[42]

Unilateral solutions, also from the perspective of the principle of tax fairness analysed by us, do not contribute to its fulfilment and we can state that they rather undermine it. Several European states have already introduced national digital services taxes (in various modifications). These include (among others) France and Spain.[43] On the other hand, there are states that are still considering the possibility of introducing their own digital services tax.[44] This approach is not correct and is also being challenged by the above-mentioned international organisations (see below).[45]

Discussions on the taxation of digital services started to intensify in the EU in 2017, starting with the Tallinn Digital Summit. The summit was attended by EU heads of state or government. The aim of the summit was to create a platform of sorts for future discussions on digital innovation, which should ensure the EU's competitiveness on a global scale with other world powers. A number of docu-

[40] S. Simić, *Vybrané otázky zavedenia a možnej harmonizácie digitálnej dane*, [in:] *Taxation of Virtual Currency and Digital Services…*, p. 320.

[41] See K. Cakoci, K. Červená, *Tax Transparency in the Context of a Shared Economy*, [in:] *Finansovoje pravo v cifrovuju epochu: materijaly meždunarodnoj naučno-praktičeskoj konferencii*, Moscow 2021, pp. 174–183.

[42] In the context of EU initiatives, C. Dimitropoulou (*The Digital Services Tax and Fundamental Freedoms: Appraisal under the Doctrine of Measures Having Equivalent Effect to Quantitative Restrictions*, "Intertax" 2019, vol. 47(2), pp. 201–218) points out a high risk that the digital services tax will run counter the aim of the digital single market itself.

[43] L. Hrabčák, A. Popovič, *On Certain Issues of Digital Services Taxes*, "Financial Law Review" 2020, vol. 17(1), pp. 52–69.

[44] An example of such a state is the Slovak Republic, where these ideas have not yet been implemented into a concrete legislative proposal for a digital services tax.

[45] We add that there are states not only within the EU that have, at least temporarily, introduced unilateral measures for the taxation of digital services. M. Magwape (*Debate: Unilateral Digital Services Tax in Africa: Legislative Challenges and Opportunities*, "Intertax" 2020, vol. 50(1), pp. 444–458) has researched such measures implemented in several African countries in the context of the post-COVID-19 pandemic.

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ments were drawn up in its wake, including the "European Council Conclusions, 19/10/2017". The document covered a number of issues, one of which was "Digital Europe". There, the EU set a number of priorities, including "an effective and fair taxation system fit for the digital era".[46] It is clear from the above that the aim of the forthcoming proposals is precisely to achieve a fair taxation system.

Another such document was the Communication from the Commission to the European Parliament and the Council of 21 September 2017 "A Fair and Efficient Tax System in the European Union for the Digital Single Market".[47] The very title of the document suggests that it too considers a fair and efficient tax system as the ultimate objective. Furthermore, its text underlines one of the attributes or requirements of the principle of tax fairness in the context of the industrial revolution 4.0, which is the taxation of income where value and profits are actually generated. At the same time, it can also be inferred from its text that the EU prefers to reach a broader consensus at the international level on how to address the issue rather than addressing it itself. Nevertheless, a number of proposals have been made by the EU institutions to lay the basis for the taxation of digital services across the Member States, namely:

1) 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 21 March 2018 (hereinafter: the Proposal for a DST Directive),[48]
2) Proposal for a Council Directive laying down the rules relating to the corporate taxation of a significant digital presence of 21 March 2018 (hereinafter: the Proposal for an SDP Directive),[49] and
3) Proposal for a Council Directive on the common system of a digital advertising tax on revenues resulting from the provision of digital advertising services of 1 March 2019.[50]

It was the third Council proposal in the sequence that was supposed to represent a kind of compromise solution to the taxation of digital services with a much narrower scope compared to the Proposal for a DST Directive and the Proposal for an SDP Directive. A compromise solution was sought by very proactive Member States such as Germany and France. It should be added, however, that even this compromise has not found sufficient support from other Member States and none of the proposals have been adopted so far. In spite of this fact and in spite of the declared objective of achieving tax fairness, it is necessary to point out some facts in the legislative proposals in question which lead us to consider that the achievement or fulfilment of

[46] European Council conclusions of 19 October 2017, EUCO 14/17.
[47] COM(2017) 547 final.
[48] COM(2018) 148 final – 2018/073 (CNS).
[49] COM(2018) 147 final – 2018/0072 (CNS).
[50] COM(2018) 73 (CNS).

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the principle of tax fairness is being declared outwardly, while the sole intention was (and probably still is) to raise additional revenue for public budgets by introducing a new tax and perhaps even moving towards a harmonised corporation income tax.[51]

In doing so, one can point in particular to the understanding of the taxable person in the Proposal for a DST Directive, which was supposed to be a kind of temporary solution on the way to a comprehensive solution in the form of the Proposal for an SDP Directive. According to the proposal, an entity should qualify as a taxable person only if it meets both of the following conditions: the total amount of worldwide revenues reported by the entity for the latest completed financial year for which a financial statement is available exceeds EUR 750,000,000, and the total amount of taxable revenues obtained by the entity within the Union during that financial year exceeds EUR 50,000,000. The personal scope thus formulated can be described as discriminatory, since the criteria are so strict that this proposal for the legislative act addresses only a narrow group of companies, such as the above-mentioned Google, Apple, Meta, or Amazon.[52]

The proposed setting of the DST could also be judged by the Court of Justice of the European Union as contrary to the prohibition of discrimination and also, in our opinion, the original idea of the legislators – to achieve the principle of tax fairness – is slightly lost. Certainly, we consider that the issue needs to be addressed and dealt with by introducing a new digital services tax or modifying the existing income tax, but without such a narrowly defined personal scope of the Directives, thus avoiding unnecessary complications and related court proceedings regarding compliance with primary EU law.[53]

In addition to the activities of the EU, reference should also be made to the work of the OECD, which has already addressed the issue of the digital economy, at least in outline, in its BEPS Action Plan in 2013.[54] Among the more recent initiatives, also in the context of tax fairness we are examining, we can mention "Statement on

[51] We are considering whether a harmonised corporate tax would still make budgetary sense in a common digital services tax environment, as the largest MNEs are active in digital services and their income would already be taxed, including with regard to the principle of avoidance of double taxation.

[52] For the sake of completeness, it can also be noted that the French DST is also referred to as the GAFA tax (Google, Apple, Facebook [now Meta], and Amazon) because it targets only the big digital giants.

[53] G. Kofler and J. Sinnig (*Equalization Taxes and the EU's 'Digital Services Tax'*, "Intertax" 2019, vol. 45(2), pp. 176–200) discuss the digital services tax in the context of so-called "equalization taxes", also reflecting on the question of what technical features any such tax should contain to comply with international obligations (they mention in particular EU and tax treaty law).

[54] Of the actions presented in BEPS, the action titled "Tax challenges of the digital economy" addresses the digital economy. However, we agree with the critical view presented by D. Mączyński (*The BEPS Influence on Tax Information Exchange*, "Studia Iuridica Lublinensia" 2018, vol. 27(2), pp. 127–141) that BEPS did not contain a number of significant and effective measures to counter harmful tax practices, adding that this statement also applies to the digital economy phenomena.

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a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy" of 8 October 2021. There, too, the main objective is the creation of a system under which the profits made by MNEs are fairly allocated to market jurisdictions with nexus. Pillar One addresses tax issues related to digitisation and the fair distribution of profits and taxing rights. Pillar Two provides for a global minimum tax rate of 15% (the so-called GloBE rule) and creates the possibility for developing countries to tax certain base-eroding payments when they are not taxed up to the minimum tax rate of 9%. Despite the fact that no specific legislative proposal is known, it seems to us that the OECD's intention is capable of approaching the principle of tax fairness before the various proposals made and presented in the EU.

In view of the above, we have to summarise that hypothesis H2 – the digital services tax is one of the instruments at EU level that can be used to achieve tax fairness across EU Member States in period which can be described as the digital (industrial) revolution 4.0 – has been confirmed, but we must add in the same breath that it is not the legislative proposals developed in the EU that have proved to be the case.[55] Rather, the current legislative proposals tend to undermine the principle of tax fairness, as can be demonstrated by the above-mentioned personal scope (the concept of taxable person) contained in the Proposal for a DST Directive and by setting threshold values that target a narrow range of subjects, which appears to us to be clearly discriminatory.

In relation to the OECD initiatives, we cannot yet comment responsibly, as no concrete proposal for a solution to the taxation of digital services is yet known. However, we have to say that the digital services tax is one of the instruments that can contribute to tax fairness, as it can achieve a situation where digital giants (not just "ordinary" taxpayers) also participate in the budgetary functioning of states and do not just benefit from the various public goods available to them and that is why it is a basic criterion when assessing the compliance of a certain measure with tax fairness.

CONCLUSIONS

In this paper, we have dealt with selected fundamental issues of tax law, such as the principles of taxation in the context of the digital (industrial) revolution 4.0, while special attention was paid to tax fairness. On this basis, we set out hypotheses in its introduction, in relation to which we summarise the conclusions reached in the research carried out in the points below.

[55] M. Kaźmierczak (*EU Proposal on Digital Service Tax in View of EU State Aid Law*, "Financial Law Review" 2022, vol. 25(1), p. 106), for example, takes a similar view, concluding that the proposals presented at EU level are a simple solution to the taxation of the digital economy that is inadmissible and that further discussion is necessary to achieving fair taxation.

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1. The digital economy is a significant factor influencing the established and underlying principle of taxation, which is tax fairness.

Law and its various branches are under constant pressure from changes in social relations, which are evolving dynamically. This is also true of the phenomena brought about by the digital (industrial) revolution 4.0, which can without less doubt be described as the material source of law. This also applies in particular to tax law as one of the most dynamic branches of law ever. Among the phenomena of the digital economy we also include digital services provided mainly by MNEs across the territory of several states.

As the paper also shows, digitalisation penetrates deeper, right down to the very fundamental principles of taxation, including the principle of tax fairness. Given that the provision of digital services is not tied to the physical presence of the entities that provide them, it is one of the attributes of the principle of tax fairness – the taxation of profits where value and profit are generated – that is becoming increasingly important.

In this respect, however, the so-called tax nexus, which determines the tax jurisdiction to which a taxpayer, property, income or part of income should be subject, should not be overlooked. However, in order to consider fulfilling the content and essence of the principle of tax fairness, the genuine link requirement must also be fulfilled. This requirement constitutes a link that creates an entitlement for a state to tax certain foreign situations that it would not normally be entitled to tax. Otherwise, there could be unjustified extraterritorial reach of the tax liability, which is obviously not desirable.

In the light of these facts, we conclude that hypothesis H1 has been confirmed, because the impact of the digital economy on the tax fairness is evident and unquestionable. Despite the fact that the opinions and ideas of earlier authors in relation to tax fairness have already been overcome in some aspects, the basic theses presented by Smith are still used today.

2. The digital services tax is one of the instruments at EU level that can be used to achieve tax fairness across EU Member States in period which can be described as the digital (industrial) revolution 4.0.

A number of changes in tax legislation at both national and EU level regarding the digital economy are justified by the achievement of tax fairness. Similar reasons were and still are presented by international organisations such as the EU and the OECD in relation to proposed changes to the taxation of digital services. The positions of individual states are also understandable, as they are afraid of the surrender of tax sovereignty, which is already curtailed within the EU Member States due to harmonisation in the area of indirect taxes.

The EU's proposals, which have been the subject of much debate, are not, in our view, capable of bringing about tax fairness. Rather, we are of the opinion that the proposed rules on the taxation of digital services may further undermine

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it and deepen tax unfairness. The proposed set of thresholds of personal scope of the digital services tax addresses only a very narrow group of companies, which is clearly discriminatory in nature. Certainly, we are of the opinion that the current situation is not flattering and needs to be addressed.

There are potentially large (tax) revenues for public budgets in the digital economy (especially when we are talking about digital services). This is all the more true in a time marked by many crises connected with the disease of COVID-19 or the war in Ukraine, which are connected with several other negative phenomena in the economy. However, the design of the tax on digital services must be different so that we can talk about it being a means or instrument by which tax fairness can be achieved. The design will have to consistently adjust the tax nexus and the genuine link to a specific tax jurisdiction under the current sensitive setting of threshold values when adjusting the personal scope in order to eliminate the discriminatory nature of such a measure.

In the light of these findings, we further conclude that hypothesis H2 has been confirmed. Indeed, the digital services tax is one of the instruments that can be used to achieve tax fairness in what can be described as the digital (industrial) revolution 4.0, provided, however, that the reservations we have formulated in the present paper, which are of fundamental importance from the point of view of the fulfilment of the principle of tax fairness, are taken into account.

Only consistent observance (and not only declaration) of tax fairness can contribute to states having modern tax systems that will reflect the current social situation. In our opinion, the science of tax law faces the difficult task of formulating a test of compliance with tax fairness, while the individual criteria within the mentioned test will probably differ depending on the specific phenomenon of the digital (industrial) revolution 4.0, taking into account its peculiarities. This statement also applies to digital services.

We believe that the views presented by us will also contribute to a very heated debate within the scientific community on the taxation of digital services, which may lead to the adoption of a well-thought-out and acceptable legislation on the digital services tax, not only in relation to the states that will impose and collect it, but also in relation to the entities that will be obliged to pay it.

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ABSTRAKT

Zasady podatkowe są jednymi z najważniejszych kwestii leżących u podstaw systemów podatkowych. Pomimo to debata naukowa podąża ostatnio w innym kierunku i te pozornie proste sprawy nie cieszą się zbyt dużą uwagą. Nie jest to naszym zdaniem prawidłowe, zwłaszcza że obecnie prawo podatkowe (oraz inne gałęzie prawa) podlega wielu zmianom wynikającym ze zjawisk powodowanych rewolucją cyfrową (przemysłową) 4.0. Jedną z takich zasad jest sprawiedliwość podatkowa. Można ocenić, że literatura na temat tej zasady jest na wysokim poziomie. Jaki (ewentualny) wpływ ma gospodarka cyfrowa na istotę i cechy sprawiedliwego obciążenia podatkowego? Czy projektowane zmiany na poziomie Unii Europejskiej zmierzają w kierunku ograniczenia arbitralności władztwa podatkowego? Są to pytania, na które także staramy się odpowiedzieć w niniejszym artykule, mając na celu zbadanie następujących hipotez: 1) gospodarka cyfrowa jest istotnym czynnikiem wpływającym na ustaloną i fundamentalną zasadę systemu podatkowego, tzn. zasadę sprawiedliwości podatkowej; 2) podatek od usług cyfrowych jest jednym z instrumentów na poziomie Unii Europejskiej, który może być zastosowany do osiągnięcia sprawiedliwości podatków w państwach członkowskich w czasach tzw. rewolucji cyfrowej (przemysłowej) 4.0. Dla osiągnięcia ustalonego celu i weryfikacji tych hipotez cząstkowych stosujemy łącznie metody analizy i syntezy oraz metodę historyczną. Wyniki naszych badań mogą pobudzić naukową debatę i przyczynić się do zaktualizowania ustalonej wiedzy teoretycznej ogólnie przyjętej przez środowisko naukowe.

Słowa kluczowe: gospodarka cyfrowa; zasady podatkowe; sprawiedliwość podatków; podatek od usług cyfrowych