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20 ANIVERSARIO

Documento de Trabajo
Serie Política de la Competencia y Regulación
Número 60 / 2020

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Jean Monet Network EU-China: Comparative experiences and contributions to global governance in the fields of climate change, trade and competition

Ref. 587904–EPP–1–2017–1-ES-EPPJMO-NETWORK
Co-funded by the Erasmus+ Programme of the European Union

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Serie *Política de la Competencia y Regulación* Documentos de Trabajo del Real Instituto Universitario de Estudios Europeos

The EU-China trade partnership from a European tax perspective

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ISBN: 978-84-17385-63-7
Depósito legal: M-7964-2020

Maquetación: Gráficas Vergara, S. A.

Contenido

1. The evolution of EU-China trade partnership and tax-related issues

ELENA MASSEGLIA MISZCZYSZYN[1]

1.1. Introduction

The People's Republic of China ("China") nowadays is a strategic partner of the European Union ("EU"), as well as a strategic rival, proposing alternative models of governance in certain fields and being a leading technological power.

The EU-China trade relationship started officially in 1975. Since then, the soaring globalised economy and the intensification of digitalization broadened the connections between the two parties, and so the interactions of the tax systems who lead to an increase of the risk of tax-related barriers and distortions on the one hand, and on the other hand the exploitation of mismatches between different tax regimes by businesses operating internationally. International trade and taxation are strictly related.

Even if sometimes it is alleged the lack of transparency and of level playing field on the Chinese side, it is undeniable that the EU and China are still open to cooperation and that the EU is showing its intention to found a balance in trade and tax matters, insisting on reciprocity, to minimize the mentioned risks.

1.2. Evolution of relationships from the 1978 Trade Agreement to the CAI and the BEPS Action Plan: bridging the links

Ten years after the creation of the EU Customs Union, a first agreement marked the beginning of trade relationships between the EU and China, despite the different nature of the interests of the two contracting parties underlying the signature –primarily economic for the first and political for the second[2]. On 3rd April 1978, the official signing ceremony took place in Brussels – it was the first occasion on which the institutions of the European Economic Community ("EEC") received a member of the Chinese government[3]– and on 1st June 1978 the *Trade Agreement between the European Economic Community and the People's Republic of China* entered into force[4] ("1978 Trade Agreement").

As far as tariffs are concerned, the two parties agreed to apply the most-favoured-nation ("MFN") clause[5]. So, any favourable provisions as regards customs duties and any taxes and charges in connection with importation and exportation of goods and services under other treaties with other contracting parties shall be accorded in the exchanges between the nine EEC countries[6] and China – exception made for customs unions, free trade areas, advantages to neighbouring countries and obligations undertaken under international commodity agreements. One of the main clauses of the General Agreement on Tariffs

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2 ECC was interested in signing a trade agreement with China for "economic gains", while the reasons encouraging China to these negotiations were mainly political, see XIAOTONG, Z. "Linkage Power. How the EU and China managed their economic and trade relationship", in TELÓ, M., CHUN, D. and XIAOTONG, Z. (2018) (eds.), *Deepening the EU-China Partnership. Bridging Institutional and Ideational Differences in an Unstable World*, Routledge, Oxon and New York, 2018, p. 155-156.

3 See European Communities – The Council, *Signing of the trade agreement between the EEC and the People's Republic of China. Speech by K.B. Andersen, President in Office of the Council, Minister for Foreign Affairs of the Kingdom of Denmark*, Brussels, 3 April 1978.

4 COUNCIL REGULATION (EEC) No 946/78 of 2 May 1978 concerning the conclusion of the Trade Agreement between the European Economic Community and the People's Republic of China.

5 Art. 2 of the 1978 Trade Agreement.

6 Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands and United Kingdom.

and Trade ("GATT")[7] were therefore included in this first agreement, even if China was not yet a member of the GATT/WTO (*see below*).

Moreover, China undertook to consider Community imports in a favourable light and the ECC of nine, for its part, committed itself to endeavour to increasingly liberalize imports of Chinese origin, extending the list of liberalized products and augment the amounts of quotas[8]. To boost the cooperation, they also agreed to create a Joint Committee.

Considering the satisfactory application of the 1978 Trade Agreement[9], the EEC and China decided to enter into a new trade agreement –the *Agreement on Trade and Economic Cooperation between the European Economic Community and the People's Republic of China* ("1985 Trade Agreement")– which was signed on 21st May 1985 and entered into force on 1st October 1985. As regards tariffs, the terms of the 1985 Trade Agreement were the same as those of the 1978 Trade Agreement: the MFN was reiterated. As it is evoked by the official title, the novelty aspect with respect to the previous treaty relates to the new provisions about the *economic cooperation*, including the promotion of investments and the enhancement of a propitious framework for the latter[10]. In any case, the EEC Members States were still allowed to undertake bilateral activities and conclude agreements relating to economic cooperation[11].

The mentioned two agreement are a manifestation of the trend reversal of the Beijing glance towards the outside world, opening the doors to foreign investment[12].

This change is also perceived in the purely (international) fiscal sector. It is during the Eighties that the first double tax treaties, including those with some of the EEC countries[13], were negotiated and signed. Moreover, starting from the 1979, several acts concerning the taxation of foreign investments were enacted to attract the latter and expand economic cooperation: on 1 July 1979 the Act of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, on 10 September 1980 the Income Tax Act of the People's Republic of China Concerning Joint Ventures with Chinese and Foreign Investment, on 13 December 1981 the Income Tax Act of the People's Republic of China for Foreign Enterprises (the two latter then replaced in 1991 by the Income Tax Act of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises)[14].

In the period at hand, the financial flow was mainly unidirectional: from the EEC companies to China and it is also confirmed by article 13 of the 1985 Trade Agreement which drawn attention on the different levels of development of the two contracting parties[15]. However, this was about to change.

China was determined to pursue the path undertaken as increasingly market-driven economy and therefore to participate in the multilateral trading system. In 1986, China requested the resumption[16] of its status as a GATT contracting party. An early accession of China to the GATT was supported by the

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7 Art. 1 of the GATT.

8 Art. 4 of the 1978 Trade Agreement.

9 Preamble of the Agreement on Trade and Economic Cooperation between the European Economic Community and the People's Republic of China.

10 Art. 12 of the 1985 Trade Agreement.

11 Art. 14 of the 1985 Trade Agreement.

12 AUYEUNG, P. K. (2003). "Taxation Trends and Issues in the People's Republic of China: 1984 to 2006", in *Bulletin for International Taxation*, IBFD, Amsterdam, June 2008, p. 249.

13 *E.g.* with France in 1984, Italy in 1986, Netherlands in 1987, United Kingdom in 1984. See www.oecd.org.

14 WTO, *Accession of the People's Republic of China. Decision of 10 November 2001*, 23 November 2001, WT/L/432, pp. 75-76, available at www.wto.org; AUYEUNG, P. K. (2003).; *op. cit.*, pp. 249-251; BAO, L. "China's Tax Policy toward Enterprises with Foreign Investment: A Comprehensive Appraisal", in *Intertax*, Kluwer Law International, 2003, Vol. 31, Issue 2, pp. 66 *et seq.*

15 "In view of the difference in the two Contracting Parties' levels of development, the European Economic Community is prepared, within the context of its development aid activities, within the means at its disposal, and in accordance with its rules, to continue its development activities in the People's Republic of China. / It confirms its willingness to examine the possibility of stepping up and diversifying these activities."

16 China was a signatory of the GATT in 1948, but –after the revolution in 1949– the Taiwan government announced the withdrawal from the GATT. The Beijing government never acknowledged the latter withdrawal; however, it notified the resume of the membership in 1986. See WTO Press Release, "WTO successfully concludes negotiations on China's entry", 17 September 2001, Press/243, available at www.wto.org.

EEC with which Beijing carried out bilateral negotiations[17]; but due to historical, economic and political reasons it was delayed until 2001, when China acceded to the Marrakech Agreement Establishing the World Trade Organization ("WTO Agreement") and thereby became a member of the World Trade Organization ("WTO"). One of the interests of the EEC, then –since 1993– the European Community ("EC"), was to improve "the climate for European investment in China"[18] and so also to significantly whittle Chinese import tariffs on industrial and agricultural goods as well as to ameliorate the establishment and trade conditions in China for foreign companies[19]. This goal was attained quite successfully. From a tax perspective, a series of important commitments were undertaken by China, *inter alia*[20]:

1. The foreign individuals and enterprises will be accorded treatment no less favourable than that accorded to those in China (even as regards border tax adjustments);
2. The elimination of subsidy programs falling within the scope of article 3 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement");
3. China will ensure the compliance of customs fees, internal taxes and charges with the GATT;
4. The elimination of all taxes and charges on exports, except for those specifically provided in the Protocol or applied in conformity with Article 6 of the GATT;
5. The notification of subsidies pursuant to Article 25 of the SCM Agreement;
6. China bound tariffs for imported goods, it committed to decrease the average bound tariff level for agricultural and industrial products and it will eliminate several tariffs and reduce others mostly by 2004 and in any case no later than 2010.

Simultaneously, in 1997 the EC Council authorised the EC Commission to negotiate a customs cooperation agreement on behalf of the EC and in 2004 it approved the *Agreement between the European Community and the Government of the People's Republic of China on cooperation and mutual administrative assistance in customs matters* ("CCMAA"). Taking also into account that "operations in breach of customs legislation including infringements of intellectual property rights are prejudicial to the economic, fiscal and commercial interests of both Contracting Parties"[21], China and the EC decided to enhance the cooperation between competent administrative authorities in ensuring the accurate assessment of customs duties and other taxes. Customs cooperation covers all matters relating to the application of customs legislation[22], including exchange of information and expertise on customs techniques and procedures, exchange of personnel and training, seeking a coordinate position in the context of international organisations as well as the assistance in ensuring the proper application of customs duties (*i.e.* recovery of duties, taxes or fines, arrest or detention) and prevention and fight against fraud[23]. Recently, to reiterate and increase the effectiveness of the mutual cooperation and assistance in the field of customs, the European Commissioner for Economic and Financial Affairs and the Minister of Customs of China has signed a *Strategic Framework for Customs Cooperation for the years 2018-2020*, which *inter alia* extends the collaboration to the e-commerce sector and supports the review of the CCMAA[24].

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17 Commission of the EC, *Communication from the Commission. Building a Comprehensive Partnership with China*, 25 March 1998, COM(1998)181, p. 12.

18 *Ibidem.*

19 *Ib.*, pp. 12-16.

20 Protocol on the accession of China annexed to WTO, *Accession of the People's Republic of China. Decision of 10 November 2001*, *op. cit.*; WTO Press Release, "WTO successfully concludes negotiations on China's entry", *op. cit.*

21 COUNCIL DECISION of 16 November 2004 on the conclusion of an Agreement between the European Community and the Government of the People's Republic of China on cooperation and mutual administrative assistance in customs matters, 2004/889/EC.

22 Art. 6 CCMAA.

23 Art. 6-10 CCMAA.

24 The mentioned Framework follows the *Strategic Framework for Cooperation* for the period 2010-2012 and that for the period 2014-2017. See the note to delegation of the Council of the European Union, *Enhancing EU-China Trade Security and Facilitation: Strategic Framework for Customs Cooperation 2018-2020 between the European Union and the Government of the People's Republic of China*, 22 May 2017, 9548/17.

Subsequently, in 2006, discussions about the update of the 1985 Trade Agreement started. Unfortunately, they have been stalled since 2011, but the negotiations evolved and lead to a China's proposal of a free trade agreement ("FTA") and later, in 2012[25], to the launch of talks about a EU-China Comprehensive Agreement on Investment ("CAI") on the basis of the EU's objective to replace all the bilateral investment treaties ("BITs") concluded by the EU Member States with China[26]. In 2016 the parties established a joint negotiating text and the negotiations rounds about the CAI are still and frequently on the Brussels and Beijing agenda in order to conclude the agreement by 2020[27]. From a EU point of view, a unitary and reassuring legal framework is needed: the comprehensive agreement that EU Commission Directorate-General for Trade and the European External Action Service ("EEAS") are bargaining is a good legal instrument.

The CAI scope goes beyond the usual dimension of investment protection and additionally cover market access that goes also through taxation. There is a proposal of a tax provision to be included in the CAI, but the EU Commission Directorate-General for Taxation and Customs Union has not been still effectively involved, since direct taxation is part of the general exemptions – one of the last provisions of the agreement. Nevertheless, there are tax-related aspects – even sensitive – that have already been debated, but that are still controversial, such as the case of disinvestments and tax measures that may amount to expropriation of investors' assets (*see* para. 1.3)[28].

In the light of the above, we can affirm that the register and the matters mooted have evolved, inasmuch China is not the same developing country with which the EU signed the 1985 Trade Agreement.

Another evidence of this change is the Beijing active participation in the international forum to tackle the *BEPS* issues to protect its tax base. China is a *key partner* –not a member– of the Organisation for Economic Co-operation and Development ("OECD"), it is a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes and it is committed to implement the G20/OECD Base Erosion and Profit Shifting ("BEPS") Action Plan released in 2015[29], working closely with the EU Commission which takes part in the work of the OECD, together with the majority of the EU Members States that are also OECD members[30]. This is one of the direction of changes driven by the Belt Road Initiative ("BRI") – weather at treaty level that at domestic level –, combined with the progressive removal of tax barriers to facilitate Chinese outbound investments, including the strengthening of collaboration between the China State Administration of Taxation with the local officers of other countries.

1.3. Distinctive challenges

The (trade) relationship between Europe and China is long-established and nowadays it is acknowledged the important role of China in international tax law making. Connections rises, they are increasingly closer, and we observe a growing need to address global challenges by global solutions.

Nevertheless, several issues – due to different approaches – come to light and it seems necessary to untangle them in order to proceed on the taken route.

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25 Council of the European Union, *Joint Press Communiqué of the 14th EU-China Summit*, 14 February 2012, 6474/12 PRESSE 50, §11, p. 2.

26 Since the entry into force of the 2009 Lisbon Treaty, the EU gained the exclusive competence for foreign direct investment. See Art. 207 TFUE.

27 The last round (the 23rd) of the negotiations for the CAI has been held in Beijing on 23-24 September 2019. See European Commission Directorate-General for Trade, *Note to the file. Report of the 23rd round of negotiations for the EU-China Investment Agreement*, 25 September 2019, available at www.trade.ec.europa.eu.

28 European Commission Directorate-General for Trade, *Note to the file. Report of the 18th round of negotiations for the EU-China Investment Agreement*, 18 July 2018, European Commission Directorate-General for Trade, *Note to the file. Report of the 19th round of negotiations for the EU-China Investment Agreement*, 13 November 2018, and European Commission Directorate-General for Trade, *Note to the file. Report of the 20th round of negotiations for the EU-China Investment Agreement*, 1 March 2019, available at www.trade.ec.europa.eu.

29 See *infra* section III.

30 Twenty two of the thirty six OECD members are also EU Members States.

At the EU level, transparency is increasingly becoming one of the operative words in the tax law sector (and even beyond) under the overarching concept of good tax governance[31], in order to tackle tax fraud, evasion and avoidance, protect the integrity of tax systems and foster fair taxation[32]. To this aim, the EU encourages positive changes through cooperation and this is always on the negotiations agenda between the EU and China, ranging from the general market model and the legal system to the economic and monetary policies as well as the food safety regime or the energy sector[33].

On the same wave, to ensure good economic relations between the EU and China, the state aid policies and the regulation of the Chinese state-owned companies are constantly under the spotlight – even tax measures can constitute state aid. Since 2001[34], the EU-China dialogue on competition policy has been intensified and, recently, a new *Memorandum of Understanding on a dialogue in the area of the State Aid Control and the Fair Competition Review* has been signed to enhance the exchange of good practices and an "effective, transparent and non-discriminatory state aid control and fair competition review"[35].

It happens that sometimes legal concepts are differently understood in distinct legal system. An example concerns taxation, disinvestment and the notion of expropriation. Investment implies the possibility of disinvestment and the latter could be usually subject to economic consequences, even tax levy. Nevertheless, if the taxation approximately amounts to the whole disinvestment it could be perceived as more than a levy and, rather, a disincentive to investment. In that case the tax measure imposed may consist in an expropriation and therefore not being compliant with the national treatment principle. In the context of the CAI, the EU and China have different positions as regards this aspect – and in particular the identification of an expropriation as a result of a tax measures and the tax dispute exclusion clause in the CAI[36]. The negotiations are still in progress.

Lastly, the attention should be drawn on a slippery area that is mainly internal to the EU but that has an impact on the relationship with third countries: the EU competence as regards (international) taxation. On the one hand, difference is made between direct and indirect taxation. With respect to direct taxation – taxes on natural persons and companies income –, it is still a competence of the Member States ("MS"), even if the principle of the primacy of the EU law over the MS domestic law applies[37] and the EU gave and is giving a framework to the national regulations[38] under article 115 of the Treaty on the Functioning

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31 As regards good tax governance, see HJI PANAYI, C. "The Europeanization of Good Tax Governance", in *Yearbook of European Law*, Oxford University Press, Oxford, Volume 36, 2017, pp. 442-495; MOSQUERA VALDERRAMA, I. J. "The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries", *Intertax*, Issue 5, 2019, pp. 454–467.

32 Reference is made in particular to the Code of Conduct for Business Taxation (Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997 on a code of conduct for business taxation) as well as the strengthening of the administrative cooperation in the field of direct taxation and in the VAT sector (Council Directive (EU) 2011/16/EU on administrative cooperation in the field of direct taxation –also known as "DAC"– as lastly amended in 2018; Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, lastly amended in 2018).

33 European Commission - High Representative of the Union for Foreign Affairs and Security Policy, *Joint Communication to the European Parliament and the Council. Elements for a new EU strategy on China*, 22 June 2016, JOIN(2016) 30 final, available at www.eeas.europa.eu; European Commission Directorate-General for Trade, *Note to the file. Report of the 16th round of negotiations for the EU-China Investment Agreement*, 12-15 December 2017, available at www.trade.ec.europa.eu.

34 See "Declaration on the start of a dialogue on competition by the EU and China" available at www.ec.europa.eu.

35 Memorandum of Understanding on a dialogue in the area of the State Aid Control and the Fair Competition Review between the State Administration for Market Regulation of the People's Republic of China and the Directorate-General for Competition of the European Commission, 9 April 2019, available at www.ec.europa.eu.

36 European Commission Directorate-General for Trade, *Note to the file. Report of the 16th round of negotiations for the EU-China Investment Agreement, op. cit.*; European Commission Directorate-General for Trade, *Note to the file. Report of the 19th round of negotiations for the EU-China Investment Agreement, op. cit.*; European Commission Directorate-General for Trade, *Note to the file. Report of the 20th round of negotiations for the EU-China Investment Agreement, op.cit.*

37 *Inter alia* CJCE, 13 December 1967, C- 17/67, *Neumann/Hauptzollamt Hof/Saale*; CJCE, 13 December 2005, C-446/03, *Marks & Spencer*.

38 See, for example, Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States; Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States; Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation; Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States; Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices

of the European Union ("TFEU") which sets forth the approximation of MS legislations affecting the internal market. Concerning indirect taxation, we should distinguish between customs duties – which fall within the EU exclusive competence[39] – and the excise duties and the value added tax ("VAT"), which, instead, are "only" harmonised[40] under article 113 TFUE There is no homogeneity in the decision-making processes followed for the different taxation policies. Moreover, except for customs law, both in direct and indirect taxation, it is the Council who, upon the EU Commission proposal, adopts – acting unanimously – provisions for the approximation or harmonisation – the EU Parliament having a consultative role only. Also due to the unanimity clause, the EU has still limited powers in foreign tax policies, but if it is willing to strengthen the competitiveness of its tax system and to adapt quickly to changing economic realities, it should call for a more united voice. That is also the idea of the EU Commission, which is supporting the replacement of the unanimity principle with a qualified majority voting since "EU tax policy must be able to react and adapt quickly" and "a coordinated EU action in taxation is essential to protect Member States' revenues and ensure a fair tax environment for all"[41].

1.4. Conclusions

Global challenges require international cooperation, and the tax sector is also concerned. The partnership between the EU and China has become progressively closer in a wider range of fields. The EU has always supported a greater integration in multilateral initiatives of global interest and both parties still promote a coordinated approach even towards exchanges of experiences to deal with tax matters this changing world is experiencing, for the benefit of all. The importance of cooperation in tax matters has been emphasised from both parties and a bilateral regulation between the EU and China could be an effective solution. The dialogue is consolidated, frequent and based on trust and respect, even if on some thorny topics the positions differ and they are the discourse priorities. Nevertheless, the main challenge for the EU is still internal: the actualisation of the internal market should not be the sole concern when it exercises its fiscal power. A broader outlook is needed and the EU should call for full unity among the Members States in cooperating with China to reach its full potential.

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that directly affect the functioning of the internal market; Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), 25 October 2016, COM(2016) 683 final; Proposal for a Council Directive on a Common Corporate Tax Base, 25 October 2016, COM(2016) 685 final.

39 The EU is a Customs Union which is governed by the Union Customs Code (Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code).

40 The directives allow a relatively little leeway in their transposition (albeit significant, as regards VAT, in terms of rates and exemptions). See Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax; Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty; Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax.

41 Communication from the Commission to the European Parliament, the European Council and the Council - Towards a more efficient and democratic decision making in EU tax policy, 15 January 2019, COM(2019) 8 final, p. 1.

2. Retail digital platforms in EU-China trade

MARIE LAMENSCH, EDOARDO TRAVERSA AND ELENA MASSEGLIA MISZCZYSZYN[42]

Platforms have now become key players in the e-commerce sector. They also acted as catalyst in the development of the sharing economy sector. This central positioning raises new challenges as regards the taxes traditionally levied on companies (income tax and VAT).

2.1. Introduction

According to UNCTAD, global e-commerce sales generated $25.3 trillion in 2015. An amount of $22,400 billion as business-to-business ("B2B") sales and an amount of $2,900 billion as business-to-consumer ("B2C") sales.[43] Nevertheless, the online retail sector has not yet reached its saturation point: it is estimated that by 2022, the amounts generated in this sector could reach $4,500 billion.[44]

The development of online retail is strictly linked to the emergence of platforms, these new types of online intermediaries, which are now essential on the Internet. If initially, Internet was supposed to prompt a disintermediation process of the e-commerce – allowing direct access to a global base of potential customers – the reality showed a different trend: a strong reintermediation process. Moreover in recent years, a limited number of "mega-platforms" (including Amazon and Alibaba) has indeed captured a significant portion of the overall B2C market. In addition to reintermediation, we are therefore also witnessing a process of concentration.[45]

The emergence of platforms entailed new challenges in several legal areas and the tax law sector is not an exception.

2.2. Income taxation: outdated rules and slow developments

The emergence of platforms raises several questions about the adequacy of current corporate income tax rules, in particular in an international context.

Indeed, the international rules currently in force concerning the allocation of territorial jurisdiction between countries limit the possibilities for the State where the economic activity is carried out to apply its tax rules in the absence of a Permanent Establishment ("PE").

Traditionally, the notion of PE refers to two different circumstances. On the one hand, the OECD Model Convention[46] defines the PE as "a fixed place of business through which the business of an enterprise is wholly or partly carried on"[47], definition which implies a certain level of physical infrastructure, such as

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43 UNCTAD Information Economy Report 2017: Digitization, Trade and Development (United Nations publication, No. E. 17. II. D. 8).

44 Statista, Retail e-commerce sales worldwide from 2014 to 2021, 2019.

45 UNCTAD Secretariat, *Fostering development gains from e-commerce and digital platforms*, note for the meeting of the Intergovernmental Group of Experts on E-commerce and the Digital Economy held in Geneva on 18-20 April 2018, p. 7.

46 Treaties for the avoidance of double taxation signed by the Organisation for Economic Co-operation and Development ("OCDE") members –among which there are 21 EU countries– are largely inspired by the OECD's Model Tax Convention on Income and on Capital ("OECD Model"). The People's Republic of China is a "key partner" of the OECD and has entered into double taxation prevention treaties with EU member states in accordance with the OECD Model.

47 On the notion of permanent establishment, see in particular OECD (2019), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Article 5 (including changes related to the BEPS process), OECD, 2018 and the reports to the 2009 Congress of the International Fiscal Association (Sujet A: "Is there a permanent establishment?", Cahiers de droit fiscal international, vol. 94a, general report by Sasseville, J. and Skaar, A. and 40 national reports, including the Belgian report by Cauwenbergh and Claes).

offices or a factory. The OECD model excludes activities having a preparatory or auxiliary character, such as storage, exhibition, information collection, etc.[48].

On the other hand, the concept of permanent establishments also refers to the presence of a person acting "on behalf of an enterprise and has, and habitually exercises, in a Contracting State, an authority to conclude contracts in the name of the enterprise" (OECD Model, Article 5.5, old version). This provision excludes the independent agent or broker acting as an intermediary without having the power to bind the company. Apart from the possible hypothesis of general or specific anti-abuse rules[49], or the prohibition of State aid under European law[50], which presupposes the fulfilment of conditions which are not always obvious to establish, it is therefore possible for a platform to play on the notion of permanent establishments to legally avoid the payment of income tax in the State of sale[51].

The reaction of public authorities to this phenomenon of non-taxation of platform revenues has been threefold: (a) a series of actions have been launched by the OECD on the basis of its BEPS plan[52]; (b) the European Commission has submitted several proposals to harmonise the taxation concerning the digital economy; and (c) measures unilaterally adopted by EU Member States targeting multinational companies operating through platforms on their territory (in particular as regards indirect taxation).

The OECD has published a series of reports under the project named "Base Erosion and Profit Shifting" (BEPS) covering 15 actions to be taken to tackle tax avoidance[53] and to adapt the international and national framework for the taxation of digital business income. These actions include in particular Action 1 "Addressing the Tax Challenges of the Digital Economy" and Action 7 "Preventing the Artificial Avoidance of Permanent Establishment Status".

The first report concerning the Action 1 describes the challenges which the tax systems are facing as a result of the emergence of new business models of the digital economy and highlights how they may exacerbate the BEPS risk[54].

The report on Action 7 of the BEPS plan[55] relates to the amendments to the notion of permanent establishment in the OECD Model, as well as in existing and future double taxation conventions, in order to address arrangements used to avoid falling within the scope of the permanent establishment notion, and thus avoid having a taxable presence in a jurisdiction under tax treaties. The goal is to strengthen the taxing power of the State where platforms carry out their activities.

At the EU level, the European Commission – working closely with the OECD – adopted two proposals in March 2018 aimed to adapt the corporate tax rules to the characteristics of digital businesses. The first – conceived as a temporary measure – sets out the common system of a tax on income from the

48 Article 5, par. 4, OECD Model.

49 On tax abuse and avoidance in the European Union, see in particular DOURADO, A. P. (ed.), Tax Avoidance Revisited in the EU BEPS Context, IBFD, 2017 (and the national reports included therein).

50 In Europe, countries such as Ireland, the Netherlands and Luxembourg have found themselves in the spotlight not only in the media but also in the courts, particularly with regard to the compatibility of certain tax arrangements concluded with multinational companies in the digital sector with the European state aid regime. See in particular TRAVERSA, E., SABBADINI, P., «*Rulings* et aides d'État fiscales : un état des lieux», *J.D.E.* 2017/4, No. 238, pp. 138-141.

51 Companies operating in the e-commerce or digital economy sectors could (and still in many cases) relatively easily avoid to fall within one of the two mentioned hypotheses, being therefore able to sell goods and services in a territory without being taxed on the income generated by this activity. They usually concentrates the revenues in a company located in a State chosen on the basis of the leniency of the tax systems. Sometimes, income are even immediately deducted as costs (interest, royalties, remuneration for technical services, etc.) to a group entity located in a jurisdiction with even more favourable taxation (tax heaven).

52 For a description of the genesis and content of the BEPS action plan, see in particular the OECD website (www.oecd.org) and TRAVERSA, E. and POSSOZ, M. «L'action de l'OCDE en matière de lute contre l'évasion fiscal internationale et d'échange de renseignements: développements récents", Revue Générale du Contentieux fiscal (R.G.C.F.), 2015, n°1, pp. 5-24.

53 See OECD/G20 Base Erosion and Profit Shifting Project Final Reports 2015, OECD, 2015 (available at www.oecd.org).

54 OECD, Addressing the Fiscal Challenges of the Digital Economy, Action 1 - Final Report 2015, OECD, 2015, www.oecd.org. This first report has been followed by an interim report, OECD, Brief on the tax challenges arising from digitalisation: Interim report 2018, 2018, www.oecd.org. A final report on the digital economy is expected by the end of 2019 taking into account the inputs raised on the occasion of the public consultation on the tax challenges of digitalization that took place at the beginning of 2019, concerning *inter alia* the identification of a taxable presence of a non-resident digitalised business. See OECD, "Addressing the tax challenges of digitalization of the economy", Public Consultation Document 13 February - 6 March 2019, www.oecd.org.

55 OECD, Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report, 2015, www.oecd.org.

supply of certain digital services[56] ("Digital Services Tax" or "DST") as digital advertising interface, multi-sided digital interface which allows users to find and interact with other users, the transmission of data collected about users on digital interfaces[57].

This 3% tax on income generated by these activities only applies to certain companies with total revenues exceeding 750 million and 50 million in the EU. The second proposal[58] entails more fundamental changes as the objective is to establish a taxable nexus of a digital business in a jurisdiction by introducing the notion of "significant digital presence" – as a complement of the concept of permanent establishment – based on the revenues from digital services supply, the number of users of digital services or the number of contracts for a digital service. As regards the mentioned indicators, the proposals sets forth different thresholds: there is a significant digital presence in a Member State if one or more of the following criteria are met if (i) the revenues from providing digital services to users in a jurisdiction exceed 7 million in a tax period, (ii) the number of users of a digital service in a Member State exceeds 100 000 in a tax period, or (iii) the number of business contracts for digital services exceeds 3 000. This proposal is supplemented by a Recommendation addressed to the Member States for including provisions on a significant digital presence and in their double taxation treaties with third countries[59].

These two proposals, which are subject to the requirement of the unanimous approval by the EU Council, could not reach a sufficient consensus before the end of the 2014-2019 legislature.

Lacking the European compromise, some Member States have decided to take a step forward unilaterally by adopting different types of measures, still within the existing framework of the international agreements they concluded (*e.g.* the double taxation conventions) and mostly following the European Commission proposal. These provisions aim to increase the platforms' taxable presence in the jurisdiction where they are carrying out their business. For example, in the United Kingdom the Diverted Profits Tax applies since 2015[60], the French Republic has approved the act concerning the so-called "taxe GAFA" on digital services in July 2019[61], in Italy, the "Web tax" has been approved but an implementation decree has to be enacted[62] and in Spain a law proposal related to a tax on digital services has been enacted in January 2019[63].

2.3. E-commerce, platforms and collection of VAT

Countries are facing difficulties in collecting VAT due on sales via the platforms. Therefore different solutions have been recently adopted at the EU level as well as at the national level – specifically in the United Kingdom and in Germany – aimed at involving the platforms in the collection procedures. Platforms are identified as allies by governments to protect their VAT revenues. To be noted that in contrast with the situation in the field of corporate income tax, there is no doubt that the transactions carried

56 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, COM (2018) 148.

57 The following activities are thus excluded: retail activities (e-commerce); streaming services (digital interface consisting of the provision of digital content such as video, audio or text, either owned by this entity or that this entity has acquired distribution rights); game interfaces; crowdfunding; interfaces where user participation is not central to value creation (e. g., ensuring a secure environment, e. g. financing); provision of taxable services between entities in a consolidated group for financial accounting purposes.

58 Proposal for a Council directive laying down rules relating to the corporate taxation of a significant digital presence of 21 March 2018, COM (2018) 147.

59 Commission Recommendation of 21 March 2018 relating to the corporate taxation of a significant digital presence, C (2018) 1650.

60 For a description see HMRC, Diverted Profits Tax - Guidance, December 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/768204/Diverted_Profits_Tax_-_Guidance__December_2018_.pdf.

61 It is a 3% tax on the turnover realised in France applying to businesses with income deriving from the provision of digital services exceeding 750 million worldwide and 25 million in France, see *Loi n. 2019-759 du 24 juillet 2019 portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés* on https://www.legifrance.gouv.fr.

62 Art. 1, paras. 35-49, of Budget Act 2019 (*Legge n. 145/2018*) sets forth the levy of a 3% tax on income of businesses supplying digital services (as advertising on digital interfaces, provision of a multilateral digital interfaces allowing connections between users, transmission of data collected and generated by the use of a digital interface) with a worldwide income higher than 750 million of which at least 5.5 million from digital services provided in the Italian territory.

63 The proposal regulates a 3% tax applying to businesses supplying digital services with worldwide income higher than 750 million and 3 million in Spain, see *Proyecto de Ley del Impuesto sobre Determinados Servicios Digitales* of 25 January 2019 http://www.congreso.es/public_oficiales/L12/CONG/BOCG/A/BOCG-12-A-40-1.PDF.

out by platforms are taxable in the State where the economic activity takes place and not in the State where the platform are residing (irrespective of the existence of a permanent establishment in the market jurisdiction). Nevertheless, it might be difficult to enforce the collection of VAT when the platforms are non-resident.

Ensuring the correct collection of VAT on online sales has become a major challenge for governments around the world. Platform facilitate cross-border trade and we observe a significant share of imported goods from Asia to the EU.

From a VAT perspective, as regards the supplies made through a platform, the taxable person is the underlying vendor, not the platform. One of the main difficulties is that for a State it is hard or even impossible (both legally and practically) to force companies established abroad to collect VAT on their behalf and to supervise them. The level of VAT compliance on cross-border transactions therefore largely depends largely on the "goodwill" of foreign companies. This lack of control over foreign companies has an impact on the income collected, but also on domestic companies, which are subject to real controls and face unfair competition from foreign companies that do not properly charge VAT on their sales.

At the OECD level[64], many countries are discussing about the best way to follow and the recently emerged trend is the identification of the platforms are as key actors in the collection process of VAT on the online purchases that they facilitate when the vendors are non-established businesses, to increase the level of compliance.

From 1 January 2015 already in the European Union[65], platforms through which electronically supplied services[66] are provided to consumers established or usually residing in one of the Member States must be responsible for collecting and remitting the VAT due on their services.[67] A One Stop Shop ("OSS") system is available for the periodic payment of VAT in a single Member State (of their choice). In case the platform is not registered with the OSS, the registration in each Member State where the VAT is due is required.

Concerning the goods – for which the application of VAT rules is more complex as the location of the goods at the time of sale will be decisive for the characterization of the sale, an element over which platforms often do not have control – two approaches currently coexist in the EU.

a) The "first line enforcers" approach

A first approach is to require platforms to ensure the payment of the VAT, without collecting the VAT directly, but imposing on them due diligence obligations. They have to check several information about the sellers they host (in particular, the validity of their VAT number; they must also collect information on sales made) and to block these sellers, either in case of doubt as to the validity of their registration with the tax administration or at the request of the latter. If they fail to comply with these due diligence obligations, the platforms are jointly and severally liable for the payment of unpaid VAT to the Treasury.

This approach has been followed by the United Kingdom since 2016 for non-established sellers[68] and since 2018 for all B2C suppliers passing through a platform[69], and by Germany (where all sellers supplying goods to German customers via platforms must obtain a VAT certificate) since January 2019.[70]

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64 OECD, International VAT/GST Guidelines, available at: https://www.oecd.org/ctp/international-vat-gst-guidelines-9789264271401-en.htm. The World Customs Organization has also set up a working group on electronic commerce to map out possible policies that could be proposed. In June 2018, it published a "Framework of Standards on cross-border e-commerce" that addresses, *interalia*, the collection of VAT/GST and customs duties on imports.

65 See art. 5 of Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services

66 For example, the supply of software, music or films for downloading and other applications that are supplied in a fully automated manner.

67 In order to simplify the collection, a one-stop shop system has been set up. Platforms register in a single Member State and remit the VAT due on services provided to all Member States.

68 Finance Act 2016 (UK), s. 124 introducing subsections 73B, 73C, and 73D into the VAT Act 1994.

69 Finance Act 2018 (UK), s. 38 amending s. 73B of the VAT Act 1994.

70 New Sections 22f and 25e of the German VAT Act.

b) The "primary liability" approach

In December 2017, the Member States adopted the "VAT e-commerce package"[71]. The approach chosen, which will enter into force in 2021 (the German will therefore be rescinded to comply with it, in contrast the United Kingdom regulations will probably remain into place), consists, on the one hand, in requiring platforms to collect and keep (for 10 years!) details of transactions concluded via their interface and, on the other hand, in treating platforms as "deemed to have received and supplied those goods" themselves[72], and therefore as fully taxable person liable to collect and remit VAT on a periodic basis, when they *facilitate*:

- A domestic or intra-EU sale of goods by a taxable person not established within the European Union to a non-taxable person ("distance selling");[73]
- An import of goods ("distance selling from a third country").

The implementing regulation[74] provides that the term 'facilitates' will be defined very broadly. According to Article 5b of the Implementing Regulation, it will cover the cases where an electronic interface allows a customer and a supplier, selling goods through the electronic interface, to enter into contact, resulting in a supply of goods through that electronic interface to that customer.[75] Only platforms that do not perform any of the following tasks will be excluded from this "primary liability" system:[76]

1. Determine, either directly or indirectly, the general terms under which the supply of goods is carried out;
2. Participate, either directly or indirectly, in charging the customer in respect of the payment made;
3. Participate, directly or indirectly, in the ordering or delivery of the goods.

A platform will also be outside the scope of the mentioned "primary liability" regime if it only deals with one of the following activities:[77]

1. The processing of payments in relation with the supply of goods;
2. The listing or advertising of goods;
3. The redirecting or transferring of customers to other electronic interfaces where goods are offered for sale, without further intervention in the supply.

In the case of imports ("distance sales from a third country"), unlike in the electronic services sector (*see above*), platforms falling within the scope of said provision are not required to register via the OSS (or to register in each Member State) and then remit VAT on a periodical basis. They may opt to not register and in that event the postal operator will have to collect the VAT from the customer. However, they are required to provide the exact information enabling the carrier to fulfil its task.

The objective of this "primary liability" approach for platforms is to ensure a higher degree of compliance. Platforms are more likely to comply with VAT legislation than the thousands of vendors they host. However, several (non) legal issues arise in relation to that regime.

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71 The package consists of a Directive (Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods) and two Regulations (Council Regulation (EU) 2017/2454 of 5 December 2017 amending Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax and Council Implementing Regulation (EU) 2017/2459 of 5 December 2017 amending Implementing Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax).

72 Art. 2, para. 2, Council Directive (EU) 2017/2455 of 5 December 2017.

73 As indicated above, the qualification of "domestic" or "intra-EU" will depend not on the location of the seller but on where the goods are. A seller established in China can therefore carry out a "domestic sale" of goods in Germany if the goods and the customer are located in Germany at the time of the sale. So, if the goods are located in Belgium and they are sold in France, but the company is based in China, the sale will be considered as an "intra-EU" supply.

74 Proposal for a COUNCIL IMPLEMENTING REGULATION amending Implementing Regulation (EU) No 282/2011 as regards supplies of goods or services facilitated by electronic interfaces and the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of goods of 11 December 2018, COM(2018) 821 final (hereinafter the "Implementing Regulation"). Political agreement has been reached on this proposal and the Regulation should be officially adopted in the coming weeks.

75 Article 5b of the Implementing Regulation.

76 *Ib.* 75.

77 *Ib.* 75.

It should be borne in mind that the problem of undervaluing/underreporting remains unresolved as such (whereas it is estimated that more than 60% of imports are subject to underreporting).[78] Member States can only hope that platforms will remit the correct amounts of VAT or that they declare correct amounts to carriers without actually having the possibility to control them.

With respect to imported goods, it is also important to highlight the risk that platforms face when they register with the OSS. In practice, in the event of registration to the OSS, VAT must be invoiced to the customer when he buys (the chargeable event is the sale finalization and the VAT has to be remitted via the OSS on a monthly basis) and the physical entry of the goods into the EU (the importation) must then be exempt, otherwise the supply is taxed twice. Conversely, if the platform is not registered, it will not charge VAT at the time of sale but the VAT will be due on the import. It will therefore be necessary for the customs authorities to distinguish between imports that should be exempt (because VAT was invoiced at the time of sale and it will be remitted via the OSS at the end of the tax period) and those that should not be exempt. This distinction will be made on the basis of the submission (or not) of a valid OSS registration number in the import declaration. In other words, a valid registration number will entitle you to an exemption. It is clear that there is a significant risk that foreign companies may use the number of one of the major platforms to obtain an import exemption (which is not confidential since it must be communicated to sellers active on these platforms so that they can obtain the import exemption when they organise the shipment of goods) even though the sale was not made by the platform and VAT was not charged at the time of sale. [79] The Implementing Regulation sets forth that the platform are only liable for the declared and paid VAT on these supplies but they need to prove that it did not and could not reasonably know that the information provided by the supplier was incorrect. At this stage, for the Treasury no protection mechanism against this type of fraud seems to be put in place.

In any case, this legislative change at the EU level will have a significant impact on platforms, both in terms of internal procedures and cost terms. In the long term, it could even favour the major platforms, which will be the only ones able to meet the new compliance obligations, discouraging the small platforms – and therefore the phenomenon of concentration mentioned in the introduction will be reinforced.[80]

2.4. Conclusions

The platforms have fostered the spectacular growth of the e-commerce sector. They have also led States to rethink their strategies for protecting their incomes.

In the area of income taxation, the emergence of digital companies is forcing governments, the EU, and international organisations such as the OECD to thoroughly review the key concepts of international taxation used in bilateral double taxation treaties, in order to give to the source country (where the company actually operates) a broader taxing power and counteract avoidance strategies. This process has been launched, but is still evolving too slowly and it is too early at this time to know the exact contours of the notion of digital permanent establishment.

In the field of VAT, the future will tell us whether the cumbersome nature of the obligations recently imposed (or soon to be imposed) on platforms will have an impact on their diversity in the e-commerce sector or whether these obligations will reinforce the phenomenon of concentration that we are already observing nowadays.

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78 Copenhagen Economics (2016): "E-commerce imports into Europe: VAT and customs treatment", available at: https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/8/348/1462798608/e-commerce-imports-into-europe_vat-and-customs-treatment.pdf

79 For a detailed analysis of the flaws in the e-commerce package, see LAMENSCH, M. "Adoption of the e-commerce VAT package: the road ahead is still a rocky one", EC Tax Review Vol. 27, Issue 4, pp. 186-195.

80 See LAMENSCH, M.; MILLAR, R. "The Role of Marketplaces in Taxing B2C Supplies", in LANG, M.; *et al.* (Eds.), *CJEU - Recent Developments in Value Added Tax 2018*, (ed. Michael Lang), Linde Verlag, 2019, pp. 51-78.

3. International taxation between BEPS and the Belt and Road Initiative. Implementing BEPS in the EU

MARTA VILLAR EZCURRA[81]

3.1. Introduction

The People's Republic of China (hereinafter, the PRC) is the EU's second-largest trading partner and the EU is the PRC's largest trading partner.

As OECD Secretary-General Angel Gurria has stated in 2015 "base erosion and profit shifting affects all countries, not only economically, but also as a matter of trust. BEPS is depriving countries of precious resources to jump-start growth, tackle the effects of the global economic crisis and create more and better opportunities for all. However, beyond this, BEPS has been also eroding the trust of citizens in the fairness of tax systems worldwide. The measures we are presenting today represent the most fundamental changes to international tax rules in almost a century: They will put an end to double non-taxation, facilitate a better alignment of taxation with economic activity and value creation, and when fully implemented, these measures will render BEPS-inspired tax planning structures ineffective"[82].

"Base erosion and profit shifting" refers to "tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations"[83]. As called for in the OECD report on BEPS, *Addressing Base Erosion and Profit Shifting* (OECD, 2013)[84] the BEPS Plan (i) identifies actions needed to address BEPS, (ii) sets deadlines to implement these actions and (iii) identifies the resources needed and the methodology to implement BEPS Plan.

The 15 Actions have been identified as such: Action 1 "address the tax challenges of the digital economy"; Action 2 "neutralise the effects of hybrid mismatches agreements"; Action 3 "strengthen CFC rules"; Action 4 "limit base erosion via interest deductions and other financial payments"; Action 5 "counter harmful tax practices more effectively, taking into account transparency and substance"; Action 6 "prevent treaty abuse"; Action 7 "prevent the artificial avoidance of PE status"; Action 8 to 10 "assure that transfer pricing outcomes are in line with value creation"; Action 11 "establish methodologies to collect and analyse data on BEPS and the actions to address it"; Action 12 "require taxpayers to disclose their aggressive tax planning arrangements"; Action 13 "re-examine transfer pricing documentation"; Action 14 "make dispute resolution mechanisms more effective" and Action 15 "develop a multilateral instrument".

As M. Teresa Soler have pointed out "the main challenge is coordination and in this respect multilateralism and the work under Action 15, especially dealing with treaty issues is a key element on the process, although its final outcomes remain to be seen"[85].

The BEPS project is still a work in progress and will continue to be so in the coming years. The EU has driving the implementation of BEPS forward in many respects. Some key-BEPS measures have been translated into binding EU law so they are implemented across the EU Member States.

Of the 15 BEPS Actions, the EU has already taken an active role in respect to 10 of them. For example, regarding Action 1, the European Commission issued two proposals for new Directives on digital economy and the Anti-Tax Avoidance Directive (ATAD) addresses the recommendations contained in BEPS Actions

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81 Professor of Tax Law at the Universidad CEU San Pablo.

82 OECD (2015), Centre for Tax Policy and Administration, OECD presents outputs of OECD. Paper presented at G20 BEPS Project for discussion at G20 Finance Ministers Meeting, Lima, Peru, October 5.

83 See OECD website at: http://www.oecd.org/tax/beps/.

84 OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing. http://dx.doi.org/10.1787/9789264202719-en.

85 See Soler ROCH, M. T. "Consistency and Hierarchy among the BEPS Actions", DOURADO, A. P. (ed.), *Tax Avoidance revisited in the EU BEPS context*, EATLP Annual Congress Munich, 2-4- June 2016, EATLP International Tax Series Vol. 15, IBFD, 2017, p.138.

2, 3, 4 and 6. In the context of Action 5, the EU has adopted the Directive on exchange of information of tax rulings; a Commission recommendation on the implementation of measures against tax treaty abuse that was adopted in 2016 urges Member States to implement general avoidance rules and to amend the PE definition in their treaties in line with BEPS Actions 6 and 7. The Directive on new mandatory transparency rules for intermediaries and taxpayers broadly reflects the objectives of Action 12 of the OECD BEPS Project; with the CbC Directive 2016/881, the EU introduced into legislation BEPS Action 13; and lastly, in line with the recommendations set out under Action 14, the EU has adopted the Tax Dispute Resolution Directive setting forth the rules for a mechanism to resolve disputes between Member States. Apart from the proposals on digital taxation, which are still awaiting adoption by the Council, and the Commission recommendation related to Actions 6 and 7 that has no binding effect, all the other EU measures have already been adopted and constitute part of the EU legislation[86].

Based on this premise, we would like to highlight two issues. On the one hand, that China has actively participated in both developing and implementing the BEPS project[87]. On the other hand, that the Belt and Road Initiative (BRI) will give rise to an unprecedented hybrid model of investment governance significantly shaped by transnational policy networks[88].

As China´s key trading partner, the EU is interested in coordinating a strategy to open up the doors to China´s investment. In this regard, the 19th EU-China Summit in 2017 advanced a bilateral strategic partnership, which has a global impact, and highlighted joint commitments to addressing global challenges and the promotion of multilateralism. This is why the European Parliament remarked the EU emphasis on a multilateral governance structure and on non-discriminatory implementation of the BRI[89]. Nevertheless, unilateral measures are taking place in some States[90].

Implementing BEPS in the EU raises a variety of interesting topics at the intersection between BEPS and the BRI, but there are probably two areas to highlight from the perspective of promoting foreign Chinese direct investment in the EU reducing the legal risks for companies: (i) the regulation of taxation and investment; (ii) and the need to strength cooperation in tax matters to assure and effective and efficient dispute resolving mechanism[91].

3.2. The regulation of taxation and investment

Mark Feldman remarks that "striking an appropriate balance between the ambition of a state-driven model and the inclusiveness of a transnational policy network model will be of central importance for BRI investment governance", as well as the significant roles played in rulemaking[92].

In the Forth Regional Meeting of the Inclusive Framework on BEPS for Eastern Europe and Central Asia (7-9 November 2018) the need to promote and to clarify the new rules to taxpayers and the main stakeholders and to enhance legislative, organisational and human resource capabilities as well as cross-country co-operation, was stressed (*e.g.* through Advance Pricing Arrangements (APA), Mutual Agreement

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86 This summary is based on the EY report, "The latest on BEPS – 2018 mid-year review A review of OECD and country actions in mid-year 2018", available at https://www.ey.com/Publication/vwLUAssets/ey-the-latest-on-beps-2018-mid-year-review-now-available/$FILE/ey-the-latest-on-beps-2018-mid-year-review-now-available.pdf

87 China has been an active participant in the OECD-G2 project initially as a member of the CFA Bureau Plus in the first phase, and now in the Steering Group of the Inclusive Framework on BEPS. For further information about this topic see https://data.oecd.org/china-people-s-republic-of.htm and Reuven Avi-Yonah and Haiyan Xu, "China and BEPS", Laws 2018, 7, 4; doi:10.3390/laws7010004.

88 See FELDMAN, M. "China´s Belt and Road investment governance: building a hybrid model", Columbia Center on Sustainable Investment, Columbia FDI Perspectives No. 244, January 28, 2019, available at http://ccsi.columbia.edu/files/2018/10/No-244-Feldman-FINAL.pdf

89 See the European Parliament Report on the state of EU-China relations (2017/2275(INI). Committee on Foreign Affairs" (A8-0252/2018), 10 July 2018.

90 See section 2.2., p. 13.

91 See MEJÍA-LEMOS, D. "The Belt and Road Initiative (BRI) and International Tax Law: A Winter Note on Law-making and Dispute Resolution Issues Raised by the BRI", available at: https://globtaxgov.weblog.leidenuniv.nl/2019/01/23/belt-and-road-initiative-bri-and-international-tax-law-a-winter-note-on-law-making-and-dispute-resolution-issues-raised-by-the-bri/

92 See supranote 88.

Procedures (MAP) and exchange of information). Participants discussed there the role of tax consultants in ensuring consistent implementation and stressed the importance of consultation processes.

According to official data, since 2008, China has acquired assets in Europe worth USD 318 billion and since 2016, the PRC has become a net investor in the EU. Likewise, "the EU outward foreign direct investment (FDI) in the PRC has steadily decreased since 2012, particularly in the traditional manufacturing sector, with a parallel increase in investment in high-tech services, utilities, and agricultural and construction services, while the PRC's investment in the EU has grown exponentially over the past few years. Since 2016, the PRC has become a net investor in the EU. In 2017, 68 % of Chinese investments into Europe came from state-owned enterprises"[93].

To assure public resources in the jurisdiction where the value is created, transparency and legal certainty are, among others, key issues for investors and tax administrations.

3.3. Fair taxation of the Digital Economy

The PE concept and the problem of the nexus are among the most important challenges regards in the way of finding a long-term solution to tax to the digital economy.

Under the OECD/G20 scope, from 2010 to 2018 different proposals have been held for the establishment of a fair taxation of the digital economy. The OECD recognised that "it would be difficult, if not impossible, to 'ring-fence' the digital economy from the rest of the economy for tax purposes because of the increasingly pervasive nature of digitalisation […]. Beyond BEPS, digitalisation raised a series of broader direct tax challenges, which it identified as data, nexus and characterisation"[94].

On 21 March 2018, the European Commission issued two proposals for new Directives: as an interim solution, the one referred to as the Digital Services Tax (the DST)[95] and a longer-term Council Directive laying down rules relating to the corporate taxation of a significant digital presence (SDP or the Significant Digital Presence proposal)[96]. The DST proposal, which will apply only until the SDP solution has been implemented, is for a gross revenues (i.e., turnover) tax, set at a uniform rate of 3% across all EU Member States. Consensus among EU Member States has not been reached on timing, but the DST proposal sets out proposed adoption of the Directive by 31 December 2019. The SDP proposal focuses on a new concept of digital PE, along with revised profit attribution rules.

According to the proposed Directive, Member States shall adopt and publish, by 31 December 2019 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive, and they shall apply those provisions from 1 January 2020 with respect to tax periods beginning on or after that date. In April 2018, the finance and economic affairs Ministers of the EU Member States discussed the above proposals at their informal Economic and Financial Affairs Council (ECOFIN) meeting in Sofia, Bulgaria. The Bulgarian Presidency of the Council of the EU scheduled a number of technical working meetings, starting on 2 May 2018, to discuss the proposals ahead of the next European Council meeting that took place in June.

3.4. The Anti-Tax-Avoidance Directive implementation

Tax avoidance is a legal concept that emanates from the interpretation of either statutory general anti-avoidance rules (GAARs), sometimes also from targeted and specific anti-avoidance rules, from the

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93 See the 2018 European Parliament report, whereas 21 (note 5).

94 See OECD/G20, Addressing the Tax Challenges of the Digitalisation of the Economy. Public Consultation Document", 13 February – 6 March 2019, p.5.

95 Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, Brussels, 21.3.2018, COM(2018) 148 final 2018/0073 (CNS).

96 Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, Brussels, 21.3.2018, COM(2018) 147 final 2018/0072(CNS). *See above* para. 2.2.

judicial creation of GAARs or a principle of abuse, or from the reconciliatory interpretation of all the mentioned sources[97].

According to the EU Anti-Avoidance Directive (2016/1164) adopted on 12 July 2016 (ATAD), Member States must apply the anti-tax avoidance measures from 1 January 2019 by enacting new measures or amending existing ones. This Directive includes the implementation of the BEPS project in the EU and puts forward additional rules that establish a comprehensive framework against tax-avoidance.

According to its preamble, the ATAD should provide for a common framework in order to prevent a fragmentation of the market. The objective is to ensure a uniform implementation of the BEPS-package within the EU. However, Article 3 stipulates that the ATD provides for a "*de minimis*" standard. This means that if the ATAD sets minimum standards, Member States can impose more restrictive ones and go beyond that standard[98].

3.5. The exchange of information

The Directive on exchange of information of tax rulings (Directive 2015/2376, 8 December)[99] is a key legal issue for the BEPS actions implementations. The amendment of the Directive on administrative cooperation covers tax rulings going back five years from the date of implementation (that is, back to 1 January 2012) for cross-border, still valid, tax rulings, and three years (back to 1 January 2014) for those no longer valid.

The directive entered into force on 18 December 2015. Member States were due to adopt and publish by 31 December 2016 the laws, regulations and administrative provisions necessary to comply with the directive. The measures are being applied from 1 January 2017.

The Commission will receive a limited set of information for monitoring and assessing the proper application of the exchange of information, but this cannot be used for any other purpose. The exchange will be run over a six-month period.

3.6. The need to strength cooperation in tax matters to assure and effective and efficient dispute resolving mechanism

For law making, it must be noted that, as of 2016, the PRC had concluded 54 double taxation avoidance agreements with BRI participating states. As Mejía-Lemos pointed out, "as for dispute resolution, it is anticipated that, like any major set of infrastructure projects, many disputes are likely to arise out of BRI projects and to be submitted to international arbitration. Expecting an increased demand for dispute resolution services, various arbitral institutions have updated, or are in the process of updating, their arbitration rules, and adopted specific guidelines (e.g. the various initiatives of the China International Economic and Trade Arbitration Commission (CIETAC), the Singapore International Arbitration Centre(SIAC) and the Hong Kong International Arbitration Centre (HKIAC). The PRC government has also sought to address that demand, by establishing a Chinese domestic forum for the settlement of BRI disputes, in the form of international commercial courts, two of which were inaugurated in June 2018 by PRC's Supreme People's Court, the apex of the PRC state judicial branch (as reported in Xinhua news and discussed in other international legal media outlets). With particular reference to tax disputes, international arbitration may prove useful, in order to address some of the limitations of existing tax

97 See DOURADO, A. P. (2016) "Tax Avoidance revised in the EU BEPS Context", p. 3, in DOURADO, A. P. (ed.), *Tax Avoidance revisited in the EU BEPS context*, EATLP Annual Congress Munich, 2-4- June 2016, EATLP International Tax Series Vol. 15, IBFD, 2017, p. 138.

98 See POPA, O. "An Overview of ATAD Implementation in EU Member States", European Taxation 2019 Vol 59, No 2/3.

99 The directive entered into force on 18 December 2015. Member States were due to adopt and publish by 31 December 2016 the laws, regulations and administrative provisions necessary to comply with the directive. The measures are being applied from 1 January 2017.

dispute resolution mechanisms, such as negotiation between tax authorities (also known as the "mutual agreement procedure" (MAP)[100].

Regarding tax disputes resolution, it should be noted that on 10 October 2017, the EU adopted the Tax Dispute Resolution Directive 2017/1852, setting forth the rules for a mechanism to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements that provide for the elimination of double taxation. The Directive constitutes part of the EU's ongoing fight against aggressive tax planning and its efforts to resolve double taxation issues for businesses, and it is in line with recommendations set out under Action 14 on Making Dispute Resolution Mechanisms More Effective. Member States will have until 30 June 2019 to transpose the Directive into national laws and regulations. It will apply to complaints submitted after that date on questions relating to a tax year starting on or after 1 January 2018.

3.7. Conclusions

Futher progress is needed to modernise and to stabilise the international tax framework[101].

100 See MEJÍA-LEMOS, D. (2019) "The Belt and Road Initiative (BRI) and International Tax Law: A winter Note on Lawm-making and Dispute Resolution Issues Raised by the BRI", available at: https://globtaxgov.weblog.leidenuniv.nl/2019/01/23/belt-and-road-initiative-bri-and-international-tax-law-a-winter-note-on-law-making-and-dispute-resolution-issues-raised-by-the-bri/ For a discussion of the benefits (vel non) of international arbitration over the MAP in the context of PRC-ASEAN tax disputes, see Xu (2018) p. 4 *et seq.*

101 OCDE (2019), OCDE Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors,París, available at http://oecd.org./tax/oecd-secretary-general-tax-report-g20-finance-ministers-october-2019.pdf). Implementing BEPS in the EU can help to stop unilateral tax measures and legal uncertainties for investments in the BRI scenario.

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Abstract: The trade relationship between the EU and China is long-established. It started officially in 1975 and, since then, the connections between the two parties have broadened and evolved, and so the interactions of the tax systems, sharpened by the soaring globalised economy and the intensification of digitalization. In this context, the e-commerce sector and the role of platforms that have fostered the growth of the latter raise questions about the adequacy of current tax rules. States have thus started rethinking their strategies for protecting their revenue. Both the EU and China promote a coordinated approach even towards exchanges of experiences to deal with tax matters this changing world is experiencing, and this is highlighted by the development and implementation of the BEPS as well as of the regulations regarding taxation of investments. Nevertheless, several issues –due to different approaches of the two parties– come to light and it seems necessary to untangle them in order to proceed on the taken root of cooperation.

Keywords: Trade, Taxation/Tax, Customs, E-commerce, Platforms, BEPS, Investments, BRI.

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ISBN: 978-84-17385-63-7