Kluwer International Tax Blog

Pillar I of the Digital Debate: Its consistency with the value creation standard as well as the way forward

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1. **Purpose of the blog**

This blog raises the question as to whether the Pillar I Amount A proposal is consistent with the value creation standard? Naturally, as a start, the question arises as to what the value creation standard is.

2. **Value creation standard**

Although the meaning of value creation, as used in the BEPS project, was never clarified by the OECD, it has received significant academic attention. In fact, the concept has been extensively criticized.[1] Putting aside the criticism, we believe that the value creation concept does the job of a "source"[2] rule. In other words, it determines the countries that are allowed to tax an enterprise's cross-border business income.

To elaborate, under the current framework, business income is generally "sourced" in the state where an enterprise conducts business or economic activities with its production factors (such as employees).[3]. The history of the current framework can be traced back to the work undertaken by the League of Nations in the 1920s.[4] The League of Nations concluded that income of business enterprises/commercial establishments should be taxed in the state where an enterprise has its "origin". "Origin" was defined as the place where "earnings are created" by human agency.

In early 2000s, the OECD once again discussed this framework[5] and concluded that the international corporate tax base should be allocated among states based on the "supply" approach (which is based on production factors) as opposed to a "supply-demand" approach (which is based on production and demand factors). It seems that the BEPS project has also reinforced the application of the "supply" framework, as several Actions of the BEPS plan have reinforced the application of activity-based concepts. For example, BEPS Actions 8-10 now provide detailed guidance on the concept of control over risk and DEMPE; BEPS Action 5 introduced the substantial activities test; and BEPS Action 6 provides that treaty benefits will be granted only to taxpayer structures that are linked to core commercial activity. Thus, in our view, if a corporate taxpayer’s personnel, such as employees, performs relevant activities only in Country R (assuming Country R is also the state of its tax residence), then business income derived from those activities should prima facie be taxed only in that state under tax treaty and Transfer Pricing (TP) rules.[6]

On the other hand, from an international corporate tax perspective, when Company R from Country R conducts business in Country S through “origin”, “supply”, or “value creation” factors therein (such as its employees), then the latter state taxes the income linked to those factors.[7] From a legal taxable nexus perspective, the value creation factors in Country S could either be a part of the same enterprise (such as a PE)[8] or a separate related entity. From a profit allocation perspective, TP rules are typically employed to allocate profits to the separate related entity[9] or to the PE.[10]

3. **The Pillar I debate**

In addition to acting as a “negative source” rule,[11] the value creation concept has also been used to argue for the development of a “positive source” rule.[12] Indeed, with the rise of digitalization, policymakers are currently being confronted with the issue of how a user/market country can tax the business income of an enterprise operating in the digital space. While this issue was being debated heavily in academic and policymaking circles in 2019, the OECD issued a Public Consultation Document[13] offering the following three solutions: the user participation (UP) approach, the marketing intangibles (MI) approach and the significant economic presence (SEP) approach. Of these three approaches, the first two were linked to the value creation concept. The UP proposal argued that a user creates value and not the activities of the firm itself. This proposition should be dismissed as the mere availability / contribution of raw data by users does not create value for an enterprise. The MI proposal, on the other hand, argued that the activities of a firm create intangible value in the minds of the customers/users and proposes to tax such intangible value. This line of thinking stays within the boundaries of the value creation concept. In the latter part of 2019, these three approaches were merged in the OECD’s Proposal for a Unified Approach under Pillar I (Pillar I Proposal),[14] which comprises, in particular, of Amount A.[15] One can raise the question of whether Amount A is consistent with the value creation standard (as the present authors understand it).

4. **Our perspective**

On the one hand, it could be argued that out of these three proposals, from a conceptual perspective Amount A seems to be built on the MI proposal. To elaborate, the value creation standard should, to begin with, be seen from a supplier’s (firms) perspective. This would imply that the standard clearly permits taxation in the state where the firm performs its activities with its personnel (as discussed earlier). This also implies that the standard permits taxation in the market country to the extent that the non-resident supplier has created value in that state. Indeed, it is reasonable to state that many MNEs currently create “intangible” value in the market country as a result of their own efforts. This intangible value could either stem from extensive investments to develop the goodwill of their trademarks, i.e. their brands.

To elaborate, a *trademark* is a sign that is controlled by one legal proprietor, the trademark owner. The trademark owner is conferred a legal monopoly by a public authority – generally a State – over the use of the sign in a given territory.[16] From an economic point of view, a trademark is a benchmark that indicates the origin of a good or service;[17] as such, the trademark creates incentives for the trademark owners to propose goods or services of at least constant quality.[18] This system works because the legal monopoly to use the trademark makes it impossible for competitors of the trademark owner to duplicate the protected sign.[19]

A *brand*, by contrast, is a marketing term which may be defined as a "name, term, design, symbol, or *any other feature* that identifies one seller's good or service as distinct from those of other sellers".[20] Fundamentally, the origin of the value of a brand is found in the exclusive right of the owner of the trademark on which the brand is based to use the protected sign.[21] To determine the value of a brand, particular attention is paid to consumer preferences[22], sunk costs[23], access to consumers,[24] market phase[25] and to the possible existence of a wide portfolio of products that may be obtained under strong brands.[26] These various elements may constitute barriers to entry for competitors from the brand owner.[27] These barriers to entry have, to some extents, similarities to the barrier to entry deriving from the existence of an exclusive contract[28]

For undertakings, the importance of brands goes far beyond the functions usually attributed to trademark law. The reason therefore is that a brand has *goodwill* attached to it, which may make it one of the most important assets of an undertaking.[29]

- Firstly, brands retain various intellectual property rights that provide brand owners with *legal protection* and enable the owners to invest in their brands. As already stated, the protection issued to trademark law profits to brand owners. In addition, a package can be protected through copyrights and designs, and a manufacturing process can be preserved by a patent. For this reason, thanks to the exclusivity provided by the state, brand owners have the incentive to improve their products and to differentiate them from competing products.[30]
- Secondly, brands represent a *competitive and financial advantage*: the loyalty associated with a brand "provides predictability and security of demand for the firm and creates barriers to entry that make it difficult for other firms to enter the market".
- Thirdly, brands reduce barriers to entry for their owner, because the holding of an existing brand may be an important asset for a firm willing to diversify its activities into a new market: the brand, in that sense, will be an indicator of quality of the new product.[31] As a means of identification, brands also simplify the *handling or tracing of products*.[32]
- Finally, "brands use non-price factors to differentiate products and drive purchasing decisions along non-functional dimensions".[33] Brands thus enable firms to differentiate their products not only through the four elements which can traditionally be copied by competitors, namely *product*, *price*, *place* and *promotion*, but on the basis of the *personality* of the product, which is an element of differentiation between products that cannot be duplicated.[34]

It is fundamental to stress one more time that brands find the origin of their economic importance in the legal protection granted by trademark law. As a consequence of the prevention that trademark law offers regarding the use of a protected sign to any person who is not authorised by the right owner, the brand of one undertaking is connected by consumers with the quality of *one* certain product or service only.

From a tax '*sourcing*' perspective, a few commentators such as *Professor Lawrence Lokken*[35] and *Professor Mitchell A Kane*[36] have argued that the use of IP could be sourced to the country wherein laws provide legal protection for that property[37]. Other commentators such as *Paul Oosterhuis and Amanda Parsons* build on this line of thinking and state that, under existing principles, '*a strong argument can be made that the jurisdiction where the base of customers or a network exists is a natural source for goodwill and customer-based intangibles*'[38].

In light of the above considerations, it could be argued that many MNEs (consumer facing or automated digital service businesses), as a result of their own efforts (especially marketing efforts), create market related intangibles which are "inherently connected to the sales market".[39] At the same time, many highly digitalized businesses, in particular those operating as online advertisers or online marketplaces, create user networks (which are currently intangible in nature).

Under the current international corporate tax framework, in most circumstances, the value of these intangible assets that is linked to the user/market country is not taxed. In other words, income that can be "sourced" to the user/market countries escapes taxation. As Amount A seeks to allocate MNE's profits to user/market countries (albeit a portion of the residual profits), it seems consistent with the value creation standard (or at least, our understanding of that standard) [40]. We do acknowledge that this is a debatable proposition.

On the other hand, it could be argued that Amount A goes beyond the value creation standard as it incorporates elements of all three proposals. This is especially true as certain elements from the G24 & SEP proposal have been incorporated into the Unified Approach such as i) the international corporate tax base should be based on the "supply-demand" approach which takes into account demand side factors – this would nevertheless ultimately depend on the re-allocation percentages; ii) a predetermined formula should be used to solve the profit allocation issue, as opposed to facts and circumstances transfer pricing rules; iii) the scope of Amount A covers cloud computing businesses which are mostly B2B as opposed to B2C.

5. **Way forward and alternate proposals, for instance, UN Proposal**

Irrespective of the above debate, our view is that the Pillar I blueprint puts forward a strong framework to arrive at a global consensus. As discussed in the IFA / OECD session today, policy makers should take this opportunity to advance the international tax debate as opposed to introducing unilateral taxes (e.g. DSTs). Furthermore, they should stop focussing on bilateral solutions within the existing tax treaty framework (e.g. the UN Proposal[41] on digital services which was made without a proper impact assessment as compared to Pillar I which, in combination with Pillar II, seeks to raise USD 50-80 Billion per year). In fact, the UN proposal, on the face of it may seem an easy solution, but is loaded with challenges. A thorough analysis might indicate that its gross withholding approach (Art. 12B Para 2) may not really be in the interest of developing countries in light of its various features, for example, not being applicable to businesses beyond ADS businesses (restrictive scope) as well as its sourcing rules (Art. 12B Paras 6-7). Additionally, in situations wherein the income is connected with a PE, the rules throw you back to Article 7 (Art. 12B Para 5). In such circumstances, if the profit attribution rules are not changed then the income that could be attributable to the PE could be minimal or zero. Also, from a taxpayer's standpoint, the net taxation approach under the proposal (Art. 12B Para 3) does not provide rules for loss relief as compared to the Amount A proposal (pre regime losses or losses within the regime) as well as rules dealing with segmentation. Moreover, as it stays within the existing framework, it does not provide a strong tax certainty mechanism for taxpayers. Thus, the UN proposal, which is a "rushed" out proposal, is prone to disputes which could ultimately lead to double taxation. These matters will be discussed at a later point in time. Stay tuned.

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[1] For recent criticism, *see* W. Haslehner & M. Lamensch, *General Report*, in W. Haslehner & M. Lamensch (Eds), Taxation and Value creation, EATLP International Tax Series, vol. 19, Amsterdam: IBFD, 2021, forthcoming.

[2] This said, as rightly pointed out by Prof. Wilkie, "there is no universal understanding or agreement concerning the source of income". *See* J.S. Wilkie, *An Inverted Image Inspires a Question: Comments on Professor Ulrich Schreiber's "Sales-Based Apportionment of Profits"*, 72 Bull. Intl. Taxn. 4/5 (2018), Journal Articles & Papers IBFD.

[3] *See* V. Chand, *Allocation of Taxing Rights in the Digitalized Economy: Assessment of Potential Policy Solutions and Recommendation for a Simplified Residual Profit Split Method*, 47 Intertax 12 (2019).

[4] G.W.J. Bruins et al., *Report on double taxation: Submitted to the Financial Committee*, E.F.S.73.F.19 (League of Nations 1923), pp. 25-40

[5] OECD, *E-Commerce: Transfer Pricing and Business Profits Taxation* (OECD 2005).

[6] V. Chand & B. Malek, *The Relevant Economic Activity Test and Its Impact on International Corporate Tax Policy*, British Tax Rev. 3 (2019).

[7] D. Pinto, *E-Commerce and Source-Based Income Taxation* sec 2.2.1. (IBFD 2003), Books IBFD.

[8] *See* Art. 5 *OECD Model* (2017).

[9] Id., at art. 9(1).

[10] Id., at art. 7(2).

[11] J.S. Wilkie, *New Rules of Engagement? Corporate Personality and the Allocation of "International Income" and Taxing Rights*, in *Tax Treaties after the BEPS Project – A Tribute to Jacques Sasseville* pp. 357-371 (B.J Arnold ed., Canadian Tax Foundation 2018)

[12] A.J. Martín Jiménez, *Value Creation: A Guiding Light for the Interpretation of Tax Treaties?*, 74 Bull. Intl. Taxn. 4/5. pp. 207-214 (2020), Journal Articles & Papers IBFD., at pp. 200-207.

[13] OECD/G20, *Public Consultation Document: Addressing the Tax Challenges of the Digitalisation of the Economy, 13 February-6 March 2019* (OECD 2019), Primary Sources IBFD.

[14] OECD, *Public Consultation Document: Secretariat Proposal for a "Unified Approach" under Pillar One, 9 October-12 November 2019* (OECD 2019) [hereinafter *Secretariat Proposal*].

[15] OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint : Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, Éditions OCDE, Paris, https://doi.org/10.1787/beba0634-en. [hereinafter *Pillar One Blueprint*].

[16] J. Phillips,*Trade Mark Law: A Practical Anatomy*, para. 1.15 (2003); see also E. Mestmäcker, *Gewerbliche Schutzrechte und Urheberrechte in der Eigentums- und Wirtschaftsordnung*, in: A. Fuchs/ H. Schwintowski/ D. Zimmer, (EDS), *Wirtschafts- und Privatrecht im Spannungsfeld von Privatautonomie, Wettbewerb und Regulierung, Festschrift für Ulrich Immenga zum 70. Geburtstag* (2004), p. 261

[17] Court of Justice, Judgement in *Sirena v Eda* EU:C:1979:236, para. 16; Masoudi, Speech, II.C.; Phillips, paras 2.24 ff. More recently, the Court of Justice has also recognised other functions, "in particular that of guaranteeing the quality of the goods or services in question and those of communication, investment or advertising" (Court of Justice, Judgement in *L'Oréal and Others* EU:C:2009:378, para. 58).

[18] On the whole aspect, see *e.g.* S. Dogan & M. Lemley, *Trademarks and Consumer Search Costs on the Internet, in:* 41(3) Houston Law Review *(2004),* pp. 786 ff.; N. Economides, *The Economics of Trademarks,in:* 8(4) *The Trademark Reporter* 523 (1988), pp. 525 ff.; W. Landes & R. Posner, *Trademark Law: An Economic Perspective,* 30(2) *Journal of Law and Economics* 265 (1987), pp. 268 ff.; D. Desai, *Response: An Information Approach to Trademarks,* 100(6), in: *The Georgetown Law Journal* 2119 (2012), p. 2121. As such, "trademarks have a self-enforcing feature: they are valuable because they denote consistent quality, and a firm has an incentive to develop a trademark only if it is able to maintain consistent quality", see W. Landes & R. Posner, *op. cit.*, p. 270. Trademarks seek other goals than other intellectual property rights such as patents and copyrights, which aim to encourage innovation and facilitate trade, see F. Lévêque & Y. Ménière, *The Economics of Patents and Copyright* (2004), pp. 3 f. For a description of other economic functions sometimes associated with trademark law, see S. Dogan & M. Lemley, *op. cit.*, p. 799.

[19] R. Bone, *Enforcement Costs and Trademark Puzzles*, 0(8) *Virginia Law Review* 2099 (2004), pp. 2107 f.; J. Drexl, *Is There a "More Economic Approach" to Intellectual Property and Competition Law?*, in: J. Drexl (Ed.), *Research Handbook on Intellectual Property and Competition Law*, Cheltenham/Northampton (2008), p. 51.

[20] P. Bennett, "Brand", *Dictionary of Marketing Terms*, 2nd edn (1995).For an overview of the different brand approaches that have been developed by marketing and brand management scholars, see T. Heding/ C. Knudtzen/M. Bjerre, *Brand Management: Research, Theory and Practice* (2009), pp. 20 ff.

[21] Said differently, the fact that a trademark enables customers to differentiate the goods or services of a certain firm from those of other firms, is the basis of the creation of any successful brand, U. Bernitz, *Misleading Packaging, Copycats, and Look-Alikes: An Unfair Commercial Practice* in: A. Ezrachi & U. Bernitz (Eds.), *Private Labels, Brands, and Competition Policy: The Changing Landscape of Retail Competition* (2009), p. 219.

[22] The different levels of consumer preferences are described using legal concepts such as brand *recognition*, brand *reputation*, brand *loyalty* (or concepts issued from the marketing sciences (brand equity concept) such as brand *awareness*, brand *image* and brand *loyalty*). Higher consumer preferences towards a brand are associated with increased barriers to entry for competitors. A special case of loyalty exists vis-à-vis certain brands that retailers consider necessary to have on their shelves because of the demand of consumers (must-have brands), on the whole aspect, cf. D. Canapa, *Trademarks and Brands in Merger Control : An Analysis of the European and Swiss Legal Orders* (2016), p. 32.

[23] Building and promoting a new brand requires important investments in advertising and marketing; these investments, which cannot be recovered in the case of a failure, constitute a sunk cost and therefore a barrier to entry (European Commission, Case IV/M.190 – Nestlé/Perrier, para. 97).

[24] Existing brands may constitute a barrier to entry on the market by rendering access to consumers more difficult for products of new brands for reasons of limited shelf space or for distribution restrictions: retailers and distributors have to make choices in the selection of products, and take into account the existing consumer preferences, for example regarding branding, to make these choices.

[25] Brands are generally more important in stable, mature or declining markets than in dynamic (innovation-driven) or growing ones, in which other factors, such as the quality of innovation, play a more fundamental role.

[26] In such a case, competitors must one the one hand overcome the reputation of the brands constituting the portfolio and, on the other hand, gain access to shelf space which is limited because of the range of products sold under different brands that may be offered by the brand portfolio holder.

[27] Brands linked to trademarks, and intellectual property rights in general, may be treated as a "barrier to entry" if this terminology does not have *per se* a pejorative meaning. Trademarks and other intellectual property rights exclude the use of the

protected right to non-authorised persons, but they do not exclude competition (C. Von Weizsäcker, *Markzutrittsschranken*, in: P. Oberender (Ed.), *Effizienz und Wettbewerb* (2005), pp. 46 ff.; H. Ullrich & A. Heinemann, in: U. Immenga & E. Mestmäcker, *Immaterialgüterrecht*, paras 21 ff.).

[28] D. Canapa, *op.cit.,* p 39.

[29] U. Bernitz, *op.cit.*, p. 221.

[30] G. Gundlach & J. Philipps, *Brands and Brand Management,* in: D. Desai/ I. Lianos/S. Waller (Eds.), *Brands, Competition and IP* (2015), p. 124, the brand and brand management literatures underscore that "brands are "real" forms of product differentiation."

[31] P. Davis & K. Edwards-Warren, *An Introduction to the Competitive Effects of Branding*, in: D. Dessai/ I. Lianos/S. Waller (Eds.), *Brands, Competition and IP* (2015), p. 16.

[32] On the whole aspect, see K. Keller, *Strategic Brand Management: Building, Measuring, and Managing Brand Equity,* 4th edn (2012), pp. 35 f.; see also P. Dobson & R. Chakraborty, *Private Labels and Branded Goods: Consumers' "Horrors" and "Heroes"*, in: A. Ezrachi & U. Bernitz (Eds), *Private Labels, Brands, and Competition Policy: The Changing Landscape of Retail Competition* (2009), p. 104.

[33] D. Desai & S. Waller, *Brands, Competition, and the Law*, in: 5(2010) *Brigham Young University Law Review* 1425 (2010), pp. 1443 ff.

[34] C. Lury, *The Logos of the Global Economy (2004),* p. 33.

[35] L. Lokken, *The Sources of Income From International Uses and Dispositions of Intellectual Property,* 36 Tax Law Rev. 233, 242 (1981).

[36] M.A. Kane, *A Defense of Source Rules in International Taxation,* 32 Yale J. on Regulation 311, 341-342 (2015).

[37] R. Vann, *Reflections on Business Profits and the Arm's-Length Principle*, in *The Taxation of Business Profits under Tax Treaties*, 145-146 (B. J. Arnold, J. Sasseville & E. M. Zolt eds, Canadian Tax Foundation, 2003).

[38] P. Oosterhuis & A. Parsons, *Destination Based Income Taxation: Neither Principled Nor Practical?, 71* Tax Law Rev. 515, 522-524 (2018).

[39] R.J. Vann, *Taxing International Business Income: Hard-Boiled Wonderland and the End of the World*, 2 World Tax J. 3 (2010), Journal Articles & Papers IBFD.

[40] V.Chand, G. Lembo, *Intangible Related Profit Allocation within MNEs based on Key DEMPE Functions*, International Tax Studies, Journal Articles & Papers IBFD (2020) available on https://www.ibfd.org/IBFD-Products/Journal-Articles/International-Tax-Studies/collections/itaxs/html/itaxs_2020_06_o2_1.html

[41] See https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-08/TAX%20TREATY%20PROVISION%20ON%20PAYMENTS%20FOR%20DIGITAL%20SERVICES.pdf

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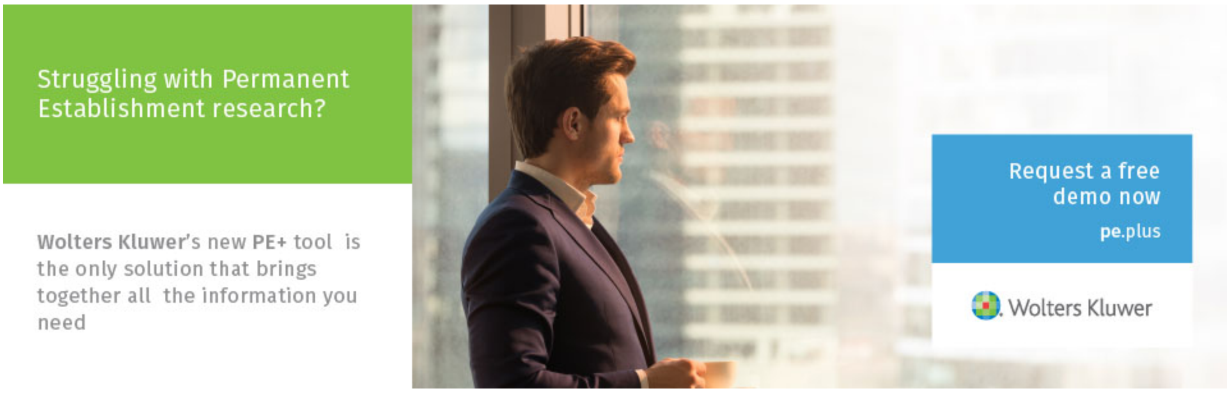

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