

Digital Taxes and the Scope of Article 2 OECD-MC

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1. Introduction

The discussion related to the imposition of digital taxes has arisen in the context of the digitalization of the economy. Due to the exponential growth of technology worldwide, physical presence has become far less relevant for the purposes of business development, allowing the mobility of information technology (IT) companies and an increase in tax planning by multinational enterprises (MNEs) (among which the IT giants Google, Apple, Facebook, and Amazon stand out).¹

In this context, the OECD identified that the digitization of the economy could represent a major issue² insofar as the existing international tax system would no longer capture the value created by these new digital business models.³ As a consequence, policymakers have begun to address new solutions to capture the activity of these new digital business models.⁴

In 2015, the OECD and G20 countries adopted a 15-point Action Plan named the Based Erosion and Profit Shifting Project (BEPS Project).⁵ Afterwards, the European Union implemented many of the BEPS Project recommendations in Anti-Tax Avoidance Directives (named ATAD 1 and ATAD 2) as well as in their domestic tax law or in their double tax conventions (DTCs) through the Multilateral Instrument (MLI). However, such measures were considered insufficient to address the issues of the digital economy.⁶

Consequently, many countries have adopted unilateral measures and moved ahead with different forms of taxation on the digital economy.⁷ In addition, in 2018, the European Commission released the “Digital Taxation Package” aiming at introducing a short-term proposal for a “digital service tax”.⁸

The implementation of such measures has raised debates regarding the application of DTCs and allocation of taxing rights. Under the current international tax rules, if a tax falls within the scope of a DTC, the residence state of a taxable person is obligated to give to the taxpayer a relief (exemption or credit).⁹ However, such

1 Valentin Bendlinger, ‘Minimum Taxation – Results of the consultation on the OECD GloBE Proposal’, *SWI – Steuerrecht und Wirtschaft International Tax Business Review* (2020) p. 1.

2 Valentin Bendlinger, *SWI – Steuerrecht und Wirtschaft International Tax Business Review* (2020) pp. 1–2.

3 Daniel Bunn, Elke Asen and Cristina Enache, *Digital taxation around the world* (Washington: Tax Foundation, 2020) p. 3.

4 Daniel Bunn, Elke Asen and Cristina Enache, *Digital taxation around the world*, p. 3.

5 OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report* (Paris: OECD Publishing, 2015) <http://dx.doi.org/10.1787/9789264241046-en> (accessed 14 May 2023), p. 5.

6 Laura Simmonds, ‘Comments on the Digital Services Tax: A Panacea or Placebo for the Taxation of the Digital Economy?’ in: Pasquale Pistone/Dennis Weber (eds.) *Taxing the Digital Economy: The EU Proposals and Other Insights* (Amsterdam: IBFD, 2019), p. 2.

7 Daniel Bunn, Elke Asen and Cristina Enache, *Digital taxation around the world*, p. 16.

8 Georg Kofler, ‘The Future of Digital Services Taxes’, *EC Tax Review* (2021/2022) p. 50.

9 Laura Simmonds, ‘Comments on the Digital Services Tax: A Panacea or Placebo for the Taxation of the Digital Economy?’ in: Pasquale Pistone/Dennis Weber (eds.) *Taxing the Digital Economy: The EU Proposals and Other Insights* p. 9.

reliefs are only granted in the case that a tax falls under the subjective and objective scope of a DTC. The subjective scope requires that the taxpayer is a resident of at least one of the contracting states whereas the objective scope requires that a tax falls under the material scope of a DTC.¹⁰ Therefore, a detailed analysis of Article 2 of the OECD Model is crucial for understanding whether these new “digital taxes” are encompassed by the tax treaties currently in force.

The aim of this article is to address the objective scope of Article 2 of the OECD Model and the requirements therein established that shall be fulfilled for a tax to fall under such a rule. For this purpose, it also aims at analysing the characteristics of digital taxes in order to conclude whether the digital taxes have the elements established by Article 2 of the OECD Model. In this regards, section 2 discusses the scope and structure of Article 2 of the OECD Model as well as the concept of the term “tax” and its characteristics. Second, section 3 analyses the taxes covered by a such provision and their respective elements (income and capital). Finally, section 4 addresses the concept of digital taxes and the criteria that determine whether they are included or excluded from the objective scope of Article 2 of the OECD Model.

2. Article 2 of the OECD Model

2.1. The scope and structure

Article 2 (1) of the OECD Model states that the convention “shall apply to taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivision or local authorities, irrespective of the manner in which they are levied.”¹¹

The function of Article 2 of the OECD Model is to determine which taxes are covered by the convention. According to the commentary, Article 2 of the OECD Model is intended to make the terminology and nomenclature related to the taxes covered by the convention more acceptable and precise as well as to ensure the identification of the contracting state’s taxes is covered by the convention and to widen its field of application as much as possible.¹² Based on a dynamic interpretation approach, the commentary also states that the taxes covered should be in harmony with their respective domestic tax laws in order to avoid the necessity of concluding a new convention whenever they are modified.¹³

10 Pasquale Pistone/Andreas Ullmann, ‘Digital Taxes and Article 2 OECD Model Convention 2017’ in: Georg Kofler/Michael Lang/Pasquale Pistone/Alexander Rust/Josef Schuch/Karoline Spies/Claus Staringer (eds.) *Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global Environment of Newly Created Taxes* (Vienna: IBFD, 2020) p. 2.

11 OECD Model Tax Convention on Income and on Capital (2017) Article 2 (1).

12 Commentary on Article 2 of the OECD Model Tax Convention on Income and on Capital (2017), para. 1.

13 Eva Bernichon, ‘The Notion of “Tax” according to Article 2 of the OECD Model Convention’ in: Auer/Dimitropoulou (eds.) *Access to Treaty Benefits* (Vienna: Linde 2021) pp. 263–264.

The scope of Article 2 of the OECD Model is decisive in determining whether or not a taxpayer is subject to the allocation rules and method articles and whether the taxpayer has access to a treaty benefit.¹⁴ Therefore, clarifying the scope of this provision and its real substance is essential to conclude for a (non)qualification of a digital tax as “taxes covered” under the OECD Model.¹⁵

As established by Article 2 (1) of the OECD Model, the convention limits addressing its applicability to taxes on income and on capital whose concepts are further described in Article 2 (2) and can be illustrated in Article 2 (3) of the OECD Model.¹⁶ Article 2 (4) of the OECD Model extends the material scope to “any identical or similar taxes”.¹⁷

However, it does not provide a definition of the term “tax”.¹⁸ Its provision is limited to indicate a notion of what a tax is and what criteria it has to meet for the purposes of Article 2 of the OECD Model.¹⁹ The commentary also does not further provide a precise definition.

In the literature, it has been argued that its definition must be constructed in accordance with general principles of interpretation established by the Vienna Convention on the Law of Treaties (VCLT). In this sense, it is also argued that Article 3 (2) of the OECD Model²⁰ should come into play in order to define the term “tax”.²¹

Although the commentary indicates that the concept of taxes has to be interpreted in harmony with the contracting state’s domestic law, the latter usually does not provide a definition of a tax as covered by the tax treaties. In general, the definition of the term “taxes” under a treaty perspective remains attributed to the

14 Eva Bernichon in: Auer/Dimitropoulou (eds.) *Access to Treaty* pp. 263–264.

15 Patricia Brandstetter, “*Taxes Covered*”: *A Study of Article 2 of the OECD Model Tax Conventions* (Amsterdam: IBFD, 2010), p. 50.

16 Eva Bernichon in: Auer/Dimitropoulou (eds.) *Access to Treaty* p. 263.

17 Commentary on Article 2 of the OECD Model Tax Convention on Income and on Capital (2017), para. 7.

18 Michael Lang, “‘Taxes Covered’ – What is a ‘Tax’ according to Article 2 of the OECD Model?” *Bulletin – Tax Treaty Monitor* (2005) p. 216.

19 Mario Riedl, “The Notion of ‘Tax’ According to Article 2 OECD Model Convention 1982 and 2017” in: Georg Kofler/Michael Lang/Pasquale Pistone/Alexander Rust/Josef Schuch/Karoline Spies/Claus Staringer (eds.) *Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global Environment of Newly Created Taxes* (Vienna: IBFD, 2021) p. 1.

20 Article 3 (2) of the OECD Model establishes as follows: “As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires or the competent authorities agree to a different meaning pursuant to the provisions of Article 25, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.”

21 Mario Riedl in: Georg Kofler/Michael Lang/Pasquale Pistone/Alexander Rust/Josef Schuch/Karoline Spies/Claus Staringer (eds.) *Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global Environment of Newly Created Taxes* pp. 1–2.

economic and legal doctrines.²² In the case that the domestic tax legislation does not provide a legal concept of “taxes” under a domestic legislation perspective, Article 3 (2) of the OECD Model, although applicable, will no longer have any effect as the definition of the term “tax” cannot be determined based on the domestic tax law of a contracting state.²³

In any case, based on a comparative approach, the concept of tax does not differ significantly from one country to another. Although discrepancies exist depending on the context in which the term is applied, there are common standards and elements that the concept of “tax” is used as a starting point of its definition both at domestic and treaty levels, such as common general definitions and principles, legal theories, or even decisions of courts.²⁴ In this perspective, the following section will deal with the criteria and the concept of “tax” and its characteristics.

2.2. What is a “tax”?

2.2.1. The concept and characteristics of a tax

As the term “tax” is not defined in the OECD Model nor the commentary, the scope of this section is to explain the concept of the term “tax” and which criteria it must meet in order to be covered by Article 2 of the OECD Model. On several occasions, the literature has relied on dictionary definitions as a starting point for the interpretation of terms indicated in tax treaties and so do courts and tax administrations.²⁵ The concept of “taxes” stated by Article 2 of the OECD Model has been defined by the OECD, UN Glossaries, and IBFD International Tax Glossary.

According to the OECD definition, taxes are “compulsory, unrequited payments to general government”.²⁶ The list of taxes includes income, profits, and capital gains; payroll; property; goods and services; and other taxes. In addition, compulsory social security contributions paid to general governments are also treated as taxes and are classified under a separate heading as discussed below.

In addition, similar to this definition, the UN Glossary includes that taxes are payments “in cash or any kind made by institutional units to government units”.²⁷

22 Patricia Brandstetter, “*Taxes Covered*”: A Study of Article 2 of the OECD Model Tax Conventions, p. 50.

23 Mario Riedl in: Georg Kofler/Michael Lang/Pasquale Pistone/Alexander Rust/Josef Schuch/Karoline Spies/Claus Staringer (eds.) *Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global Environment of Newly Created Taxes* pp. 1–2.

24 Patricia Brandstetter, “*Taxes Covered*”: A Study of Article 2 of the OECD Model Tax Conventions, pp. 48–49.

25 Patricia Brandstetter, “*Taxes Covered*”: A Study of Article 2 of the OECD Model Tax Conventions, p. 50.

26 OECD iLibrary, https://www.oecd-ilibrary.org/search?value1=tax&option1=quicksearch&facetOptions=51&facetNames=pub_igoId_facet&operator51=AND&option51=pub_igoId_facet&value51=%27igo%2Foecd%27&publisherId=%2Fcontent%2Figo%2Foecd&searchType=quick (accessed 14 May 2023).

27 UN Glossary of 1993, <https://unstats.un.org/unsd/nationalaccount/glossresults.asp?gID=544> (accessed 14 May 2023).

The IBFD International Tax Glossary confirms both of these definitions and states that there is no single definition of “tax” which may vary according to the context. It follows the UN definition and also refers to the definition presented by the OECD Glossary.²⁸

Based on the wording of Article 2 (1) of the OECD Model and the definitions provided by the OECD and UN Glossaries, the concept of “taxes” relates to the following terms and expressions: (i) unrequited payment to general governments; (ii) imposed on behalf of; (iii) a contracting state or of its political subdivision or local authorities; and (iv) irrespective of the manner in which they are levied. These expressions are further discussed below.

2.2.2. Analysis of the expression “unrequited payment”

The OECD Glossary clarifies that unrequited payments are related to benefits provided by governments to taxpayers irrespective with the proportion to their payments.²⁹ Likewise to the OECD definition, the UN establishes that “unrequited payments” means that governments are not obligated to provide anything in return to the individual unit making the payment, although “governments may use the funds raised in taxes to provide goods or services to other units, either individually or collectively, or to the community as a whole.”³⁰

As a result, one of the requirements for a payment be characterized as a tax is the absence of a determined counterpart. This means that taxpayers finance public actions and cannot expect the cost of a benefit directly linked to the same amount offered for taxation. By contrast, it refers to the fact that there is no direct connection between the tax liability and the benefit,³¹ and it is due regardless of whether a taxpayer utilizes goods or services provided by the government.³²

2.2.3. Compulsory payment: Analysis of the term “imposed”

Article 2 (1) of the OECD Model establishes that taxes are “imposed on behalf of a Contracting State or its political subdivisions or local authorities.” The term “imposed” refers to payments made upon a legal obligation and are characterized as compulsory or mandatory.³³ Therefore, a tax payment can never arise from a

28 IBFD International Tax Glossary. <https://research.ibfd.org/#/glossary> (accessed 14 May 2023).

29 OECD iLibrary, https://www.oecd-ilibrary.org/search?value1=tax&option1=quicksearch&facetOptions=51&facetNames=pub_igold_facet&operator51=AND&option51=pub_igold_facet&value51=%27igo%2Foecd%27&publisherId=%2Fcontent%2Figo%2Foecd&searchType=quick (accessed 14 May 2023).

30 UN Glossary of 1993, <https://unstats.un.org/unsd/nationalaccount/glossresults.asp?gID=544> (accessed 14 May 2023).

31 Eva Bernichon in: Auer/Dimitropoulou (eds.) *Access to Treaty* p. 268.

32 Patricia Brandstetter, “Taxes Covered”. *A Study of Article 2 of the OECD Model Tax Conventions*, p. 54.

33 Eva Bernichon in: Auer/Dimitropoulou (eds.) *Access to Treaty* pp. 263–264.

contractual obligation or voluntary act.³⁴ This description is found across different national legislations worldwide.³⁵

2.2.4. Payments on “behalf of” a state

The OECD is silent with respect to the meaning of the “on behalf of” expression.³⁶ According to the literature, the meaning of this expression is linked to the fact that taxes are due and payable as a consequence of a government’s sovereign power to tax.³⁷ It has been also discussed whether a tax falls under the Article 2 of the OECD Model scope in the case that a non-state entity collects it. Churches, professional interest representatives, or international and supranational organizations are cited as examples.³⁸

In that regard, it is argued that such collections are qualified as taxes as the legislature has the decision of whether the amounts collected are totally or partially transferred from a non-state entity to the state or its subunits or whether the payments are used for a specific public purpose. The idea behind it is based on the concept that all tax revenue should be earmarked as common welfare and to build and maintain the public system. If that is the case, the interpretation of the OECD materials has led to the conclusion that the criteria “imposed on behalf of” is met.³⁹

2.2.5. A contracting state or its political subdivisions or local authorities

The OECD Commentary gives examples of what the terms “contracting state”, “political subdivisions”, and “local authorities” can be related to, i.e. “states, regions, provinces, départements, cantons, districts, arrondissements, kreise, municipalities or groups of municipalities, etc.”⁴⁰ It suggests that only authorities at a certain geographical level would fall under the scope of Article 2 of the OECD Model. In addition, the convention also covers federal or even provincial and local taxes.⁴¹

34 Mario Riedl in: Georg Kofler/Michael Lang/Pasquale Pistone/Alexander Rust/Josef Schuch/Karoline Spies/Claus Staringer (eds.) *Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global Environment of Newly Created Taxes* pp. 2–3.

35 Patricia Brandstetter, “Taxes Covered”: *A Study of Article 2 of the OECD Model Tax Conventions*, p. 50.

36 Eva Bernichon in: Auer/Dimitropoulou (eds.) *Access to Treaty* p. 268.

37 Mario Riedl in: Georg Kofler/Michael Lang/Pasquale Pistone/Alexander Rust/Josef Schuch/Karoline Spies/Claus Staringer (eds.) *Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global Environment of Newly Created Taxes* p. 4.

38 Mario Riedl in: Georg Kofler/Michael Lang/Pasquale Pistone/Alexander Rust/Josef Schuch/Karoline Spies/Claus Staringer (eds.) *Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global Environment of Newly Created Taxes* p. 5.

39 Mario Riedl in: Georg Kofler/Michael Lang/Pasquale Pistone/Alexander Rust/Josef Schuch/Karoline Spies/Claus Staringer (eds.) *Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global Environment of Newly Created Taxes* pp. 4–5.

40 Commentary on Article 2 of the OECD Model Tax Convention on Income and on Capital (2017), para. 2.

41 Michael Lang, *Bulletin – Tax Treaty Monitor* (2005) pp. 216–217.

The term “contracting states” was defined by the OECD Model Convention on Income and Capital of 1963 which makes references to “State A” and “State B”, as it is still mentioned by the OECD Model Convention on Income and Capital of 2017,⁴² even if it is not expressly therein mentioned.⁴³ Although the terms “political subdivision” and “local authorities” are simultaneously interpreted, the former refers to entities at a “larger political unit” whereas the latter includes “smaller political subdivisions”. In both cases, the entities must perform core public functions and have a territorial connection to the contracting state and sovereignty over tax collections.⁴⁴ On the other hand, other kinds of legal entities or organizations (such as the OECD, the UN, or the EU) do not meet the requirements of a state (territory, permanent population, and subject to the control of a government) and therefore are never entitled to conclude a tax treaty.⁴⁵

2.2.6. The expression “manner in which they are levied”

The Commentary on Article 2 (1) of the OECD Model explains that the method of levying taxes is immaterial and that the collection can be achieved “by direct assessment or by deduction at the source, in the form of surtaxes, or as additional taxes (centimes additionnels).”⁴⁶ Article 2 (1) of the OECD Model makes reference to “taxes on income and on capital”, and the term “direct taxes” is avoided as it is considered to be extremely “far too imprecise”. In this regard, an interpretation issue occurs with withholding taxes that may be confused with indirect taxes.⁴⁷

As discussed in the literature, withholding taxes give rise to two interpretative discussions. First, withholding taxes are usually levied on gross amounts (e.g. the taxpayer’s turnover) which could be conflicting with the understanding that taxes should only be levied on a net basis. Second, to the extent that withholding taxes are collected by persons other than a taxpayer (who is primarily liable to tax), the application of such source taxation might lead to a nominal transfer of legal liability.⁴⁸

42 OECD Model Tax Convention on Income and on Capital (1963) Article 3 (1) a.

43 Mario Riedl in: Georg Kofler/Michael Lang/Pasquale Pistone/Alexander Rust/Josef Schuch/Karoline Spies/Claus Staringer (eds.) *Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global Environment of Newly Created Taxes* pp. 5–6.

44 Mario Riedl in: Georg Kofler/Michael Lang/Pasquale Pistone/Alexander Rust/Josef Schuch/Karoline Spies/Claus Staringer (eds.) *Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global Environment of Newly Created Taxes* pp. 5–6.

45 Mario Riedl in: Georg Kofler/Michael Lang/Pasquale Pistone/Alexander Rust/Josef Schuch/Karoline Spies/Claus Staringer (eds.) *Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global Environment of Newly Created Taxes* pp. 5–6; Eva Bernichon in: Auer/Dimitropoulou (eds.) *Access to Treaty* pp. 270–271.

46 Commentary on Article 2 of the OECD Model Tax Convention on Income and on Capital (2017), para. 2.

47 Michael Lang, *Bulletin – Tax Treaty Monitor* (2005) p. 217.

48 Wei Cui, *Article 2 – Taxes Covered – Global Tax Treaty Commentaries* (Amsterdam: IBFD, 2021) pp. 11–12.

One tax that has a similar logic is an excise tax on the payer. The transfer of nominal legal responsibility from one party to another raises the question of whether such a transfer would not be sufficient to transform an income tax into a non-income tax (e.g. a consumption tax). Should this transfer imply the levying of a non-income tax, the scope of the treaty must be limited.⁴⁹

2.3. Specific discussions related to the term “tax”

2.3.1. Ordinary and extraordinary taxes

The Commentary on Article 2 (2) of the OECD Model establishes that the convention does not make any reference to “ordinary taxes” or “extraordinary taxes”.⁵⁰ Moreover, it does not provide any definition regarding these terms and only relates to the implementation of extraordinary taxes to different reasons such as their imposition, manner in which they are levied, rates, objects, etc.

Not only the term “extraordinary taxes” is unclear, but it also is contradictory. While the first sentence of paragraph 5 of the commentary suggests that extraordinary taxes are covered by the tax treaty unless they are explicitly excluded, the second determines that a contracting state should expressly include a specific provision in the tax treaty to draw extraordinary taxes within the scope of a tax treaty.⁵¹

Regardless of the confusing explanation, the Commentary does not prevent an extraordinary tax from being covered by Article 2 of the OECD Model provided that it meets all of the requirements to be qualified as a tax and leaves this issue to be agreed by the contracting states. Therefore, the distinction between both terms is irrelevant, and all types of income and on capital are covered.⁵²

Regarding extraordinary taxes, a relevant case was analysed in Greece by the Administrative Court of Appeals of Athens.⁵³ Due to the financial crisis, fiscal or parafiscal charges have been introduced in the country.⁵⁴ Among them, an extraordinary social responsibility contribution was introduced that consisted of a single rate levied on total net profits above EUR 100,000.00 in 2009. Moreover, the

49 Wei Cui, *Article 2 – Taxes Covered – Global Tax Treaty Commentaries*, pp. 11–12.

50 Commentary on Article 2 of the OECD Model Tax Convention on Income and on Capital (2017), para. 5.

51 Michael Lang, *Bulletin – Tax Treaty Monitor* (2005) p. 217.

52 Patricia Brandstetter, “*Taxes Covered*”: *A Study of Article 2 of the OECD Model Tax Conventions*, p. 65; Pasquale Pistone/Andreas Ullmann, ‘Digital Taxes and Article 2 OECD Model Convention 2017’ in: Georg Kofler/Michael Lang/Pasquale Pistone/Alexander Rust/Josef Schuch/Karoline Spies/Claus Staringer (eds.) *Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global Environment of Newly Created Taxes* p. 11.

53 S.E. (*Symboulion Epikrateias*) Athens, 7 February 2012, Decision N. 481/2012.

54 Katerina Perrou, ‘Greece: “Taxes Covered” – Is an extraordinary levy on business profits covered?’ in: Michael Lang/Jeffrey Owens/Pasquale Pistone/Josef Schuch/Claus Staringer/Alfred Storck/Peter Essers/Eric C.C.M. Kemmeren/Daniël S. Smit (eds.) *Tax Treaty Case Law around the Globe 2013* (Vienna: IBFD, 2013) p. 1.