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Digital taxation under the OECD Amount A and UN Article 12B mechanisms for market jurisdictions in Africa: a comparative analysis

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Abstract

This Policy Brief examines the need for the evolution and harmonization of international taxation in the face of the digitalization of economic transactions.

Between the OECD proposal for shared taxation of residual profits through the Amount A mechanism and the UN proposal of Article 12B for taxing income from Automated Digital Services on a gross basis through shared but capped taxation, with an optional variant of the taxation of net profits, African States need to make vital political and technical choices.

The strategic negotiations must include regulatory sustainability, the right balance and fiscal fairness between the divergent interests of residence states vs source states (which include almost all African countries), and MNEs in their quest for profit and expansion.

The Policy Brief carries out quantified evaluation of possible revenue estimates using a case study approach. However, such an exercise remains difficult for questions of accessibility and reliability of data relating to the activities of multinational companies.

To be realistic, the scope of the study was restricted to a reference company in the digital sector but targeted economies of different scales. The results of the revenue estimates represent an optimistic case of the impacts on tax revenues of the application of the OECD and UN measures on different types of economies.

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Le présent Rapport sur les Politiques examine des moyens permettant de faire évoluer et d'harmoniser la fiscalité internationale pour faire face aux enjeux liés à la numérisation des transactions commerciales.

Entre la proposition de l'OCDE d'une double imposition des bénéfices résiduels par le mécanisme du Montant A et celle de l'ONU, contenue dans l'Article 12B, qui prévoit également une double imposition au moyen d'une retenue à la source, mais dont le montant est plafonné, ou, au choix de l'entreprise concernée, d'un impôt calculé sur le revenu annuel net, les États africains sont confrontés à des choix politiques et techniques qui sont essentiels pour leur avenir.

Le rapport insiste sur la nécessité, dans le cadre des négociations stratégiques, de mettre en place des réglementations stables et de parvenir à plus d'équité sur le plan fiscal et à un juste équilibre entre les intérêts divergents des États de résidence par rapport aux États qui constituent la source des revenus (parmi lesquels figurent tous les pays africains ou presque), et ceux des multinationales dans leur quête de profit et d'expansion.

Elle procède à une évaluation quantitative des estimations de recettes qui pourraient résulter de l'application de ces mesures pour les États africains sur la base d'une étude de cas. Cette évaluation s'est avérée en raison des problèmes d'accessibilité et de fiabilité des données relatives aux activités des multinationales.

Par souci de réalisme, le champ de l'étude a été limité à une entreprise de référence dans le secteur du numérique en ciblant différentes économies en fonction de leur niveau. Les résultats de l'estimation des recettes constituent un exemple optimiste de l'impact sur les recettes fiscales de l'application des mesures de l'OCDE et de l'ONU sur différents types d'économies.

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Este Informe sobre Políticas analiza la necesidad de evolución y armonización de la tributación internacional ante la digitalización de las transacciones económicas.

Los Estados africanos deben tomar decisiones políticas y técnicas vitales, entre la propuesta de la OCDE para la tributación comparti-

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da de las ganancias residuales a través del mecanismo del Monto A y la propuesta de la ONU del Artículo 12B para gravar los ingresos de los Servicios Digitales Automatizados sobre una base bruta a través de una tributación compartida pero limitada, con una variante opcional de la tributación de las ganancias netas.

Las negociaciones estratégicas deben incluir la sostenibilidad regulatoria, el equilibrio adecuado y la equidad fiscal entre los intereses divergentes de los estados de residencia frente a los estados de origen (lo que incluye a casi todos los países africanos) y las empresas multinacionales en su búsqueda de ganancias y expansión.

El informe lleva a cabo una evaluación cuantificada de estimaciones de posibles ingresos utilizando un enfoque de estudio de caso. Sin embargo, dicho ejercicio sigue siendo difícil por cuestiones de accesibilidad y confiabilidad de los datos relacionados con las actividades de las empresas multinacionales.

Para ser realistas, el alcance del estudio se restringió a una empresa de referencia en el sector digital, pero apuntó a economías de diferentes escalas. Los resultados de las estimaciones de ingresos representan un caso optimista de los impactos sobre los ingresos fiscales causados por la aplicación de las medidas de la OCDE y la ONU, respectivamente, en diferentes tipos de economías.

Introduction

In order to face the challenges posed by the digital transition of the modern global economy, adhering to an international tax order or acting unilaterally is a tax policy choice that each sovereign State must make, regardless of their level of development.

Indeed, the "traditional" tax system bases its taxation on the physical presence of the company on the territory of the State through the notion of 'permanent establishment'.

Nowadays, this notion of presence tends to be outdated. Economic transactions are concluded remotely and involve multinational enterprises (MNEs) with complex structures that resort to aggressive tax optimization practices to increase their net profits to the detriment of State revenues.

As part of the Base Erosion and Profit Shifting (BEPS) project initiated by the Organisation for Economic Co-operation and Development (OECD) and the Group of Twenty (G20), Action n°1 aims to address the tax challenges posed by the digital economy. It advances under 'Pillar One' the 'Amount A solution,' which provides tax rules for the reattribution of part of the profits of digital activities, qualified as residual profits, to the benefit of market jurisdictions.

On October 8, 2021, this mechanism was adopted by 137 members of the Inclusive Framework, including 23 African countries[1], under the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy. However, some members have not joined it (Kenya, Nigeria, Pakistan and Sri Lanka).

At the same time, the United Nations (UN) Tax Committee has proposed modifications to the United Nations Model Double Taxation Convention, adding Article 12B dealing with automated digital services and granting a right of taxation shared between the State of source income and the State of residence.

With regard to these two mechanisms, African States in the expansion phase of their digital economies must know the digital taxation policy that is better adapted to African society. These States must mobilize their domestic resources to address the COVID-19 health crisis and its socioeconomic effects and sustain economic development. The digital economy offers promising potential to generate tax revenues if adequate taxation is implemented.

Amount A does not, in principle, create a new tax on digital services or increase global tax revenue. It is a global reallocation of taxing rights to the benefit of market economies or consumer States in particular and source States in general.

Article 12B also deals with the right to tax, but on a bilateral scale, between two contracting State parties to a tax treaty to avoid double taxation and provides for shared taxation between the State of source and the State of residence.

Nevertheless, the two mechanisms have fundamental differences in terms of both the scope and the techniques of imposition and implementation. The challenges of each State reconciling its interests with other States in a multilateral relationship are all the more delicate and complex than in a bilateral relationship. Given its global scope, the problem of taxation in the digitalized economy should have been preferably addressed in the multilateral context (like the OECD solution of Amount A). However, UN Article 12B offers an alternative of a bilateral character.

The policy choice addressed in this study is essential. It does not aim, however, at reversing the choice of Amount A for member countries of the Inclusive Framework or guiding African countries in the sense of Article 12B. Rather, it seeks to clarify the African position on the basis of an objective assessment and explore the possibilities of harmonizing the taxation of the digital economy by providing intermediate solutions that reconcile the divergent interests of the States of residence and those of consumption.

This article is divided into three parts. It makes, first, a comparative analysis of the main provisions relating to the techniques of taxation and implementation of Amount A and Article 12B.

Second, a quantified and simplified evaluation of the potential revenue gains from the comparative application

of said mechanisms is carried out for the case of a digital company operating in a few selected countries, taking into account the constraints of existing data.

Finally, this study would not be complete without recommendations on avenues for balanced and realistic solutions to defend the interests of African countries.

I. Technical and strategic issues relating to the two mechanisms for taxing the digitalized economy

The regulations concerning Amount A and Article 12B have similarities in some of their elements, in particular, the scope and method of eliminating double taxation. However, there are particularities, among other things, in the taxation criteria and the implementation procedures.

I.1. Scope

The scope of the tax law establishes an important criterion to gauge the quantitative and qualitative importance of the regulations to be introduced.

I.1.1 Persons and activities covered

The provisions of Article 12B of the UN cover within its scope 'Automated Digital Services'(ADS) arising in a Contracting State, for which payments are made to a resident of the other Contracting State. ADS activities are defined according to a positive and non-exhaustive list with two criteria: (1) services provided via the Internet or another electronic network and (2) requiring minimal human involvement from the service provider.

For Amount A, the Statement in October 2021 does not deal with the types of activities covered but provides for activities expressly excluded, which relate to the extractive industries and regulated financial services. The overriding criterion for being in scope is that it is a multinational company, the specific conditions of which are described below. Also, the public consultation document of April 2022 on Amount A of Pillar One provides further definitions of a Covered Group and Ultimate Parent Entity.

Also, by making no distinction on the nature of the activities covered, Amount A includes, subject to the criteria dealt with in the following section, all multinational companies except for those engaged in the two excluded activities. On the other hand, what is important for Article 12B is the taxpayer having residence in the Contracting State.

Thus, Amount A benefits from a broader scope as regards the nature of the activities covered than that of Article 12B but nevertheless presents restrictions on the taxable person.

I.1.2. Restrictive criteria on companies under Amount A

The OECD Inclusive Framework Statement of October 08, 2021 subjects the application of Amount A to companies that meet the following eligibility criteria:

1. a global turnover above 20 billion euros,
2. profitability above 10%, calculated using an averaging mechanism,
3. a nexus rule permitting allocation of Amount A to a market jurisdiction when the in-scope MNE derives at least 1 million euros in revenue from that jurisdiction. There is an exception for small jurisdictions with a gross domestic product (GDP) lower than 40 billion euros, for which the nexus will be set at 250,000 euros.

The challenges of these criteria are multiple. They target only large MNEs with high profitability and eliminate from the equation jurisdictions from which the companies do not derive significant revenues.

The choice of thresholds for these criteria is particularly interesting for the jurisdictions of source and residence.

Also, the OECD (2020) Economic Impact Assessment document did not study the turnover threshold of 20 billion, which was chosen in the OECD Inclusive Framework Statement of October 2021 and brings us to question the number of companies covered, especially since the scope only covers 78 companies among the 500 largest companies.[2]

The combined effects of the criteria also have a different impact on the scope of Amount A, with some criteria being more sensitive than others on the amount of profit reallocated. Also, the amount of residual profit reallocated to market jurisdictions would be slightly higher under a scenario with a 10% profitability threshold and a 20% reallocation percentage than under a scenario with a 15% profitability threshold and 30% reallocation percentage.[3] The final agreement was to reallocate 25% of residual profits.

The lower turnover threshold for nexus in small jurisdictions (with a GDP of fewer than 40 billion euros) may prove to be of minimal benefit to them if the criteria which apply earlier, such as global turnover threshold and profitability, have already disqualified these small jurisdictions from the scope of reallocation of the MNE's global taxable profits.

Nevertheless, the chosen criteria find their basis in practical reasons to avoid high and ineffective compliance and administration costs. A broad scope is likely to be unmanageable in terms of the number of businesses covered; it can cause application difficulties and disputes that affect the expected results and cost more in terms of procedures, resources, and time than tax revenue.

I.1.3 Scope of Article 12B

Article 12B is exempt from filters on turnover, profitability and nexus to attribute the taxing right. The mere performance of the activity is sufficient to bring the transactions considered into its scope.

The limits to the application of this article are when the income is categorized under other provisions of the articles of the tax treaty, in particular on royalties, fees for technical services, income from independent personal services or international shipping, and gives rise to the application of other distribution rules.

The provisions of paragraph 3 of Article 12B provide for the beneficial owner of ADS income the option of subjecting their "qualifying profits" to the provisions of the domestic law of the State of source, but these provisions fall under the methods of calculating the tax base and do not affect the scope.

I.2. Harmonization issues relating to the tax base and tax calculation

The assessment of the tax base and its calculation refer both to the specific provisions of the mechanisms and to those provided by the domestic tax law of the States.

I.2.1. The tax base

"For in-scope MNEs, 25% of residual profit defined as profit in excess of 10% of revenue will be allocated to market jurisdictions with nexus using a revenue-based allocation key". So, for Amount A, as per the OECD Statement of October 08, 2021, the relevant measure of profit or loss of the in-scope MNE is determined by reference to financial accounting income, with a limited number of adjustments. Losses will be carried forward.

This accounting income requires the keeping of consolidated and standardized financial statements. In this sense, the determination of the so-called Qualified Financial Accounting Standards must be precise for the purpose of consolidating financial statements relating to activities located in different jurisdictions.

The acceptance of the accounting rules applied (Generally Accepted Accounting Principles (GAAP) or others) by the legal authority in the tax jurisdiction of the Ultimate Parent Entity (UPE) and the absence of significant distortions in the application of Amount A have been the conditions prescribed in the work of the OECD.[4]

In addition, the segmentation is to occur only in exceptional circumstances where, based on the segments disclosed in the financial accounts, a segment meets the scope rules.

The determination of the tax base must result in obtaining the profit serving as the basis for the partial reallocation of taxable profits under the model rules relating to Amount A. These will be reflected in the Multilateral Convention (MLC) and the Explanatory Statement relating to the implementation of the mechanism. Also, apart from the loss carryforwards, which are expressly provided for in the Statement, the tax rules still require adjustments and clarifications, which require additional work.

If the MNE has not had a consolidated account yet, these obligations will generate compliance costs, and for those that have already done so, additional costs for the necessary adjustments will be expected.

These rules on the tax base present also possibly increased tax certainty for the company insofar as clear rules make it possible to avoid conflict between the existing financial accounting standards and the required adjustments.

On the other hand, they can also generate administrative burdens for the State while being a basis for improved regulation.

For Article 12B, paragraphs 1 and 2 provide for shared taxation between the State of residence and the State of source of ADS income. A limitation of the taxation by the State of source of the income is fixed in a certain percentage of the gross amount of the payments, which will be determined by countries during bilateral tax treaty negotiations.

The tax base can therefore relate to the gross amount of the service referred to and is determined according to the internal tax provisions of the State of source without, however, exceeding the aforementioned ceiling.

In addition, another option for taxing ADS services is granted by Article 12B by taxing qualifying profits according to the provisions of paragraph 3. This qualifying profit to which the tax rate under domestic law is applied is set at thirty percent of the amount resulting from applying the profitability ratio of that beneficial owner's automated digital services business segment to the gross annual revenue from automated digital services derived from the Contracting State where such income arises.

The impact of these two Article 12B options on revenue is dealt with in the second part of the assessment, but being part of the UN model double taxation treaty, it is important to specify that all the provisions included therein are negotiable according to the Contracting States.

I.2.2. Tax calculation

Article 12B's net method and Amount A do not expressly provide a numerical rate to be applied to the tax base. They leave it to the domestic law of each jurisdiction to set this rate for the allocated share of income.

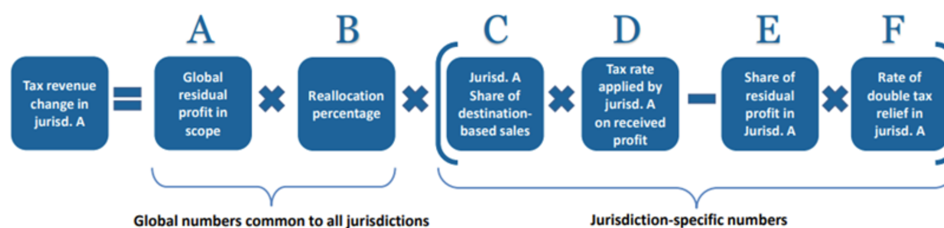
So, there is no harmonized or uniform rate for both Amount A and Article 12B, even though other mechanisms relating to Pillar Two provide for a global minimum effective tax rate of 15%.

Also, the OECD 2020 document on economic impact assessment, in image n° 1 , deals with the methods of calculating amount A in a jurisdiction by applying the domestic rate to the share of residual profit attributable to this jurisdiction and deducting from this equation the share of residual profit already taxed in that jurisdiction. It can partially solve the double taxation of an MNE in a market jurisdiction.

As for Article 12B, in addition to the calculation of the tax itself, a tax cap is applied to the gross method, as mentioned above, determined as a percentage of gross income

Image n°1: Amount A formula by OECD

Figure 2.1. Simplified formula summarising the approach on Pillar One (Amount A)



Source: OECD Secretariat.

to be negotiated in the tax treaty. Therefore, the State of residence has an obligation to eliminate double taxation within the limit of this ceiling.

I.3. Guarantee of effective implementation and tax certainty

Article 12B benefits from the implementation tools available to a tax treaty, and Amount A will have the rules of protection and tax certainty applicable through a multilateral treaty.

<u>I.3.1. The elimination of double taxation and the safe harbor</u>

The elimination of the double taxation mechanism is done according to the exemption method or the credit method within the framework of a tax treaty and is normally borne by the State of residence if necessary.

For Amount A, double taxation may result from the interaction between the taxing right under the said mechanism and the current taxation of corporate profits, generating the problem of double counting. The two methods for eliminating double taxation are thus applicable to overcome this problem after identification of the paying entity, considered to be the one that earns a residual profit.

The procedures for identifying paying entities are an essential issue for jurisdictions, which therefore deserve great attention in their determination to prevent difficulties in the application that may generate disputes.

A safe harbor is also applicable to profits from marketing and distribution activities, where the residual profits of a covered MNE are already taxed in a market jurisdiction. It will cap the residual profits attributed to the market jurisdiction via Amount A. Further work will be undertaken to design the protection regime, in particular, to take into account the overall scope. The rules require further work and continue to be negotiated.

<u>I.3.2. Tax certainty regime</u>

Amount A devotes a separate section to the provisions relating to legal certainty. It aims to ensure a compliant application of the mechanism that encompasses, according to the terms of the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy in October 2021:

- binding and mandatory procedures for dispute prevention and resolution, which will avoid double taxation for Amount A, including all issues related to Amount A (e.g., transfer pricing and business profits disputes), but also for disputes on whether issues are relevant to Amount A, without delaying the substantive dispute prevention and resolution mechanism;

- an elective binding dispute resolution mechanism will be available only for issues related to Amount A for developing economies that are eligible for deferral of their BEPS Action 14 peer review and have no or low levels of Mutual Agreement Procedure (MAP) disputes. The eligibility of a jurisdiction for this elective mechanism will be reviewed regularly; jurisdictions found ineligible by a review will remain ineligible in all subsequent years.

The aim is to settle the dispute at an early stage before making any adjustments. However, the work within the framework of the multilateral convention and the Task Force on the Digital Economy (TFDE) must meet the challenges of an effective settlement of disputes acceptable to all jurisdictions through fair and precise procedures as well as competent and impartial bodies.

For Article 12B, the bilateral relationship resulting from a double taxation Convention offers cooperation procedures that make it possible to control the difficulties and possible disputes of its application more efficiently, and this is in accordance with the tax treaty provisions negotiated previously and which correspond to the expectations of the Contracting States. Also, Article 12B can benefit from the tax treaty articles relating to mutual agreement procedure and (if necessary) arbitration, the assistance in the collection of taxes and exchange of information.

II. The assessment of gains or losses in revenue under the two mechanisms

A major component of the digital economy involves transactions with intangibles, which can cause difficulties in the accurate sourcing of revenues to countries and jurisdictions. The agreements resulting from Article 12B and Amount A integrate different solutions for digital taxation, the assessment of which will allow African States to become aware of their impacts on their tax revenues.

II.1. Methodology and context of the evaluation

The most comprehensive doctrine that deals with the revenue assessment of Amount A is certainly that established by the OECD through its numerous documentations, mainly the economic impact assessment of the BEPS Inclusive Framework.[5]

Many other doctrines deal with the subject but do not present work as extensive as this first one for the modeling and calculation stages of Amount A. This situation is understandable. On the one hand, some components of Amount A have yet to be defined. On the other hand, the OECD, with its international scope, has extensive data from country-by-country reporting and other sources at its fingertips that are not accessible to everyone or even to African tax administrations.

Nevertheless, the non-publication by the OECD of the assessment results on a jurisdictional basis prevents States from being able to compare the potential gains or losses of revenue. This leads us to ask the question about the motivation for this lack of transparency in work carried out within the Inclusive Framework.

As for the valuation under Article 12B, this option initiated by the United Nations Tax Committee is not as popularized as Amount A in the tax literature. It does not have an abundant doctrine on the subject except the comments resulting from the work of the said Committee.

Within the framework of the methodology of our study, the perspective of detailed modeling, tracing the turnover and profits of all the multinational digital companies operating in each jurisdiction, as well as the results of the related mechanisms, is beyond the scope of this study.

Accordingly, this article will provide a critical analysis of the Amount A economic impact study for the OECD jurisdiction groups.[6] This will be done without following in the organization's footsteps in complex data collection and extrapolation exercises. The means and accessibility of reliable data are not within our reach. Similarly, we seek to avoid repeating the findings of the OECD studies.

The assessments were based on simplified and easily accessible cases, remaining in the reality and context of African and other developing countries. A micro assessment of the impact of Amount A and Article 12B relating to a multinational business model in the ADS sector, the company "Facebook," was carried out on the budgetary revenues of three African jurisdictions with different income levels and of a high-income jurisdiction located in Europe.

Public data on the financial statements of the Facebook company in 2020 were extracted from Meta Platforms[7] and Statista Research Department[8]. The choice of the year does not influence the results because the health crisis has not had, in principle, a negative impact on the digital sector, and the company chosen always shows a positive progression of its results from year to year despite the global crisis.

The other data sources are from the World Bank database on the classification of countries according to their income, socioeconomic development indicators by country (nominal GDP), Average Revenue Per User (ARPU), the number of internet users by Statista Research Department and world population review and exchange rates[9].

Our assessment has certain limitations due to the fact that it does not take into account assumptions of mixed activities and segmentation, the main or "supplementary" kind of transaction, and intermediate or final consumption of digital services.

Also, for a projection on a domestic and global scale of the study results, a transposition of the evaluation at the macro-economic level implies readjustments of the parameters and the provision of more succinct data on the economic actors and their activities.

II.2. The study outline and results

Africa has high digital potential with the predominance of mobile connections and a mainly young population, which attracts investments in this sector. However, it does not have a sufficient digital infrastructure with a low development index of public e-governance and around 40%[10] of internet penetration rate.

However, a certain correlation has been observed between the share of the population's consumption of digital services and its level of income. High-income European users consume an average of 47 euros per year in digital services compared to 8 euros for moderate-income users located in Africa.[11]

Some North African populations in Africa (Egypt, Algeria, Morocco) also have strong internet connectivity compared to other regions of Africa.[12]

Table n° 1 shows the data collected according to the sources specified in the methodology, as well as the results of the gains observed under the two mechanisms studied. It should be noted that the tax rates applied by the chosen jurisdictions have similarities and are around 30%, which allows us to affirm that any differences in results are not attributable to this parameter but to other causes.

The tax calculation according to the domestic tax law of the chosen States is supposed to be uniform and based on the application of the tax rate on the profit of the company on its ADS transactions. The values displayed in the results of the study are also to be taken as approximate orders of magnitude and not as absolute values.

Under Amount A, it is thus noted that all the jurisdictions benefit from a percentage of reallocation, and on this point, the OECD[13] economic impact study underlines that on average, high, middle and low income jurisdiction groups will all see their tax revenues increase slightly.

Nevertheless, the OECD, in the same paper, also finds that low- and middle-income jurisdictions achieve more

Table n°1: Assessment of revenue gains or losses for the Facebook company in some African and European countries

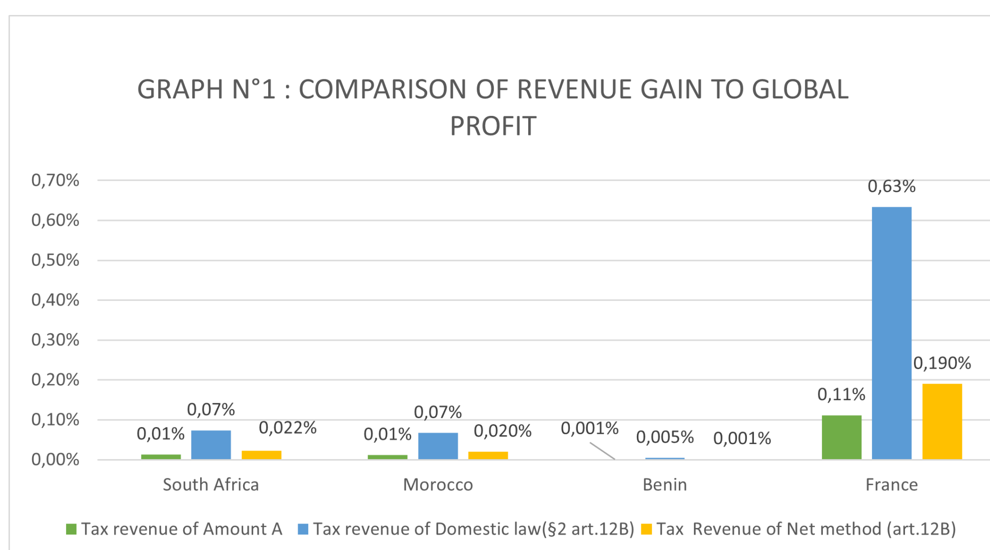
Facebook Company					
Parameters (year 2020)	Formula	AFRICA Region			EUROPEAN Region
		Upper-middle income jurisdiction	Lower-middle income jurisdiction	Low-income jurisdiction	High-income jurisdiction
		South Africa	Morocco	Benin	France
Users number	A	24 600 000	21 630 000	1 538 500	38 540 000
					in thousands of euros
Average Revenue per user (ARPU)	B	0,008	0,008	0,008	0,047
Nominal GDP		312 550 000	106 220 000	14 580 000	2 450 000 000
Percentage of population using the internet		70	84	26	85
Global turnover	C				80 075 000
Global profit	D				27 095 000
Profit margin	E=D*100/C				34
Domestic turnover	F= A x B	196 800	173 040	12 308	1 811 380
Domestic Profit	G= (F*E/100)	66 591	58 552	4 165	612 917
Amount A					
Amount A reallocated globally	H= [(D-Cx10%) x 25%]				4 771 875
Percentage of reallocation	I=(F/C)	0,25%	0,22%	0,02%	2,26%
Amount A domestic reallocated	**J = HxI**	**11 728**	**10 312**	**733**	**107 945**
Rate of tax	K	30%	31%	30%	28%
tax revenue of Amount A	**PA= J x K**	**3 518**	**3 197**	**220**	**30 225**
Article 12 B					
Tax revenue apply domestic law (paragraph 2 art 12B)	**PB= G x K**	**19 977**	**18 151**	**1 249**	**171 617**
Gross method: Cap10%	L= 10% x F	19 680	17 304	1 231	181 138
Gross method: Cap 15%	M = 15% x F	29 520	25 956	1 846	271 707
profit qualified 30%	N= F x E x 30%	19 977	17 565	1 249	183 875
Tax revenue of Net method	**PC= N x K**	**5 993**	**5 445**	**375**	**51 485**

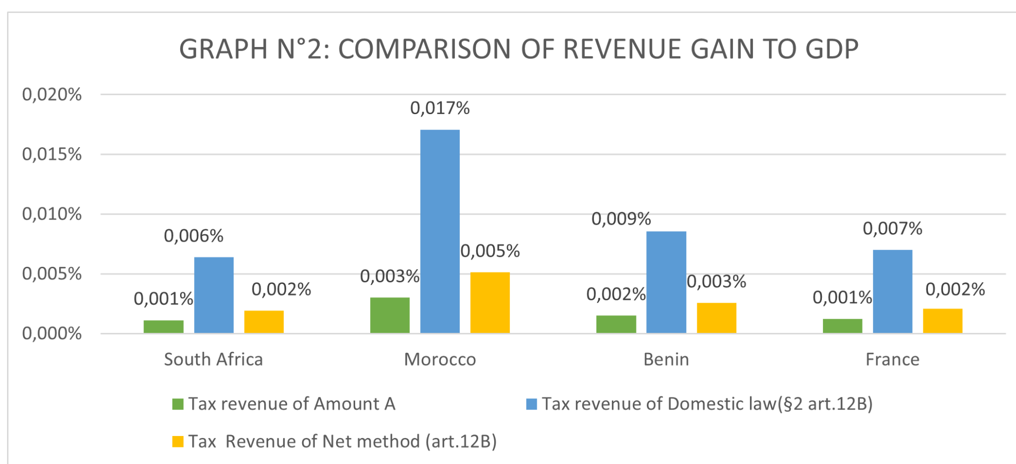
Source: Author's compilation

substantial revenue gains (as a percentage of current corporate income tax (CIT) revenue) than high-income jurisdictions because the residual profit assumed to be currently located in low- and middle-income jurisdictions is relatively small and that these gains will also be greater in jurisdictions with relatively high statutory CIT rates.

For our case study, if we assume that no jurisdiction previously received taxation on residual MNE profits, we can see that high-income jurisdictions are allocated a larger share of the taxation of residual profits under Amount A compared to other jurisdictions when compared to the company's worldwide profit (see graph n° 1).

For illustrative purposes, the volume of Amount A reallocated to the high-income jurisdiction (France) is 0.11% compared to 0.001% for a low-income country (Benin). This share decreases according to the income category of the jurisdictions. This is because the reallocation is a function of the amount of turnover from local sources. Therefore, the jurisdictions with high income have a higher





turnover and a higher consumption compared to the other middle- and low-income jurisdictions, and their share in the reallocation is correspondingly larger compared to the others.

Nevertheless, Graph n° 2 shows a very low percentage of tax revenue to nominal GDP for both high-income and low-income jurisdictions, but this can be explained by the assessment carried out on only one digital company.

For Article 12B, all things being equal, logically, this mechanism referring to applicable domestic law brings more than Amount A to all market jurisdictions for the same volume of activities of an eligible nature falling within the scope of the two mechanisms.

Indeed, the mechanism under paragraph 2 of Article 12B does not have a break-even filter or an allocation percentage as with Amount A, which means that for Africa and, essentially, for any consumption or importing country, we can position ourselves in favor of Article 12B.

Also, this application of Article 12B is beneficial for all countries, regardless of their categorization. Indeed, the assessment of revenue gains table shows for the present case that the revenue from Article 12B of the UN model has an amount higher by about 5 or 6 times more than that from Amount A of the OECD.

In addition, the insertion of the option to tax qualified profits (net method), even if the result of the assessment shown in Table 1 (PC) results in amounts higher than the taxation under amount A (PA), results in much lower amounts, approximately one-third, of the tax revenue obtained under domestic law (PB) under Article 12B. Also, the insertion of this option is not favorable to African States in its current form.

Finally, for the use of the cap on the gross amount in Article 12B, a high rate is appropriate for the source jurisdiction. Thus, the cap rate of 15% of gross income is preferred to a rate of 10% because it is noted in our table of assessment of revenue gains that the tax revenue of Article 12B exceeds the cap by 10% and therefore loses a certain amount of taxes for middle and low-income jurisdictions. On the other hand, the said tax revenue remains below the amount of the 15% cap.

III. Recommendations for designing and implementing either policy option

In view of these evaluation results, Article 12B, resulting from the work of the UN, of which developing countries are the majority members, is more favorable to market jurisdictions than the OECD Amount A resulting from the Statement in October 2021.

However, the complexity of inter-State relations, in particular the reconciliation of divergent interests and the need to grant tax sovereignty to States, leads us to propose solutions that balance existing mechanisms or intermediate solutions.

III.1. Recommendations relating to the provisions of Amount A

Market jurisdictions, middle or low-income countries, or more generally, developing country members of the OECD Inclusive Framework who agreed to the October Statement relating to Amount A, must take into account the following parameters which impact their interests and which may require renegotiations or clarification of application:

- A lower global turnover threshold to capture all the large multinational companies operating in their territory;

- A shorter review period for this global turnover threshold to make the mechanism less rigid and more adaptable to the very dynamic kind of digital activity;

- Particular vigilance on the commitment of States not to introduce any new digital tax. This commitment must not have the result of prohibiting States from applying indirect and generalized taxation on consumption such as value added tax (VAT), but must apply to taxes which, within their scope, only target taxation specific to the digital sector;

- Coherent and succinct rules at the accounting level for the global harmonization of the tax bases of the Amount A mechanism, for the identification of the sources of turnover, the application of segmentation in order to prevent superfluous conflicts and to fight against possible abuses, in particular the splitting or

Table n°2: Comparison of tax revenue from qualified profit based on 30% of net profit or gross turnover

Facebook Company (In thousands of euros)					
Parameters (year 2020)	**Formula**	**AFRICA Region**			**EUROPEAN Region**
		South Africa	Morocco	Benin	France
Current Method					
Tax revenue applying domestic law	PB= G x K	**19 977**	**18 151**	**1 249**	**171 617**
Qualified Profits under Article 12B	N= F x E x 30%	19 977	17 565	1 249	183 875
Tax revenue from Article 12B Net Method	PC= N x K	**5 993**	**5 445**	**375**	**51 485**
Tax revenue gap 1	Gap1= PB-PC/PB x100	70%	70%	70%	70%
Proposed Method by Author					
Profit qualified 30% of domestic turnover	O=F x 30%	59 040	51 912	3 692	543 414
Tax revenue	PD=O x K	17 712	16 093	1 108	152 156
Tax revenue gap 2	Gap2=(PB-PD/PB) x100	11%	11%	11%	11%

artificial segmentation of turnover or manipulation of profits made;

- Fair rules for double counting and elimination of double taxation, in particular the determination of the paying entities, the establishment of exchange of information and effective collaboration between States in addition to the prevention and resolution of disputes, accessible to developing countries.

III.2. Recommendations on Article 12B

The effectiveness of the application of Article 12B on ADS results from the negotiation and the revisions of the double taxation conventions of each State. As a model Convention, it does not bind States, which are free to make the amendments they deem necessary to the provisions of Article 12B according to their interests and the adaptability with their domestic tax law. Therefore, it is assumed that these provisions of Article 12B resulting from the negotiation of tax treaties are normally suitable for the tax policy of the jurisdictions concerned.

Also, the option to tax according to the net method of qualified profits does not bring any interest for the States of source, because it considerably limits the taxable base to a fixed level of 30% of the domestic profits. This option is defensible if the definition of qualified profit is reduced to 30% of the gross amount of ADS turnover and not on its net amount. Indeed, in this case, the tax revenue gap is reduced to 11 % of the taxation according to the domestic law (PA) for our proposal instead of 70% compared to the receipt resulting from the domestic law for the current proposal under article 12B (cf. table n°2).

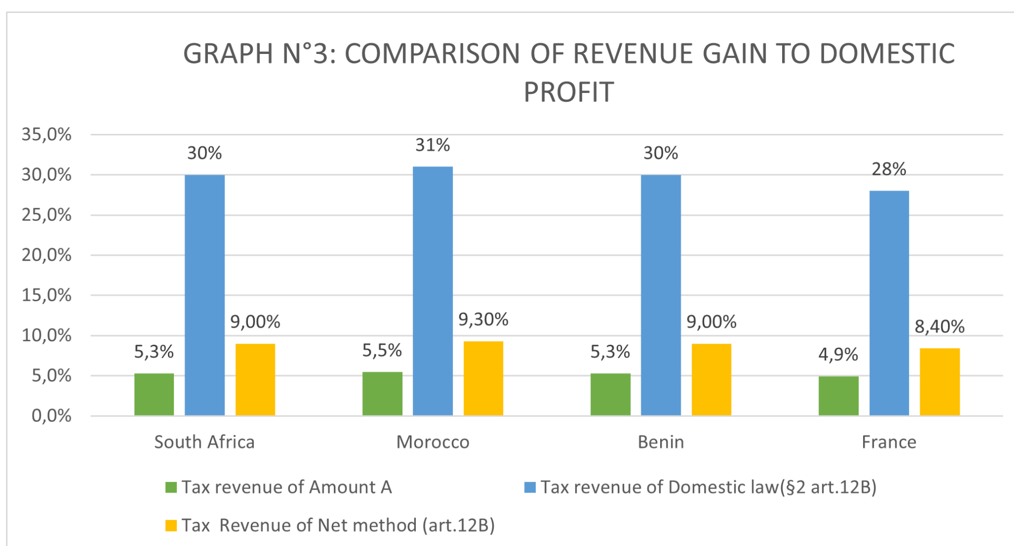
Furthermore, the application of Article 12B in the double taxation treaty falls within the bilateral relationship between the two Contracting States. The multilateral scope of the implementation of Article 12B on digital activities as an option studied by the United Nations Tax Committee must be further explored for an effective treatment of the taxation of digital economy and with a view to its harmonization in accordance with the expectations of the evolution of international taxation.

III.3. Intermediate equilibrium solutions

In the category of active income, the profit allocation for taxation of digital activities based on consumption or sales instead of the creation of value and in particular in the State of market or source, is appropriate. The consensus sought must favor this perspective despite the immaterial and sometimes non-locatable kind of digital activity and/or transactions.

Also, if the negotiation counter is reset to zero, it is better to discuss the principle of allocating the tax right on digital activity as a more general regulation, instead of a reallocation of the residual or "superprofit" of enterprises. This constitutes a more selective measure because it is established according to the performance and profitability of the enterprise and not the kind of its activity and may thus only concern certain enterprises compared with others carrying out the same activities and therefore establishes a differentiated treatment between them which encourages tax avoidance.

For a lasting solution, taxation must be fair and not harm any of the parties. The mechanism of capping the tax rate in the State of source in relation to gross income, as in Article 12B, constitutes a palliative for the sharing of



taxation between the State of source and the State of residence.

Companies will have tax certainty while States of residence will have moderate taxation, which cannot be done in the event of already substantial taxation in the States of Source.

Thus, the approach outlined in Article 12B is a legitimate consensus and in line with current international practices enshrined in double taxation treaties and with a global reach.

The choice of capping gross income withholding taxes at 10 or 15% still needs to be further analyzed by each jurisdiction. Indeed, in our case study, the amount of revenue by the use of these caps (see table 1: L and M) amounts respectively to a rate of 30% and 44% compared to the local profit or the net amount income of the "Facebook" company studied.

However, if for practical reasons in the global sharing of profits from digital activities, the reallocation of the taxation of superprofits or residual profits is applied, like Amount A, a larger reattribution percentage, higher than the present 25%, having regard to the interests of the market jurisdictions should be considered.

Indeed, for our case study, the 25% reattribution of residual profits corresponds to an effective tax rate of Amount A reallocated to approximately 5% of local profit (see graph n°3). Assuming that no taxation of profits has been made in the market jurisdiction, the raising of the said tax rate of 5% to the level of the minimum effective worldwide tax of 15% provided for under Pillar Two would thus be equivalent to an adjustment of three times the current reallocation rate of 25% currently planned.

The reconciliation of the interests of the countries of residence and market implies that any unilateral action is to be avoided from an economic point of view because it can have a perverse effect on digital activity and is counterproductive for taxation.

Strategically, unilateral or regional taxation actions of digital activities can constitute means of pressure on the jurisdictions of residence to lower their requirements in order to secure the investments of their residents.

Finally, here is a reflection on the choice of taxation strategy to consider for the following hypothetical cases, to know what is beneficial to African States:

- on the one hand, a narrow tax base with a high rate (in case of unilateral action), for example, 100 companies identified in a jurisdiction with a total tax base of value equal to 100 units taxed at 30 % and generating a value gain of 30 units;

- or, on the other hand, an extended tax base with a moderate and shared rate (in case of multilateral action), which amounts, for example, to having 150 companies identified in the jurisdiction with a total tax base of value equal to 300 units but at a reduced tax rate of 15% for the source jurisdiction side and 15% for the residence jurisdiction side, which gives each of the jurisdictions a value of 45 units.

Conclusion

In conclusion, the establishment of a common tax regulation for digital activities is not easy, and yet a collective effort to develop it is very important.

Work under Amount A is still being finalized. It has been in the making for a few years and seems to be of interest only to certain African States while other African countries are still seeking solutions better suited to their national situations and needs.

Fiscal sovereignty means that each State is free to tax companies and activities on its territory and to join regional and international cooperation of its choice.

However, it is not in the interest of any jurisdiction, source or residence to act unilaterally for disparate solutions, which can encourage conflicts and create loopholes for tax avoidance.

Also, the establishment of taxation rules for the digital economy, unilaterally by a jurisdiction, requires its effectiveness capacity in terms of identification of transactions

and taxable persons.

Only international cooperation with effective and broad-spectrum exchanges of information and intelligence can effectively identify and allow taxing on the digital activities of MNEs.

The distribution of taxation at the global level is thus recommended for the sustainability of the solution to be adapted with well-developed implementation rules capturing all the possible facets of the said activities, with a certain flexibility of adaptation of the mechanisms adopted to resolve any unforeseen events.

This difficult but achievable exercise requires finding a balance between the divergent interests of the source and residence States, with rebalanced solutions for a shared and capped taxation or an acceptable reattribution according to a percentage adapted for the source jurisdictions.

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