THINK-TANK
DIGITAL NEW DEAL

DIGITAL TAXATION
THE SECOND ROUND

By Vincent Renoux

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SUMMARY

PREFACE ... 3
INTRODUCTION ... 6
Real taxation for a virtual world: 3.5 years later, perspectives and realities

PART 1 — STATE OF PLAY
A LITIGATION AGAINST GAFA
The states are fighting back ... 8
1. In France ... 8
2. Litigation at EU level ... 13

B. RESTRUCTURING OF GAFA
1. In France ... 16
2. Impact of the abolition of the "Double Irish" and US reform ... 20

PART 2 — ATTEMPTS TO REGULATE DIGITAL COMPANIES
A. BY THE OCDE ... 24
1. The evolution of the definition of permanent establishment: towards a new connecting factor and determination of taxable profit ... 24
2. The evolution of the definition of permanent establishment in tax treaties and the contribution of the MLI Convention ... 29

B. WITHIN THE EUROPEAN UNION ... 30
1. The GAFA package ... 30
2. The e-commerce directive ... 32

C. MEASURES TAKEN AT NATIONAL LEVEL ... 33
1. France ... 33
2. Italy ... 37
3. Australia ... 37
4. India ... 38
5. United Kingdom ... 38
6. Israel ... 38
7. Nigeria ... 39

PART 3 — PROPOSED SOLUTIONS
Solution 1 The virtual permanent establishment ... 41
Solution 2 Create a tax abuse ... 43
Solution 3 D Determine the taxable income of foreign companies in France using the transfer pricing technique from the OECD comments ... 44

SYNTHESIS OF THE THREE SOLUTIONS ... 46

CONCLUSION
(Re)-territorialising the immaterial economy, by Anaïs Voy-Gillis ... 48

PREFACE

Providing public services, offering a social protection system, or regulating economy activity are all examples of missions fulfilled by the taxation system. Its role is fundamental to our model of society. The state guarantees the general interest through the participation of all citizens, whoever they may be, via taxation. This model now seems to be greatly challenged by the negative externalities of the digital revolution.

On the one hand, the immateriality of the value created by the digital giants undermines the principle of territoriality on which the corporate tax system is partly based. On the other hand, the nature of public services, financed by taxes, is being challenged by competition from private actors, who claim to replace public authorities in the administration of society.

This is urgent. There is an urgent need to re-establish the tax consent of all actors, the participation of all in our humanist ideal, the consent to our values. Urgency because it is the entire tax field that is in danger of evaporating from states, thereby cracking the cement of their sovereignty. It is in this context that we published a paper entitled ‘Real Taxation for a Virtual World’ in 2017 in order to highlight that a fair and equitable taxation would not be a success worthy of celebration, but simply a return to normality. Our think-tank took part in the political take-over of these issues and thus contributed to the advent of the famous ‘tax on digital services’ with the government.

> *“The digital revolution has gone beyond the state of adapted tax norms to an era in which many actors no longer live. These actors are navigating a grey zone. A zone that tax does not know about, but which it nevertheless protects, thereby allowing it to prosper. A paradox that threatens economic competition and the entire coherence of tax policies [...]. It is France’s duty and responsibility, in the name of its great principles protected by the most fundamental standards, to bring its tax system into line with this virtual reality.”*

Vincent Renoux
Real Taxation for a virtual world
Digital New Deal (2017)

Four years later, after a series of heated debates, mostly initiated by France and supported in a determined and continuous manner by its Minister of Economy and Finance, Bruno Le Maire, we wanted to place the fundamental issue surrounding tax participation back at the heart of our concerns, as a sine qua non of a nation based on solidarity. Although a GAFA tax was perceived as imperfect – and rightly so, as it is not the alpha and omega of big tech regulation issues – it nevertheless represented a major turning point that showed France's political voluntarism and the end of any form of angelism towards big platforms.

Four years later, the Trump administration shed a harsh light on the economic, political and legal cold war that the US is waging via GAFA. This has become a sovereignty issue. When Europe regulates, America releases its weapons. It responded to the GDPR with the CLOUD Act, imposing the extraterritoriality of American law in an increasingly pernicious way. Moreover, when the 3% tax on digital giants was imposed, Trump responded with a 100% tax on our luxury giants, thereby disregarding any form of proportionality.

Four years later, international discussions at OECD level were struggling to reach a conclusion despite the fact that the new US term of office held out the prospect of significant progress towards fairer income taxation in the digital economy at the international level.

Four years later, it was evident to us that we should ask Vincent Renoux to have another look at digital taxation. The health crisis has strengthened the power of digital giants. It is therefore essential to reaffirm this model of society that we defend and which certain immaterial companies ostensibly want to break away from, while so many French and European companies, including digital ones, continue to do so. This is a major competitiveness issue and a consubstantial principle of equity. It is also crucial in the present context where the issues of financing a recovery plan and repaying debt linked to the crisis are becoming increasingly important. The reflections in this new study intend to feed this reflection and arm France's action which is now at the forefront of this European and global battle.

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Digital Taxation

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Digital Taxation

INTRODUCTION

Real taxation for a virtual world: 3.5 years later, perspectives and realities

The 2017 study highlighted the combination of the emergence of a new model, that of the digital economy, with the prospect of infinite revenue growth and, for the US giants, an unparalleled propensity to shirk public burdens, especially in relation to corporate taxes.

For more than 10 years, a dramatic competitive fiscal imbalance was created to the detriment of French and European players. As this competitive imbalance was not the only one (monopoly, exclusion of competitors, anti-competitive practices), the domination of American players was able to develop without barriers, with the declared support of their Government, when the European states tried to rebel (threat of increasing customs duties in the face of the tax on digital services).

The American giants therefore benefitted from a major tax leverage effect. Each year they saved almost a third of their profits which could then be retained and reinjected to finance their own development or their acquisitions of start-ups.
They have stored considerable sums in tax havens. They have also, intelligently, preserved their image as much as possible, by diverting the debate on tax matters to the difficulties of adapting legislative and international standards that are out-dated and not adapted to digital technology .

In reality, however, it was simply a question of creating purely artificial arrangements aimed at diverting the bulk of profits originating in European countries, including France, to tax havens. In this respect, these artificial arrangements are very specific to America and are not the exclusive domain of digital technology. A recent tax adjustment by the Disney group in France contains some typical tax features, such as the use of a fee (royalty) to absorb the taxable profit in France (90% of the French turnover) and profits directed to a tax haven such as the Cayman Islands . The dematerialisation of activities with regard to digital technology makes it even easier to implement these arrangements.

For a long time, tax authorities and states have seemed paralysed when faced with arrangements which, for companies and groups in the real economy, seem to be unworkable because they lack substance. It is as if the abuse of rights was not a concept that could be used against these actors.

They shifted the debate on tax rates within Europe when their arrangements did not allow the host states (Ireland, Luxembourg) to tax the financial windfall that passed through their structures established in their territories. The media therefore criticised the Irish rate of 12.5%, which was taken up by some EU member states, even though the profits were stored in Bermuda and were not subject to this reduced tax rate. We have even come to criticise Luxembourg's

[1] *The Fair Tax Foundation conducted a study in December 2019 on the Silicon Six (Facebook, Apple, Amazon, Netflix, Google and Microsoft). Over the period 2010-2018-19, the gap between the taxes that should have been paid and the taxes actually paid in cash is $100 billion. In May 2021, over the period 2011-2020, the gap identified by the Foundation is USD 149 billion. 58.9% of the profits made by the Silicon Six are of foreign (non-US) origin. We can also compare the $5.9 billion paid by Amazon in taxes over 10 years with the $55.3 billion in taxes paid by Microsoft over a 10-year period. https://fairtaxmark.net/silicon-six-end-the-decade-with-100-billion-tax-shortfall/*

[2] *https://www.capital.fr/entreprises-marches/les-montages-fiscaux-de-disney-dans-le-collimateur-de-bercy-1387725*

corporate tax rate, which peaks at approximately 25%, similar to our 2022 target rate.

Until recently, they triumphed before the administrative courts to defend their artificial arrangements.

And then everything started to change. Europe, the OECD and France joined the fight. Public opinion took hold of the debate. The gilets jaunes made it one of their demands. The image of GAFAM began to deteriorate.

In France, the Minister of Action and Public Accounts, Gérald Darmanin, began to conclude agreements in view of the tax adjustments notified to GAFAM, with nearly one billion euros returned to the state treasury for Google.
The state machinery, the media and public opinion (i.e. customers and consumers) have all been set in motion. However, change is slow and the opponent is powerful, skilful and determined. The Covid crisis has only reinforced the hegemony of digital technology and GAFAM (Facebook has now passed the symbolic 2 billion active user mark). The digital sector's share of the French economy is only growing. This means the not insignificant capacity of the state to apprehend via corporate tax, but also local taxes with the company value-added contribution (CVAE), a participation of companies in public charges, is reduced by the same amount, especially if tax avoidance schemes continue. Moreover, by a game of communicating vessels, it is the actors of the real economy who will see the tax and social charges weigh on their operating results even more strongly because they will have to pay what others do not. This will delay their financial capacity to digitalise all or parts of their business.

Simultaneously, these aggressive tax arrangements produce a two-fold perverse effect: a competitive advantage to always outperform French or European digital players and the ability to generate financial windfalls to buy out any promising competitor that emerges (Facebook bought Instagram and WhatsApp) and thus become even more hegemonic. Even the use of certain electric scooters in Paris is charged by entities located outside France (in the Netherlands) for example. It is a pity that this fiscal aspect was not one of the criteria adopted by the city of Paris in its call for tenders.

The issue is even more crucial with the arrival of the Chinese giants (BATX) who can also benefit from loopholes in the tax system. It is not surprising that the debate on the monopolistic situation of certain players is emerging. The same situation previously existed in the context of oil (Rockefeller) or the telephone (Edison and ATT).

It therefore seemed necessary to us to review the situation 3.5 years after this report which, alongside others, has led to a broad awareness of this tax issue (notably within the government and national representation) and which, even though this solution has many perverse effects and is not the one we prefer, has led to the creation of the tax on digital services in France.

PART 1
STATE OF PLAY

As part of this study, it was crucial to review GAFA in the abundant news of the past three years in terms of litigation against these companies (A), but also because of an adaptation of the structures of these companies (B).

A. LITIGATION AGAINST GAFA: THE STATES ARE FIGHTING BACK

In the standoff between the tax authorities and GAFA, France has undeniably scored points (1), while the European Union has not (2).

1. IN FRANCE

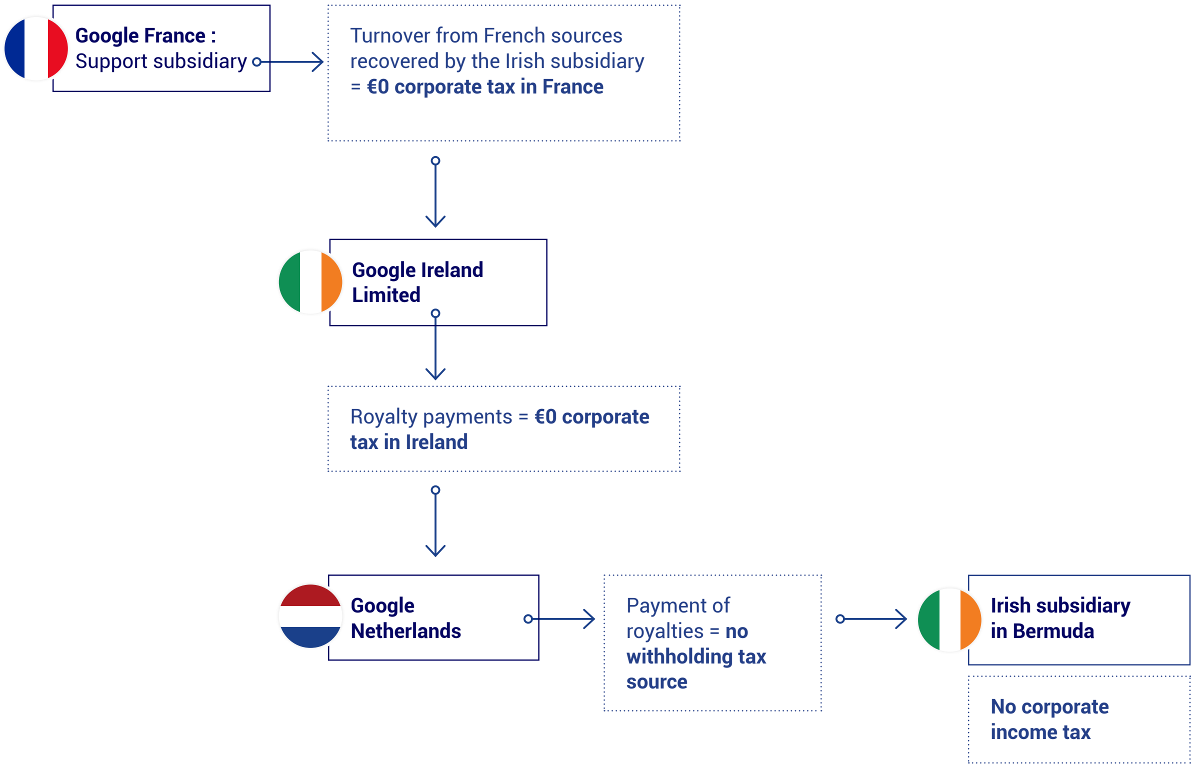
After a long period of paralysis, the tax authorities decided to intervene. In using the home visit procedure (the tax search), it was able to gather information and documents to be used in tax adjustment procedures. The authorities initially tried to use foreign companies' tax presence in France, through which revenue from French sources was passed (what is known as a "permanent establishment" in international taxation), before moving on, in our opinion, to the more solid ground of the functions performed by the French subsidiaries of GAFAM and their remuneration i.e. the field of transfer pricing.

As we described in our 2017 study, the French subsidiaries were only supposed to provide support services to the groups to which they belong. These purely internal services are not intended for third-party clients (e.g. French advertisers).

Let's take a classic example of tax avoidance. A parent company located in Ireland is invoiced on the basis of the costs of its subsidiary (essentially the salaries of the French staff and office rent), with a small margin (e.g. 5%). If, for example, the French subsidiary's operating costs are €28 million, the company's profit declared in France will be €1.4 million, i.e. with a tax rate of 33.33%: €467,000 in tax. If the group has a turnover of €2 billion in France and this turnover (not to be confused with profit, as many commentators in the media do) is received by the parent company in Ireland and then redirected tax-free to Bermuda (via a royalty paid to the Netherlands and then paid again to a second Irish company resident in Bermuda for tax purposes - SIC), the authorities may try to argue that the Irish company has a permanent establishment in France. This procedure has the advantage of extending the statute of limitations from 3 to 10 years (i.e. 10 years that can be adjusted), of allowing the authorities to initiate an ex officio taxation procedure[3] and finally, after having imposed a penalty of 80% for fraudulent manoeuvres, of initiating criminal proceedings for tax fraud, which puts undeniable pressure on the group's directors.

[3] In an ex officio procedure, the authorities themselves determine the taxable profit and reverses the burden of proof: it is up to the taxpayer to prove that the authorities' calculation is wrong.

Example of the Google optimisation scheme



In order to demonstrate that there is a permanent establishment of the Irish company present in France, the authorities must show:

- Either the presence of a fixed place of business in France through the premises of the French subsidiary; even if this remains difficult to prove for the authorities; or

- That the French subsidiary, as a result of its capacity to conclude contracts with third parties by legally committing the parent company, is an agent dependent on the latter. The subsidiary then becomes itself and someone else simultaneously, i.e. an extension of its own parent company in France. The difficulty is that, in all cases, it is the parent company who signs the contracts and it is difficult to argue that one is committed until the contract is signed (contracting without signing). It is on this last ground that the French tax authorities have taken a stand. However, in this situation of fiscal schizophrenia, it is not so easy to find out what part of the parent company's profit is attributable to this dependent agent...

That said, some groups have very subtly realised how to circumvent the permanent establishment problem i.e. by creating a permanent establishment in France. This permanent establishment is allocated a minimal share of the foreign head office's turnover, with the French permanent

[3] *Dans le cadre d'une procédure d'office, l'administration détermine elle-même le bénéfice imposable et renverse la charge de la preuve : au contribuable de prouver que le calcul de l'administration est faux.*

establishment contenting itself with providing (supposedly) internal support services to the group. The genius of this new organisation is that the foreign head office cannot have a permanent establishment in France through the permanent establishment that it already has (whereas with the subsidiary, this is possible). In other words, there cannot be a duplicate of the existing permanent establishment or a permanent establishment squared! Again, in this case, it is the determination of the permanent establishment's taxable results declared in France which will be the key to the existence or not of substantial profits taxed in France.

In the presence of a subsidiary, if the authorities succeed in arguing that a permanent establishment exists, it will be necessary to determine, in order to collect an additional tax, the part of the profits that are taxable in France. These latter profits are attributable to this permanent establishment i.e. by taking into account the turnover, but also the expenses, which is not that easy (as the royalty paid to the Netherlands will empty Ireland of its taxable income).

In the presence of a subsidiary, if the authorities succeed in arguing that a permanent establishment exists, it will be necessary to determine, in order to collect an additional tax, the part of the profits that are taxable in France. These latter profits are attributable to this permanent establishment i.e. by taking into account the turnover, but also the expenses, which is not that easy (as the royalty paid to the Netherlands will empty Ireland of its taxable income).

Alternatively, if the authorities are on the transfer pricing side, as seen in the Google case, it can go straight to the French subsidiary and carry out a functional analysis. The latter is an analysis of the risks, assets and functions carried out by the subsidiary. The authorities can tell the subsidiary that it is not carrying out a simple supporting activity for its corporate group; rather, its activity is commercial in nature (in view of all the documents recovered during the tax search). Consequently, the remuneration of the subsidiary is not correct and must be revised and adjusted upwards. The subsidiary has therefore knowingly engaged in reducing the basis for calculating the tax. The authorities can use a simple method called the TNMM (Transactional Net Margin Method), i.e. the net operating margin method, which consists of determining a target net margin that the French subsidiary should achieve on the basis of a panel of comparables from a database (i.e. a benchmark). If the margin from the benchmark is, for example, 5% (median margin), the taxable profit in France will increase to €100 million and the 33.33% tax to €33.33 million instead of €1.4 million in our example. That is 24.8 times more tax.

the product". When, for example, on Google or Facebook, user data is recovered for advertisement targeting, an even more effective approach for the State's finances can be developed, namely the "profit split" approach. In other words, the sharing of the added value created between the sources of value creation within a group, alongside the valuation of the data recovered from French Internet users (in the spirit of the Colin and Collin report on data taxation). The taxable profit can then be clearly increased, compared to the €100 million in our example. If, for example, the profitability of the group under consideration is 40% and 1/3 of this profitability is attributed to the recovered data, we can (by simplification) imagine adding to the €100 million representing the routine remuneration €333 million of remuneration for this French intangible. The taxable profit then becomes €433 million and the tax €144.33 million. Compared to the original €1.4 million, that is 103 times more!

If we take into account the fact that this is cumulated over a three-year period, because here the subsidiary's activity is not hidden, and accompanied by a penalty of 80%, this is not a small amount of revenue (€779 million).

In his report "The Tax Hackers", MP Mounir Mahjoubi estimated the loss to public finances as being over €1 billion in 2018[4].

These are only some examples. Below is the state of play of what really happened.

- **(A)** In 2012, the tax authorities launched a series of tax audits of GAFAM. However, the procedures are lengthy and the first set of results were only obtained six years later. A friendly agreement was reached with Amazon in 2018 for €200 million[5]. In 2018, Apple accepted a proposed adjustment of €576 million to settle a ten-year tax dispute[6].

  Facebook also announced in August 2020 that it had reached a settlement with the tax authorities for €106 million in respect of taxes for the 2009-2018 period[7].

- **(B)** Generally speaking, GAFAM have not challenged the tax authorities' proposed adjustments before the courts, with the exception of Google, whose dispute resulted in a judicial public interest agreement[8].

  The authorities had tried to rectify the Google France entity by arguing that it constituted a permanent establishment of Google Ireland Limited in France. Indeed, the authorities further argued that the French teams were not content with merely providing assistance to the Irish subsidiary. Rather, although they did not conclude the contracts themselves, they actively participated in their conclusion, in particular by marketing the services of Google Ireland Limited to French customers.

  However, the arguments raised by the authorities did not convince the judges, who followed the strict application of the Franco-Irish tax treaty[9]. The latter provides that a permanent establishment exists when a dependent agent has the power to conclude contracts on a regular basis on behalf of the foreign company[10].

  According to this tax treaty, a permanent establishment also results from the existence of a group's own resources, such as premises or staff, enabling it to carry on an activity independently (fixed place of business). The authorities tried to rely on this alternative argument, but the judges refused to accept it. The adjustments made by the tax authorities were therefore annulled[11].

- **(C)** The criminal angle proved to be much more effective.
  With regard to the taxes for the 2011-2014 period, the tax authorities changed their strategy. In 2015, they filed a complaint with the National Financial Prosecutor's Office for tax fraud, aggravated tax fraud, money laundering and complicity in these offences. After investigations, the National Financial Prosecutor's Office concluded that Google

[4] *The Tax Hackers, analysis paper by Mounir Mahjoubi, p 10 – September 2019*
[5] *Lemonde.fr – Amazon announces that it has reached an amicable agreement with the French tax authorities, 5 February 2019*
[6] *Google France 2018 annual accounts*
[7] *Lemonde.fr – in France, a tax reassessment of 106 million euros for Facebook, 25 August 2020*
[8] *Public interest judicial agreement concluded between the Public Prosecutor of the Financial Republic on the one hand and SARL Google and Google on the other – 3 September 2019; https://www.agence-francaise-anticorruption.gouv.fr/fr/document/convention judiciaire-dinteret-public-cjip-conclue-entre-parquet-national-financier-et-societes-sarl*
[9] *Treaty between France and Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income signed in Paris on 21 March 1968, Article 2, 9, c*
[10] *Decision of 12 July 2017.*
[11] *CAA Paris, 25 April 2019, no. 17PA03065; CAA Paris, 25 April 2019, no. 17PA03066; CAA Paris, 25 April 2019, no. 17PA03067; CAA Paris, 25 April 2019, no. 17PA03068; CAA Paris, 25 April 2019, no. 17PA03069*

France was carrying out a genuine commercial activity that should consequently have been taxed in France.
As Google did not refuse the public prosecutor's findings, a judicial public interest agreement was signed in 2020 for a sum of almost €1 billion.

— **(D)** Nevertheless, the judge's conclusion of the existence of a permanent establishment may change in the light of the recent Valueclick (or Conversant) decision of the Conseil d'État of 11 December 2020[12].

The Google and Valueclick cases have similarities, yet the conclusions of the Conseil d'État are radically different from the decisions in the Google case.

Like Google, Valueclick engages in digital marketing, with the French entity responsible for searching for customers in return for payment. Contracts are also signed by the Irish subsidiary. Again, the Franco-Irish tax treaty applies to transactions between these two entities.

The authorities argued that Valueclick France was a permanent establishment of the Irish entity acting as a dependent agent with the power to conclude contracts on a regular basis. This should have led to taxation of the turnover attached to the French entity in France.

The Conseil d'État agreed with the tax authorities. It held that a French company acts as a dependent agent when, although it does not conclude contracts, it plays a vital role in their conclusion. This is the case where the entity selects the clients with whom the Irish subsidiary is to contract and undertakes all the tasks necessary to conclude these contracts, with the Irish subsidiary merely validating and signing them.

The context differs from the Google case since, in the meantime, the OECD has modified its definition of permanent establishment and now considers that the dependent agent is not the only one who concludes the contracts, but also the one who actively participates in their conclusion (OECD multilateral convention (MLI)).

The Conseil d'État has interpreted the Franco-Irish tax treaty in light of this new definition and of the previous (and subsequent) OECD commentaries, although it has not made this clear.

Some commentators have tried to downplay the effects of this decision. Nevertheless, they are considerable since all situations of automatic validation of contracts by the parent company – the subsidiary negotiating the bulk of the contracts with French advertisers – will constitute proof of the existence of a permanent establishment, regardless of the rate of rejection of these contracts by the parent company. Thus, in all cases where the transactions concluded with French customers are negotiated by the French subsidiary and are only endorsed by the parent company, these transactions likely give rise to the qualification of a permanent establishment. As the permanent establishment is an autonomous tax entity, one can only invite the tax authorities to adopt a classic transfer pricing approach to determine the taxable result, rather than simply proposing a lump-sum amount of charges. However, it can also discuss the deductibility of the royalty paid for the use of intangible assets, which could, if necessary, deprive the French permanent establishment of its taxable substance.

[12] *Conseil d'État, 3rd, 8th, 9th and 10th chambers, 11 December 2020, n°420174*

In this respect, the transfer pricing approach, focused on the subsidiary, seems to us to be much simpler and more efficient.

However, this Valueclick decision will only persuade GAFAM to adopt other tax strategies. With the MLI Convention and this decision, we can say that the French subsidiary model which (supposedly) simply supports the group, is totally out-dated.

2. LITIGATION AT EU LEVEL

The Commission tried to counteract the planning strategies of GAFAM by challenging tax rulings and, in particular, prior pricing agreements. The agreements concluded between a state's tax authority and a multinational company allow the latter to validate the pricing policy between entities of the same group and, consequently, to validate the way in which profit will be allocated.

In the absence of direct tax competency, the Commission cannot intervene in these matters. The only way for the Commission to do so is to challenge these agreements from a State aid perspective, assuming it can demonstrate that a State has granted a selective advantage that affects competition and trade between Member States.

However, this course of action has not yet been successful. The Commission had sanctioned the agreement between Ireland and Apple and demanded that Apple reimburse Ireland €13 billion in tax that the agreements had evaded. This decision was overturned by the General Court as the Commission had failed to demonstrate the selective nature of the advantage granted[13].

However, the European Commission has appealed to the Court of Justice of the European Union (CJEU) on the grounds that the judge made errors of law. It will be interesting to see the outcome of this appeal in order to get the opinion of the CJEU.

A similar case pitted the European Commission against Amazon and Luxembourg. However, this time, the European Commission challenged the prior agreement reached in 2003 between Amazon and Luxembourg on the treatment of intangible asset royalties. Again, the Commission argued that a selective advantage, contrary to the arm's length principle, had been granted to Amazon. The agreement allowed Amazon EU (Amazon's European headquarters) to pay 90% of its operating profits to Amazon Europe Technologies Holding SCS as intellectual property royalties even though the latter was not subject to tax in Luxembourg.

In a decision of 4 October 2017, the Commission ordered Amazon to reimburse the Duchy of Luxembourg for €250 million that it had evaded[14].

Amazon and the Duchy of Luxembourg filed an appeal against this decision. The CJEU has just concluded that there is no selective advantage and has therefore annulled the Commission's decision which had declared the aid incompatible with the internal market[15].

It should be noted that in Luxembourg, as the royalty was collected by a fiscally transparent Luxembourg company (SCS), this income could not be taxed in Luxembourg under Luxembourg tax law. This is a classic situation for tax transparent companies internationally. In this respect,

[14] European Commission press release State aid: Commission considers that Luxembourg granted illegal tax advantages to Amazon amounting to around €250 million - 4 October 2017

[15] EU Judgment 12-05-2021 aff. T-816/17 Luxembourg v Commission and T-318/18 Amazon EU Sàrl and Amazon.com, Inc./ 14 Commission

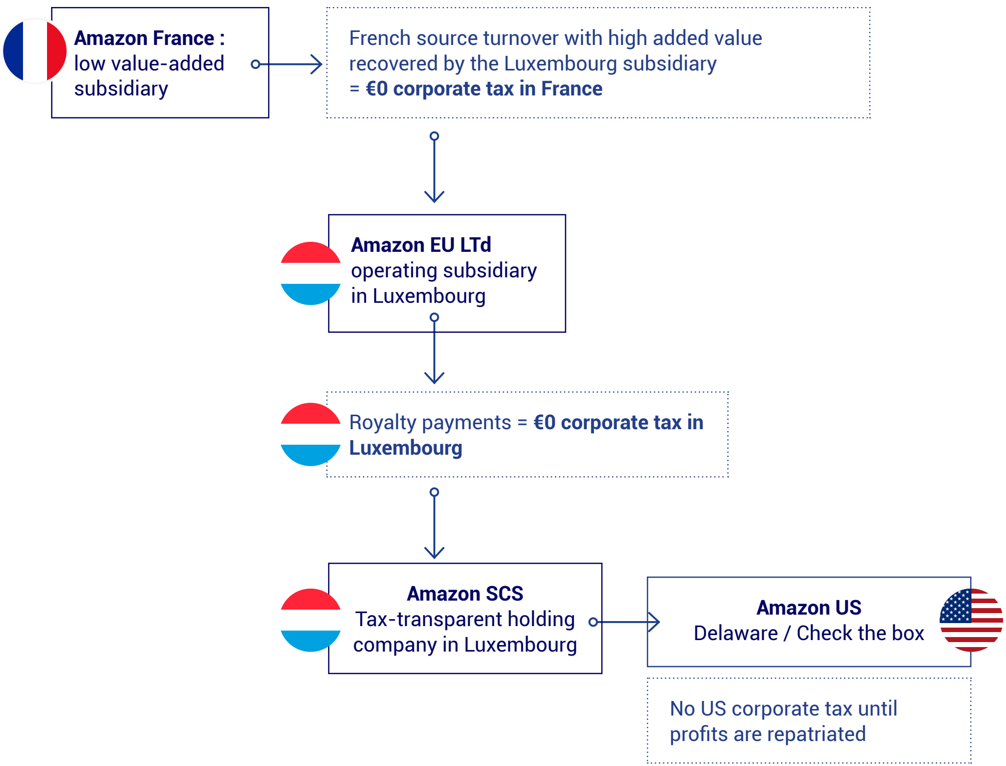
only France stands out with its concept of tax translucency whereby the existence of a foreign shareholder in a company results in corporate tax liability in France under the French structure. However, one cannot blame Luxembourg for applying its own tax concepts.

Through the American "check the box" tax principle and the choice of the "opaque company" option, the income of this company, which is not taxable in Luxembourg, is not taxed in the United States as long as it is not repatriated there. This is because, for the Americans, the Luxembourg SCS company is fiscally opaque (the form of the SCS makes this choice of opaque or transparent company possible).

In our opinion, it would have been more interesting to verify why and how it is possible to accept a royalty that takes 90% of the turnover of the leading Luxembourg company. Is accepting such a situation not in itself state aid? However, this was not the position of the General Court which validated the existence of such a considerable royalty by accepting that the profitability of the company bearing it should be tested, rather than relying on a benchmark of the royalty rate at the level of the company charging it.

As for the SCS, it would be useful to determine whether its substance allows for the recovery of such an amount of royalties and, above all, whether it should not pay back an almost equivalent amount to the United States (even if this payment would be made to the benefit of the American tax authorities, knowing that this type of arrangement is clearly not unfavourable to them, since sooner or later they will recover the taxation of these European revenues in the United States.) As in many areas, American interests are thus preserved to the detriment of European interests. One wonders if this conjunction of massive tax transfers to the benefit of GAFAM and also, ultimately, the American Treasury, is fortuitous.

Amazon tax optimisation scheme



In addition, there are two recent developments from the European Union:

- A European Parliament resolution of 29 April 2021 on digital economic taxation (idea of creating a European GAFA tax as a fall-back solution, while recalling the need for the creation of a virtual permanent establishment, the need to tax profits and not revenues, and urging the Union to continue negotiations with the OECD; notably because "the lockdowns in response to the Covid-19 pandemic have accelerated the transition to a digital services economy").
- A Commission Communication of 18 May 2021 on company taxation in the 21st century (the idea of unitary taxation with a common corporate tax base taking account of real economic activity). This would provide the framework for the taxation of European companies' income and an effective minimum tax. The Commission notes that companies engaged in digital activities tend to pay less tax than others and pay it in states where they do not necessarily operate. The Commission therefore proposes to include OECD Pillar 1 in an EU directive and to do the same for Pillar 2 and the minimum tax rate. The Commission will fight against artificial companies ("shell companies") and above all will propose the "BEFIT", a set of common tax rules both as regards the tax base and the flat-rate allocation of profits between States (thus replacing the "ACCIS" project).

Faced with the reactions of States, the OECD and the European Union, GAFAM have not remained immobile and have been forced to restructure.

B. RESTRUCTURING OF GAFA

These changes are visible in France (1), but were mainly influenced by the US tax reform which prompted GAFA to adapt their strategy, especially following the Irish tax reforms (2).

1. IN FRANCE

The various disputes seem to have had a real impact on the tax strategies of digital companies, although they have not completely abandoned their tax optimisation practices. However, they are changing their model because they are aware that the subsidiary which provides support services to the corporate group is no longer there and that behind it lies the formidable criminal weapon with which no one wants to take risks. The strategies therefore become more disparate: recognising the French subsidiary as a commercial distributor with limited profits; leaving real activities in France, but those with the least value, in a clumsy attempt to create substance in France (then tax and social charges are added together to present a significant overall amount, proof of participation in the financing of public charges); and drastically reducing the taxable profit by charging a royalty for the use of intangibles.

Nevertheless, the noose is tightening on these aggressive tax optimisation practices. However, the tax benefits gained over the last 15 years have already made all the difference. Time has passed and the dross of the tax adjustments suffered in Europe, and particularly in France, is the price to pay for keeping the essential part of the loot, which is then repatriated to the United States, where it is protected, through the American tax reform and to the joy of the IRS. While France was arguing with the US Treasury Secretary over the future tax on digital services, the perfect hold-up was carried out. Europe's taxes over the past 15 years, the taxes that should have been collected on the formidable digital saga and its exponential development, have made it possible to finance part of the US budget deficit, without Germany having any objections, as is often the case with the United States.

While the OECD has made constructive and exceptional inroads, under the determined leadership of Pascal Saint-Amans, to whom we pay a heartfelt tribute, it was the US under the Trump administration that once again blocked Pillar 1. The latter aims to allocate a share of the group's consolidated profits to market countries (such as France). While the new Biden administration has revived Pillar 2 with the idea of a global minimum tax rate of 21%, its attitude to Pillar 1 remains to be seen. As for France, it has been slow to seize the opportunity presented by this approach, perhaps lost in the shuffle. Perhaps it was lost in the nostalgia of its empire and saw itself as a country of "seats", unable to realise that the digital revolution led by foreign groups made France (at least to date) a purely consumerist country. Consumption has become the only engine of growth financed by the taxes of those who cannot, like GAFAM, evade them and by debt.

A "headquarters" country refers to the head offices of multinationals and means that value and intangibles are created in France. Luxury goods evidently come to mind here.

A market country, by contrast, is a country of consumers who consume products and services created by foreign corporate groups. The endemic deficit of our trade balance should certainly be a sign to determine France's place between these two concepts. In digital matters, it is clear that Qwant cannot compete with Google and that, apart from Criteo or Cdiscount, Blablacar or Doctolib, we lack national champions to assert ourselves as a country of "seats". On the contrary, the vast majority of French users consume services from American or Chinese groups. We are therefore, to date, a market country, even if this remains regrettable. It is therefore in our fiscal interest to implement policies aimed at attracting taxable material to countries of consumption, and to recognise the existence of local intangibles.

Alternatively, of course, since it is not possible to support everything and its opposite, it is also necessary to recognise the existence of local intangibles abroad, in China, India or Africa. In reality, however, this is not very serious for French groups since the tax paid outside France will no longer be paid in France and taxation abroad is often more favourable than taxation in France (corporate tax, plus CVAE, plus social contribution of 3.3%). Nevertheless, what the State risks losing in tax revenue vis-à-vis French groups (in luxury goods, for example), it will recover even more from foreign groups (including luxury goods for foreign brands, given the fundamental role of Paris in terms of marketplace image).

Ultimately, the recognition of the value created within local markets and by local users will allow France to capture the tax revenues that digital giants derive from our country. Revenues which, alongside the Covid crisis, continue to grow. It is therefore important to make the right decisions.

Pillar 2 represents a common cause for France and Germany, namely a minimum tax fixed for various States (at a rate that will not offend Ireland).

This is all well and good for a state such as Germany, which has companies that create added value (a headquarters state), because the aim of this type of state is to prevent the added value created locally from being sucked up by charges from states where they will be weakly taxed (by financial charges for example). It is more surprising for a market country, i.e. a country where foreign groups (digital, pharmaceutical) sell to our consumers, because in this case the aim is not to try to prevent the flight of the added value from the country (since it was not created there!) but rather to give our market a sufficiently fair return through local intangibles. In fiscal matters too, Franco-German cooperation risks being nothing but a mirage.

Without this "Copernican" revolution in our tax administration, without having the lucidity to realise that for the moment, before the start-up nation takes off, we are a country of consumers in the digital economy. All of our disorderly efforts to have the possibility of taxation recognised in France, when this possibility becomes a reality, ultimately risks leaving us with scraps to tax.

However, all is not lost; quite the contrary. The French digital ecosystem is of a quality that is the envy of the best and it is sometimes effective to arrive late in industrial revolutions. We missed the industrial revolution of coal and railways, and the Second Empire, as Pierre Milza explained, put us back on track. We can always set off again on the digital highways, our French players being helped by restored tax competition.

In any case, GAFAM have readapted to this new environment in France.

- **(A)** Regarding Facebook, Mark Zuckerberg stated in February 2020 that he was in favour of tax reform at the OECD level, even if this would lead to higher taxation[16].

  In France, as in other European countries, the social network has modified its sales structure so that the revenue generated by the French teams with major customers is attached to France.

  On reading the accounts, it is clear that the turnover has increased from 56 million to 747 million euros between 2017 and 2019. 670 million of the 747 million euros in turnover in 2019 came from activities in France[17].

  However, on the one hand, the increase in corporate income tax is much lower than that of turnover, as Facebook continues to impose heavy charges on profits relating to the payment of royalties to foreign entities in particular.

  Furthermore, the turnover declared by Facebook in France only concerns, according to its own statements, one part of its customers. It continues to be underestimated and would amount to 1.3 billion euros in 2019 instead of the 747 million euros declared. The amount of tax paid by the French subsidiary should therefore have been nearly 150 million euros[18].

- **(B)** For Netflix, the optimisation scheme was fairly typical. French subscribers were billed directly by the Dutch subsidiary Netflix International Holdings BV, to which the American parent company invoiced significant expenses, notably royalties, in order to reduce taxable profits (estimated at 71% of turnover).

  It should be noted that previously the Dutch company's profits were recycled to the Cayman Islands through a Dutch CV that collected the same fee. However, Netflix recently changed its tax optimisation scheme by setting up a subsidiary in France in November 2018.

  Indeed, Netflix did not seem to recognise the independent activity of the French structure, which only declared as turnover the income from the services it provided to the Dutch subsidiary. In 2018/2019, Netflix declared a turnover of 23 million euros in France and paid 479,411 euros in corporate tax.

  However, the turnover achieved in France is estimated at more than 800 million euros given the number of subscribers in France[19].

  In 2020, the French subsidiary increased its capital by 9 million euros and its corporate purpose was modified in order to reflect the sale, distribution and promotion of Netflix services[20]. Finally, Netflix announced that its French subscribers would contract with its French subsidiary from January 2021, i.e. that the turnover made in France would be declared in France[21].

- **(C)** In France, Amazon is the leader in e-commerce and its market share by value was estimated at 22.2% in 2019, which would represent almost 9 billion euros[22]. At the same time, Amazon declared only 1.3 billion euros in turnover and announced that

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[16] *Capital - Facebook's French subsidiary faces heavy tax penalties - Jamal Henni - August 27, 2020*
[17] *Facebook's 2019 annual accounts*
[18] *Capital - Heavy tax reassessment for Facebook's French subsidiary - Jamal Henni - August 27, 2020*
[19] *In the 2018/2019 financial year, Netflix had 6.7 million subscribers in France with a standard monthly subscription cost of 11.90 euros.*
[20] *Netflix services France SAS - acts of 08 February 2019, 30 September 2020, 24 June 2020. Netflix services France SAS - annual accounts 2018/2019*
[21] *https://www.capital.fr/entreprises-marches/netflix-va-enfin-declarer-au-fisc-francais-ses-revenus-en-france-1386810*
[22] *Kantar - e-commerce study 2019*

it had paid 230 million euros in tax in France, although it did not disclose the actual amount of corporate tax[23].

Amazon does not appear to have changed its tax optimisation scheme at this time.

Moreover, unlike other GAFAs, Amazon does not have a subsidiary in a tax haven outside the United States, the parent company being established in the state of Delaware, which benefits from advantageous tax conditions (in this case, it is the local tax of the state of establishment that is reduced by this location, but not the American federal tax). Amazon was therefore less affected by the US tax reform in this respect.

Amazon's policy, however, has been to domicile in France and to declare subsidiaries and an integrated tax group that generate the lowest added value (logistics or delivery type). This is an example of the substance left in France. Amazon may declare that it contributes 230 million euros to French public charges, but this group puts everything it can find in the way of tax or social charges into this amount, including, for example, the employer's contributions for its employees. Yet, this debate is actually about corporate tax and the CVAE...

On the other hand, the real lucrative activities such as Cloud (Amazon Web services; Video Streaming) have remained in Luxembourg and still benefit from the same tax optimisation scheme. Cloud and advertising are thus in Luxembourg and the profits can stay somewhere, between the US and Luxembourg. If one scratches under the surface, one finds Amazon's war chest, under the economically weak French subsidiaries (or rather behind them)!

En revanche les vraies activités lucratives comme le Cloud (Amazon Web services ; Streaming Vidéo) sont restées au Luxembourg et bénéficient toujours du même schéma d'optimisation fiscale. Le cloud et la publicité sont ainsi au Luxembourg. Et les profits peuvent ne rester nulle part, entre les États Unis et le Luxembourg. Sous les pavés la plage ; sous les filiales françaises économiquement faibles (ou plutôt derrière elles), le trésor de guerre d'Amazon !

— **(D)** Google had announced that it would cease to operate the "Double Irish" mechanism from 1 January 2020. This system had allowed it to create a non-resident Irish holding company established in Bermuda. The holding company held intellectual property rights from which it received substantial royalties from subsidiaries without paying tax in Bermuda because of its tax regime.

Since 31 December 2019, the intellectual property rights have been transferred to the United States.

As a result, royalties will no longer be paid to Bermuda but rather to the US subsidiary, which has had the effect of increasing the taxes paid in the US[24].

For France, this should not change much[25] in terms of structure, but it has changed the face of taxable profit and declared turnover. Indeed, the transfer pricing reassessment has radically changed these elements and the French subsidiary can no longer claim that it is a mere support for its parent company. It must declare income and turnover in relation to that achieved in France by Google, i.e. in proportion to this turnover and no longer in proportion to its costs alone (French employees and office rent... which

[23] *France culture - Interview with Frédéric Duval, Director general of Amazon France - 17 November 2020 https://www.franceculture.fr/economy/frederic-duval-dg-damazon-france-la-taxe-gafa-je-la-paie-but-je-preferais-une-taxe-au-niveau*
[24] *Alphabet - Annual Report 2020, p.88*
[25] *New Statesman - Why the end of Google's "Double Irish" tax avoidance will come with a nasty hangover - 3 January 2020*

is not the same thing in terms of amounts!).

For example, Google stated as of 31 December 2019: *"we have simplified our legal entity structure and are now licensing US intellectual property that was previously licensed through Bermuda, resulting in an increase in the share of our revenue earned in the US"*[26].

In France, the optimisation scheme does not seem to have changed, except that taxable profit is now higher. The turnover of the French subsidiary has thus increased to 411,016,300 euros. However, it only consists of the remuneration for services provided to the Irish subsidiary[27], but with a different calculation (such as an intermediary commission, proportional to turnover). The figure generated by France is therefore still not attached to the French subsidiary. According to estimates, Google holds 90% of the Internet search market. This was worth 2.5 billion euros in 2019, which would bring the turnover generated in France to 2.25 billion euros[28]. In addition, Google France has carried out a major capital increase, making it possible to deal with the issue of the deduction of its financial charges (the problem of undercapitalisation) and also that of employee participation (with a large amount of equity, employee participation is lower)[29].

- **(E)** Microsoft, which often escapes attention when the focus is on GAFA without the M. It has retained the original set-up which is devoid of substance and particularly aggressive, some would say 'arrogant', in tax terms.

  Using the same type of set-up as Google or Facebook in Ireland, Microsoft has stored its profits in Bermuda, via an Irish subsidiary, tax resident in Bermuda. Thus, last year in 2020, this Bermuda tax resident company recorded a profit of 315 billion dollars without paying a single euro of tax in Ireland, nor in Bermuda of course. Even though its substance is close to zero, as it is based in an Irish law firm[30].

  Restructurings are mostly seen outside our borders.

2. IMPACT OF THE ABOLITION OF THE "DOUBLE IRISH" AND US REFORM

Two external factors have jointly prompted GAFAM to restructure.

- **(A)** Firstly, following criticism from the European Union, the OECD and the United States, Ireland announced in 2014 that it would abolish the "Double Irish" mechanism, effective from 1 January 2020.

The abolition of this mechanism forced GAFAM to rethink their tax system.

- **(B)** The US tax reform "Tax Cuts and Jobs Acts", passed on 20 December 2017 under the presidency of Donald Trump, has also had a decisive influence on the tax strategies of US digital companies.
  In addition to a significant reduction in corporate taxes (the tax rate fell from 35% to 21% as of 1 January 2018), the reform also provided for a very advantageous flat tax

[26] *Google Annual Report 2020, p.88*
[27] *Google - Annual report 2019*
[28] *SRI report - e-advertising Observatory - Review 2019*
[29] *The letter A - Google settles its accounts with the French tax authorities and enriches its employees in the process - 22 May 2020; Google: employee profit-sharing jumps in 2019 - 26 August 2020*
[30] *https://www.theguardian.com/world/2021/jun/03/microsoft-irish-subsidiary-paid-zero-corporate-tax-on-220bnprofit-last-year*

on profits accumulated in tax havens and repatriated to the US. From 35% before the reform, tax rates were reduced to 15.5% for the repatriation of liquid assets and 8% for illiquid assets. This reform allowed the US to tax amounts that had escaped taxation in a number of states including France.

The amounts of money repatriated are substantial:

- At the end of 2017, Apple held $252 billion overseas that it had reportedly repatriated to the US and paid $38 billion in taxes in the process[31].
- By 2018, Google had repatriated 64 billion euros[32].
- In 2018, Netflix had repatriated a large part of the $484.9 million in profits held abroad and paid €32 million in taxes[33].

Tax reform has thus encouraged American digital companies to modify their tax optimisation schemes and to eliminate subsidiaries held in tax havens in order to create subsidiaries in the USA (Google, Netflix, Uber, etc.) [34].

The "Tax Cuts and Jobs Acts" also provided for two anti-tax avoidance measures: Global Intangible Law-Taxed Income (GILTI) and Base Erosion Anti-abuse Tax (BEAT).

The first scheme (GILTI) subjects US companies to an effective tax of at least 10% on profits from intangible income made outside the US by a company controlled by a US company, where the profits are found to be inadequately taxed in the foreign state where they are made.

The second scheme (BEAT) taxes US companies at a rate of 10% when they make payments to related foreign companies, where these payments erode the tax base of the US companies making them. This includes interest and royalty payments.

The aim of these schemes is to discourage US companies from relocating to tax-favoured states[35].

Alongside GAFAM, we must not overlook the presence of smaller players who are destined to grow (the NATUs and, more particularly, Netflix) but also the arrival of the Asian digital multinationals, better known by the acronym BATX (Baidu, Alibaba, Tencent and Xiaomi).

More specifically, BATXs' strategy is modelled on that of American companies and supports very strong Chinese ambitions.
China wants to become the world's leading economic power by 2030. Its economic growth depends on the development of the digital sector[36]. The government has set itself the goal of becoming the world leader in artificial intelligence by 2025 in order to dominate sectors such as the automobile (with the autonomous car) and the military industries[37].

BATX are an integral part of this strategy. These companies have emerged from the vacuum left by international digital companies that were unable to establish themselves in China due

[31] Le Monde - Apple to pay $38bn in US tax on overseas profits - 17 January 2018
[32] The Guardian - Google says it will no longer use 'Double Irish, Dutch sandwich' tax loophole - 1 January 2020 https://www.theguardian.com/world/2021/jun/03/microsoft-irish-subsidiary-paid-zero-corporate-tax-on-220bn-profit last-year
[33] Gentside - Netflix: the company's tricks to pay less tax in France - 13 January 2020; https://www. capital.fr/entreprises-marches/new-revelations-on-tax-optimisation-of-netflix-1371440
[34] Les Echos - US tax reform: who are the losers and winners - 4 February 2018
[35] Federal Register/Vol. 85, No. 197/Friday, October 9, 2020/Rules and Regulations
[36] Source: The Media Review BATX, Internet giants with thwarted ambitions - 7 March 2019
[37] Decision-makers magazine - BATX, under the empire of the Middle - 28 January 2019

to China's authoritarian protectionism.
The strengths of these companies lie in the size of the Chinese market, growth prospects of the market with a growing middle class in China, very flexible Chinese data protection legislation, and access to very large volumes of data to improve their AI algorithms.
For the moment, most of these companies are confined to local and regional markets, but they have a strong desire to expand which should not be overlooked. These companies should therefore not be left out of discussions on the taxation of digital companies. For the moment, their turnover and their position in the French market may seem weak, with the exception of Alibaba, but, in any case, they are destined to develop significantly. Indeed, among the 20 largest global internet players, nearly half are Chinese (Baidu, Alibaba, Tencent, Xiaomi).
Even in the ultra-US-dominated social media industry, one Chinese company has established itself as a market leader: TikTok. The success of this application has exploded in the face of the world in recent years. In 2019, TikTok was the second most downloaded app in the world, behind WhatsApp but ahead of Messenger, Facebook and Instagram, according to Sensor Tower, a traffic analysis company, and has more than one billion members.

Some figures:

	BAIDU	ALIBABA	TENCENT	XIAOMI
Activity	Search engine	e-commerce	Social networking Wechat and applications (e.g. Wepay)	Mobile phone manufacturer
Position in the market[38]	4th most visited site in the world	1st distributor worldwide	980 million users	
Market capitalisation by 2018[39]	87 billion dollars	488 billion dollars	530 billion dollars	50 billion dollars

This rise in Chinese digital power is an integral part of China's ambitions, with the development These companies have taken advantage of the market economy and the financing of Western stock exchanges while maintaining the rigidity of protectionist legislation. For example, Alibaba's listing through a holding company located in the Cayman Islands is based, for the shareholders, on the ownership of WFOE (wholly owned foreign enterprise) companies which only have results thanks to a simple contract with the VIE (variable interest entity) owned by Chinese founders and true owners of intangible assets and digital exploitation.

Although BATX have not implemented the same type of sophisticated tax schemes as American groups, there are holding companies in tax havens such as the Cayman Islands. Above all, digital technology has the ability to avoid having a local taxable presence, in particular through the absence of warehouses in France, which is the foundation of the recognition of a fixed place of business and thus of a possible permanent establishment.

Whatever the appropriate tax scheme, it is very likely that these practices will be to the detriment of French public finances.

[38] *France Culture - The expansion of BATX, the Chinese GAFAM - 16 September 2019*
[39] *Libération - BATX: the four Chinese web giants - 9 January 2018*

Let's take the example of Alibaba:

- This Chinese company, previously presented as one of the world's leading e-commerce companies, only has a business consulting activity in France. In its annual accounts, the Chinese e-commerce site only indicates that it carries out promotion and marketing activities in France on behalf of the Alibaba brand in order to "develop the brand and the community of users of Alibaba's e-commerce platforms".[40]
- In this respect, its turnover in France consists solely of the remuneration it receives from its parent company.
- At the same time, transactions carried out on the Alibaba website, whether for the sale of products or the provision of services, are invoiced directly by Alibaba's subsidiary in Singapore (where the corporate tax rate is 17%) and are therefore not included in the taxable income in France[41].

Tax optimisation is often confined to VAT issues and the potential circumvention of the application of French VAT in B2C relationships. In this respect, the e-commerce directive, by making platforms responsible for paying VAT, provides a welcome solution.

In this context, each at its own level - the OECD, the European Union, the States - has tried to regulate this economy and has worked to ensure that GAFAM and other digital giants are taxed where added value is also created.

[40] *Alibaba Annual Report 2018-2019, p.27*
[41] *Alibaba's Terms and Conditions of Sale*

PART 2
ATTEMPTS TO REGULATE DIGITAL COMPANIES

Numerous measures have been, or are being, developed to achieve fairer taxation of digital companies.

A. BY THE OECD

1. THE EVOLUTION OF THE DEFINITION OF 'PERMANENT ESTABLISHMENT': TOWARDS A NEW CONNECTING FACTOR AND DETERMINATION OF TAXABLE PROFIT

The OECD has started important work on this issue in order to set out principles for a fair distribution of taxation of digital companies between states in the wake of Action 1 of the BEPS (Base Erosion and Profit Shifting) project published in 2015[42]. The final report should be published at the end of the first half of 2021.

The project has two pillars:

— **(I) Pillar 1**

The objective of Pillar 1 is to share the taxation of profits made by digital companies between different states on the basis of a distribution key (nexus). However, the US has requested that these new standards apply to all companies.

After focusing on digital companies, the reform project concerns all companies that are in B2C relationships at the request of the United States. This approach should be supported. Even if digital technology is sometimes mysterious to governments or certain members of the tax authorities, it is only because this activity is constantly evolving and the business models of digital players are very different from one another. These activities have not yet reached economic maturity, as in other sectors. But in this respect, we have not established tax rules for pharmaceuticals, luxury goods, aeronautics, and agriculture. Not only is it a bad idea to venture down the road of tax rules applicable to each sector of activity; it is, above all, a dead end. The United States was therefore well-advised to ask that the reform underway at the OECD cover all activities.

Let us clear up the vagueness surrounding OECD reform in France: this is not an OECD-wide tax on GAFA. Rather, this is about redefining the way in which transfer prices, i.e. the prices of products and services exchanged within the same multinational group established in several States, are calculated.

[42] *Action 1 of the BEPS project - Meeting the digital challenge*

Through this transfer-pricing revolution, it becomes possible, by allocating to the country where the users or consumers are located, to increase the taxable profits that originate in these consumer countries, to redress the balance of the sharing of taxation of profits between states, to the benefit of the countries where the consumers are mostly located. This is good for emerging countries such as Africa, for example.

However, it is also good for France, because this is a country where growth is based on consumption alone, financed by debt and taxes through massive social transfers. Our trade balance is structurally in deficit. We have everything to gain from the OECD reform that gives us more profits to tax. Not wanting to achieve this would be demonstrating an acute blindness.

The other constructive approach is to change the connecting rule to the tax jurisdiction of a state. The sale of products or services to that State, where the users or consumers are located, will result in the taxation of part of the group's profits in that State, even if no permanent establishment has been declared there. This would put an end to the circumvention of the existence of a local permanent establishment or to the creation of a local tax presence through a subsidiary in order to develop simple support activities with low remuneration. It is therefore the economic presence in a State that is privileged without the need for a link i.e. a physical existence in that State. Remote, significant and lasting participation in the economy of a State will therefore constitute a new nexus rule which will make it possible to characterise the existence of a permanent establishment. It remains to be determined what the indicators of remote participation are, starting with local turnover.

The companies concerned will therefore also be, first and foremost, those whose turnover is partly or wholly generated by digital activities. Profits would thus also be taxed in the states in which the customers are located and not only in the states in which the targeted companies have their headquarters or in which the intellectual property rights are located.

To this end, the profit would be divided between:

- On the one hand, the routine profit taxed in the State where the company has its seat;

- On the other hand, the non-routine profit. The part of the profit considered to be made by users would be allocated to the countries in which the users are located according to the turnover in each of these countries.

This Pillar 1 approach corresponds in some ways to the profit split logic that we advocate for digital technology. It recognises the value of local intangibles. However, as the profit split is a complex technique to implement, this OECD approach has the merit of simplifying calculations and providing ground rules that can be the same for everyone.

(II) Pillar 2

Pillar 2, also known as the global anti-base erosion (Globe), aims to combat base erosion by creating a global minimum tax rate to discourage digital companies from shifting their profits to jurisdictions with zero or near-zero taxation.

For France, these measures should only concern a small number of companies as 100 multinationals have been identified.

Moreover, according to some estimates, only pillar 2 would really prove to be effective in terms of tax revenue, since it would enable France to gain 4.6 to 7 billion euros in taxes. Pillar 1 should only bring in 100 million euros[43]. However, these calculations do not seem reliable to us and must be updated according to the profit distribution rules of the relevant groups, once these rules have been clearly fixed.

With regard to Pillar 1, its effectiveness can only be measured in terms of the share of the consolidated result that is to be allocated to market countries. Since this share varies according to business sector, it will be necessary to determine what the share of digital activities should be. With regard to the richest companies in the world, whose market capitalisation is often equivalent to the GDP of certain States, it is conceivable that a large part of the consolidated profit could be allocated to the countries where the users are located and therefore, ultimately, to France. This would therefore increase our tax revenues by the same amount.

Let's face it, this is the right approach, unless we clearly extend the "profit split" practice to transfer pricing. Let us be wary of those who, defending the interests of American groups, argue that the State will lose out (by exchanging the profits of the digital sector, which are moved to France to be taxed there, with the profits of the luxury goods or aeronautics sectors, which are moved from France to abroad to be taxed there). The growing share of the digital sector in our country is a guarantee of significant additional tax revenues. As for the French sectors that serve as a guarantee that nothing will change, in many groups the profits are already made abroad and not in France. We therefore have nothing to lose and everything to gain. Those who argue to the contrary actually want "everything to change so that nothing changes...".

The impact of these measures is estimated at $100 billion for all OECD countries, most of which would result from the application of Pillar 2[44]. But these figures remain uncertain, since everything depends on the allocation of profits to market countries...

(III) New proposals from the Biden administration - April 2021

Very recently, at the G20 Finance Ministers' meeting on 7 April 2021, the new Biden administration seemed to favour Pillar 2 with a minimum tax rate set at 21% (the US rate is set to rise to 28% to finance the $2 trillion recovery plan). Nevertheless, this leaves open the question of the distribution of taxable income between states. These proposals from Treasury Secretary Janet Yellen have been welcomed by the EU, which however does not agree on the rate.

In this respect, the US proposals would aim to create a new global tax, different from the more complex Pillar 1 tax, based on the sales made by the largest and most profitable companies, whether or not they are in the digital sector. As such, it does not matter

[43] Source CPO The new rules of international corporate taxation: assessment of the economic effects for France June 2020, Conseil d'analyse économique - Note n°54 International corporate taxation: what reforms for what effects? November 2019
[44] OECD Tax challenges arising from the digitalization of the economy - update on the economic analysis and impact assessment - 12 February 2020

whether or not there is a local tax presence (permanent establishment or subsidiary). This is the logic behind Pillar 1.

This agreement aims to bring back around 100 billion dollars into state treasuries hit hard by the Covid-19 crisis and by the shutdown of the world economy.

Here is partially where we find the idea of a minimum global corporate tax put forward by the IMF and its chief economist, Gita Gopinath, or the idea of a global tax, as defended by Gabriel Zucman. In its French version, one could imagine a global CVAE.

The G7 meeting in London on 4 June 2021 took up the philosophy of the Biden proposals and that of Raphaël Zucman (global minimum tax) by proposing the establishment of a minimum tax of 15%. We should, however, beware of announcements that are not followed through. If less than 15% tax is paid in the states where GAFAM subsidiaries are located, the US Treasury will recover the difference, not France. The minimum tax for France will therefore primarily concern French groups. For example, a French group that sells yoghurt in Dubai where there is no tax will have to pay 15% to the French Treasury. But Apple will pay its 15% on profits from Bermuda to Joe Biden's America. There will be nothing for us. Is this the result we wanted when we took all these international steps and negotiations to tax GAFAM? Beware, therefore, of getting ahead of the game as this could lead to cruel disillusionment.

Furthermore, and this is the most important thing for France, by making the functioning Pillar 1 of the OECD's work more explicit, the G7 has taken a position on the allocation to market countries of 20% of profits above a profitability of 10% (profitability, i.e. profits divided by turnover). In concrete terms, this means that France, which is a market country for digital technology, could recover 20% of Apple's profitability in taxable income, for example, above 10%, but knowing that this 20% will be distributed in proportion to the turnover of the different market countries, between these same countries. This Pillar 1 approach is what can actually bring back the taxation of GAFAM profits to France. There is still a long way to go, however, to determine precisely whether all this work will result in significant tax revenues for France or not (since only 20% of the excess profitability is shared between all market countries). Will this represent the real added value created by French users at the end of all these calculations? But it is already a giant step forward and should be welcomed.

Following the G7 meeting, on Saturday 10 July 2021, the G20 Finance Ministers that met in Venice agreed to introduce a new international tax, based on a "global" tax at a rate of 15% (this is the OECD's Pillar 2 - with, however, the exclusion of income representing less than 5% of the depreciable value of tangible assets and the payroll) and on the reallocation of profits to market countries (this is Pillar 1) when the profitability of the multinational group concerned exceeds 10% of the turnover, with the objective, which is still under discussion, of reallocating 20% to 30% of the share of the profits exceeding this 10% threshold to market countries. France proposes a rate of 25%. At the same time, the European Union, which re-launched the idea of a digital tax just before the G20 to finance the 750 billion euro recovery plan, is being asked by the United States to forget about this idea. In the same way, the United States is asking for the abandonment of the various taxes on digital technology that have been unilaterally implemented by the States. It should be noted in passing that the G20 plan only concerns companies with a turnover of more than €750 million, i.e. around 10,000 companies to determine the threshold for the application of the 15% rate and €20 billion in turnover (!) for the application of pillar 1 (with a minimum turnover of €1 million in the market country or €250,000 for small countries with a GDP of less than €40 billion). This agreement was signed by 132 of the 139 members of the OECD working group which brings together advanced and emerging countries (Ireland remaining against with its 12.5% rate and above all its "ruling" policy, like Hungary).

Two comments:

On the one hand, this 15% rate remains low and could constitute an incentive for "tax dumping" in relation to countries that have higher rates, in particular to bail out public finances that have been damaged by the pandemic. The United States is planning to raise its internal rate to 28% and a rate of 21% for profits made outside the United States.

On the other hand, not all companies are concerned by this new international tax system and there is no reason for the French State to waive its share of taxes for international companies that fall below the application threshold. In particular, the 20 billion euro threshold of pillar 1 is particularly high and many multinationals are likely not to be concerned by these rules, even if GAFAMs will evidently be primarily concerned. The allocation to market countries is referred to by the OECD as “Amount A”. "Amount B" corresponds to the classic transfer pricing rules when a multinational is already active locally in the market country. This means that since GAFAMs already have a local presence in France, the application of one of our proposals, the "systematic profit split", would allow the French State to secure a significant share of tax revenues. There is no suggestion at this stage that this would be lower than Amount A. In other words, better taxing GAFAMs in France thanks to our domestic tax law is like a revenue insurance, in case the application of the new rules is less attractive than expected.

This is why, while waiting for the implementation of an international agreement, which always takes a long time to put in place and in order to prevent things from slipping through the cracks, the purely internal measures recommended in the report still seem just as necessary to us.

Finally, from a purely practical point of view, the implementation of this agreement with regard to pillar 1 will require a significant capacity for information gathering and data processing. Either this processing is carried out at State level alone via international administrative assistance or it is based on companies that have control over the data, with States then having the capacity to monitor. In any case, it will not be simple to identify and then distribute the different components of the formula that will be retained for pillar 1. Let's face it, each element will have to be identified (the share of the profit exceeding the 10% threshold, the share distributed to the market countries, the possible intervention of Amount B to locally reduce the Amount A reallocated and, above all, the share of turnover attributable to each market country (how will we know?).

In short, all these purely practical aspects aimed at reallocating and then imposing in each market country the share that is due to it will require resources, the invention and implementation of a specific process, which is likely to greatly delay the effectiveness of this measure (all this with the risk of backtracking due to changes in the majorities in the various countries concerned).

If we do nothing in domestic law, years will be lost. Domestic law and international agreements can work perfectly well together. The international dimension, or even at this stage the promise of an international dimension, should not prevent France from charting its course.

Will the counter-intuitive virtue of GAFA's aggressive tax optimisation ultimately advance global tax fairness?

2. THE EVOLUTION OF THE DEFINITION OF 'PERMANENT ESTABLISHMENT IN TAX TREATIES AND THE CONTRIBUTION OF THE SO-CALLED MLI CONVENTION

The OECD has changed the definition of permanent establishment through Action 7 of the BEPS project, as mentioned above. In addition to the qualification of the dependent agent, the OECD has also modified the exceptions to the existence of a fixed place of business.

The treaties generally include some exceptions for particular activities, such as the warehousing of goods for the purpose of storage, display, delivery and processing. These are considered to be incidental or ancillary. Following the changes introduced by Action 7, the assessment of the ancillary nature of these activities depends on the activity of the company. For example, the storage of goods by online sales companies would no longer be considered ancillary and could allow recognition of a permanent establishment in the State in which the storage warehouse is located.

These developments have been introduced in fifty bilateral tax treaties signed with France[45].

Unfortunately, the United States, the country from which tax optimisation by digital companies is now likely to take place, has not signed the agreement providing for these changes[46]. Furthermore, Ireland did not want to introduce the new definition of permanent establishment into the tax treaties to which it is a party. However, the Valueclick/Conversant[47] case mentioned above will settle this issue.

Most importantly, the MLI convention is a significant contribution. This treaty modifies the provisions of existing bilateral tax treaties, with each state choosing the provisions that suit it. In particular, it broadens the cases of recognition of a permanent establishment, following the approach of French case law with the "Valueclick" decision.

Ireland, for example, has been careful not to include the provisions on taxable presence through a permanent establishment.

[45] Number of bilateral tax treaties updated as of 1 January 2021
[46] Multilateral Convention on the Implementation of Tax Treaty Measures to Prevent BEPS, adopted on 24 November 2016
[47] Conseil d'État, 3rd, 8th, 9th and 10th chambers, 11 December 2020, n°420174

It should be noted, however, that two minimum standards are imposed on all signatory states (including Ireland). Firstly, with regard to the purpose of the conventions and, secondly, with regard to the circumstances in which the benefits of these conventions may be set aside.

In other words, this means that tax shopping is prohibited (i.e. setting up in a State to benefit from its treaty provisions) and that, on the other hand, a treaty advantage may be denied when the main purpose of the arrangement is precisely to obtain it.

French case law had already decided that a tax treaty (with Luxembourg) could be set aside when the purpose of using a company located in the other State was exclusively fiscal (notion of abuse of law). Here, with the MLI, a mainly fiscal purpose is sufficient, which allows this exception to be applied in a much broader way.

Thus, in the presence of an artificial arrangement aimed at using the advantages of a tax treaty to avoid taxation of income in France, as we suspected in 2017, the French administrative courts should be able to disregard the use of treaties and the definition, if any, of permanent establishment to consider that under domestic law, in particular with the concept of a complete business cycle, a foreign company carries on a taxable activity in France, without the treaty provisions being an obstacle. Another option for the administration, by disregarding these treaty provisions, is to apply the withholding tax under Article 182 B of the French General Tax Code of 26.5% in 2021 (the corporate tax rate) on sums paid by French customers in remuneration for services used in France (typically sums paid by French advertisers). This axis would be potentially punitive for French advertisers as they would bear the tax adjustment, without necessarily having the possibility to re-invoice it to the GAFA concerned.

In any case, the MLI provides real avenues for repatriating taxable material to France.

B. WITHIN THE EUROPEAN UNION

The European Union has addressed digital companies through the GAFA package (1) and, more specifically, VAT in e-commerce through the e-commerce directive (2).

1. THE GAFA PACKAGE

On 21 March 2018, the European Union attempted to achieve better taxation of digital companies via a GAFA package on digital taxation. The latter consisted of two proposed directives and a recommendation.

- **(A)** The first proposal for a directive aims to ensure that profits are recorded and taxed in Member States where companies have significant interaction with users.

- **(B)** The second proposal for a directive is based on OECD recommendations and attempts to create a temporary European digital services tax amounting to 3% of turnover.

  It would target certain digital activities: sales of personal data, sales of online advertising space to certain users based on the data they provide, services that enable interactions between users and facilitate the sale of goods and services between them.

This tax would be based on turnover at the level of each State and the tax would be due in each Member State where the users are located.

The Digital Services Tax would only apply to a limited number of companies, since it would only affect companies with an annual worldwide turnover of more than EUR 750 million and EUR 50 million of which is taxable in the European Union. In practice, this measure should affect 120 to 150 companies, half of which are American. At the European level, the revenue from this tax is estimated at 5 billion euros, including 500 million euros for France .

Despite the Commission's good intentions, the Digital Services Tax raises a number of questions. First of all, this tax is based on the turnover created by digital companies and not on their profits. It therefore does not take into account losses.

Secondly, there is a risk of cascading taxation along the entire value chain.

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- **(C)** Finally, the GAFA package contains a recommendation to encourage Member States to develop the concept of establishment in their tax treaties to include the concept of significant digital presence. Accordingly, a permanent establishment would be recognised in a Member State "where there is a significant digital presence through which a company carries on all or part of its business". The European Commission is adopting a proposal that was once made by the OECD, but which was ultimately abandoned.

  The Commission's proposal defines what can be qualified as a significant digital presence and which would result from: (i) a turnover from the provision of services exceeding 7,000,000 euros, (ii) the existence of more than 100,000 users of those services in a State or, (iii) a number of commercial contracts concerned with those services exceeding 3,000.

[48] *Commission européenne – Document de travail des services de la Commission, résumé de l'analyse d'impact accompagnant le document : proposition de directive du Conseil établissant les règles d'imposition des sociétés ayant une présence numérique significative – 21 mars 2018*

Once again, consensus among Member States is difficult to find.

Not all countries are in favour of implementing a tax on digital services, either because some countries such as Germany have given in to the threat of economic retaliation from the US or because others such as Sweden, Finland and Denmark prefer to wait for proposals from the OECD[49].

However, in the absence of an agreement at OECD level, Member States will have no choice but to come to an agreement[50].

2. THE E-COMMERCE DIRECTIVE

The Commission has also issued a directive to reform the VAT regime on distance selling.

VAT is not immune to the difficulties posed by the digital economy and, more specifically, by e-commerce. In France, it appears that a large number of foreign sellers on e-commerce platforms do not pay VAT in France and are not registered in France[51].

In France, the loss of revenue is estimated at 15 to 20 billion euros[52].

In principle, businesses carrying out distance sales to non-taxable persons must pay VAT in France either because the amount of sales in France exceeds the threshold of EUR 35,000 (for intra-Community distance sales) or because they import goods into France from non-EU countries[53].

Sellers put forward various arguments to "justify" their failures:

- VAT registration must be carried out in each Member State.
- Since VAT is due in the country of destination from the first transaction that crosses the €35,000 threshold, this obligation requires daily monitoring of the turnover per country. Moreover, the threshold differs from country to country.
- Tax representatives are reluctant to represent companies whose disclosures they cannot verify.

In order to circumvent the registration and declaration requirements, foreign sellers resort to various techniques, such as sending the products as samples or gifts, or declaring a customs value of less than 22 euros in order to benefit from the VAT exemption.

On 5 December 2017 the European Council adopted the e-commerce VAT package comprising the VAT Directive and two regulations. This package aims to modernise the VAT rules for e-commerce. The provisions will enter into force on 1 July 2021.

The reform should go some way to solving the following difficulties:

- E-commerce platforms are considered liable for VAT on distance sales below EUR 150. The 150 threshold will be abolished as of 2022 for imports. Platforms will be

[49] *Articles 258 A and 258 B of the General Tax Code*
[50] *Reuters - EU: Nordic countries opposed to GAFA tax - 1 June 2018 ; Le Point - Digital tax: France and Ireland move closer - 27 February 2019 ; Le Monde Between Europe and the American GAFAs, the points of tension are numerous - 16 July 2020*
[51] *France inter - le 7/9 - 9 November 2020*
[52] *In its November 2019 report, IGP states that of the 24,459 sellers controlled by the SNEF and operating on e-commerce platforms, only 538 were in order*
[53] *IGF - Securing VAT recovery - November 2019*

liable for VAT regardless of the amount of the sale for imported goods.

- The threshold of €22 below which transactions were exempt from VAT is abolished;
- The threshold of €35,000 above which VAT on distance sales must be paid in the country of destination has been lowered to €10,000;

This reform should help to reduce VAT fraud on e-commerce platforms. Nevertheless, platforms will no longer be liable for VAT on distance selling from EU countries for amounts exceeding 150 euros. Fraudulent practices could therefore continue for these transactions.

In addition, these new provisions should make it possible to recover 7 billion euros in revenue out of the 15-20 billion euros in shortfall.

C. MEASURES TAKEN AT NATIONAL LEVEL

France is not alone in trying to recover the financial windfall that should, in principle, go into state treasuries.
Alongside France (1), other countries such as Italy (2), Australia (3), India (4), the United Kingdom (5), Israel (6) and Nigeria (7) have introduced local (and sometimes innovative) tax measures in order to put an end to the tax optimisation schemes practised by digital companies.

1. FRANCE

— **(A)** The creation of a tax on the physical and online distribution of audio-visual content, known as the 'Youtube' tax, which came into force in September 2017, aims to restore a balance between, on the one hand, sales and rentals of videograms, including video-on-demand platforms intended for private use by the public and, on the other hand, free video distribution platforms. The former were subject to the tax on video sales and rentals, while the latter were not.

This 2% tax is applied on revenues earned in France, whether the persons are established in France or abroad[54]. In the 2020 budget, its rate rose to 5.15%.

Although a rebalancing is welcome, this tax remains above all symbolic. It only concerns the limited sector of video platforms, which leads to very limited effectiveness in terms of revenue. In 2018, the tax brought in 25.7 million euros[55].

In 2020, its yield was expected to reach 66 million euros, of which almost 10 million will be contributed by free video services (mainly YouTube) and around 35 million euros by foreign video-on-demand (VOD) services (mainly Netflix)[56].

— **(B)** More recently, the digital services tax was introduced in France. This tax responds to a need for greater tax fairness since, thanks to their tax optimisation strategy, the GAFA tax rate is only 9.5%, whereas it is 23.5% on average for European SMEs[57].

This temporary tax came into force on 1 January 2019[58].

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[54] *Law n° 2016-1918 of 29 December 2016 for amending finances for 2016, Art. 56; Article 1609 sexdecies B of the CGI*
[55] *Senate legislative report - Finance bill for 2020: media, books and cultural industry, 21 November 2019*
[56] *https://www.lalettrea.fr/medias_audiovisuel/2019/12/06/le-cnc-veut-remettre-a-plat-ses-sources-de funding,108385130-evl*
[57] *Bill creating a tax on digital services and modifying the trajectory of the decrease in corporate tax, report review - 15 May 2019*
[58] *Law No. 2019-759 of 24 July 2019 creating a tax on digital services and modifying the trajectory of the decrease in corporate tax, Art. 1*

It will be replaced by the tax created at EU level or any other mechanism provided by the OECD.

The digital services tax covers certain digital services. These include:

- The provision of advertising targeting services based on Internet users' data;
- The provision of a service for bringing Internet users together, whether or not this service enables these Internet users to carry out transactions directly with each other;
- The sale of data that has been collected on the internet for the purpose of advertising targeting.

The tax rate is 3% of turnover.

It is limited to companies with a worldwide turnover of more than 750 million euros and a turnover in France of more than 25 million euros[59]. Given these thresholds, only 26 companies would be subject to this tax for an estimated revenue of 500 million euros per year[60].

This tax provides a partial and incomplete response to a real issue: the taxation of GAFAM profits.
Indeed, it taxes turnover, which VAT already does very well.

Turnover, as already stated above and contrary to the belief of many commentators, is not profit. One can have a large turnover and still make a loss, which is one of the major pitfalls of this new tax.

This tax affects all digital players, regardless of whether they pay full tax or avoid it. Some groups are therefore subject to double taxation. As such, no mechanism for correcting this double taxation is provided for, for example via an imputation of the corporate tax paid or the reverse.

This tax concerns 26 companies in France, with only a single hidden treasure, Critéo (2,700 employees and $960 million in turnover), which already pays corporation tax in France. There are also actors with a French origin, such as Leboncoin, Meetic and Priceminister.

Finally, at 3% of turnover, this tax weighs heavily and unnecessarily on groups with low profitability. A group with an operating margin of 3% of its turnover would thus see the tax take away its entire margin. There is no mechanism to take account of low margins and to only tax from a certain minimum level of profitability. This tax thus strongly resembles a recycling of the "YouTube" tax proposed long ago by Senator Marini. However, it remains a false good idea, even if it has the advantage of giving a strong political signal (something is finally being done).

Above all, no mechanism to correct its imperfections or its perverse effects has been retained, by the government and, ultimately, by the legislator, despite our efforts in this direction, particularly with Mrs Frédérique Dumas, MP, a measure that the British legislator has succeeded in putting in place, for example. In this respect, we do not believe that correcting the main perverse effects (double taxation and taxation of loss-making or unprofitable companies) would have entailed the risk of assimilating the tax to corporate tax and thus the risk of contravening international tax conventions. This tax is not covered by the treaties in question and is purely

[59] Article 299 of the CGI
[60] The first instalments were paid in November 2019 and raised €350 million. The tax had been suspended pending an agreement between OECD members on the proposed digital business tax. However, negotiations were unsuccessful and the tax came back into force in December 2020.

a matter of domestic law with its own application procedures.

In response to the introduction of this tax, GAFAM have planned to pass on its cost in the price of services charged to developers, advertisers or third-party sellers. Google has therefore announced a 3% increase in rates for developers[61], Amazon has increased the rates charged to sellers in its marketplace by 3% from 1 October 2019[62] and Apple is passing on this tax in its Apple Stores.

For their part, the United States has also threatened to increase customs duties on French flagship products such as wine, cosmetics or luxury goods, to an amount of 2.4 billion dollars[63].

The French digital services tax faces the same pitfalls as the Digital Services Tax discussed above.

Other countries have also tried using different ways to tax GAFAM and digital companies more generally.

Some countries have followed France's lead and also introduced a tax on digital services.

In the **UK**, the Digital Services Tax came into force in April 2020[64].

It covers revenues from search engines, social media and e-commerce platforms that derive their value from users located in the UK.

It applies to legal entities with a worldwide turnover of more than £500 million and a turnover from UK users of more than £25 million. There is a reduction in the tax where one of the users of a transaction is located in a country with a similar tax.

The tax is 2% on the revenues mentioned above.

The tax is expected to raise £1.5 billion over 5 years.

The tax on digital services is retained despite US pressure, but includes measures to manage its perverse effects, notably a profitability cap.
The texts provide for a £25 million allowance leading to the first £25 million of income from digital services being exempt from the tax on digital services.

In addition, low-margin or loss-making businesses may choose to use as their tax base for each of their digital service activities:

- Either the activity's own net income;
- Or, the operating margin of the activity. If the operating margin is zero or negative, the tax on digital services payable will be zero for that activity[65].

Italy adopted a tax on digital services which came into force on 1 January 2020[66].

[61] *https://developer.apple.com/news/?id=oyy56t2r*
[62] *https://www.silicon.fr/taxe-numerique-la-france-lappliquera-en-2020-339803.html#*
[63] *Source News Factory 9 July 2020*
[64] *HMRC - Communication Digital Services Tax - 11 March 2020 https://www.gov.uk/government/publications/introduction of-the-digital-services-tax/digital-services-tax; HM Treasury Budget 2018 Digital services tax*
[65] *HMRC internal manual - Digital Services Tax manual - DST43410, Alternative charge calculation, 13 April 2021*
[66] *OECD: Tax challenges raised by the digitisation of the economy - interim report 2018, p.161 and 162 La legge di bilancio 2020 (L. 160/2019).*

The tax relates to services provided via the internet or an electronic network to customers who are Italian resident and which would not have existed in the absence of information technology.

This applies to companies with a worldwide turnover of more than EUR 750 million and a turnover from digital services in Italy of more than EUR 5.5 million.

The tax rate is 3% on revenues net of VAT.

The expected revenue is €600 million in a full year in 2020 and 2021.

Austria introduced a temporary digital services tax of 5% as of 1 January 2020. This tax is levied on revenue from online advertising services provided in Austria. The companies concerned are those with a worldwide turnover of more than EUR 750 million and a turnover from online supply in Austria of more than EUR 25 million[67].

In **Spain**, a tax on digital services also came into force on 16 January 2021.

The tax covers online advertising, intermediation and data transmission services.

The tax affects companies with a worldwide turnover of more than 750 million and a turnover from users located in Spanish territory of more than 3 million euros. Users of digital services must be located in Spain.

Kenya introduced a 1.5% digital services tax in January 2021 based on the revenue of digital services or, in the case of marketplaces, on the commission paid to the marketplace for the use of its platform where the users of those services are established in Kenya. The tax is payable by resident and non-resident service providers. The tax is expected to raise $45 million in revenue for the Kenyan government by June 2021[68].

Tunisia has introduced a 3% tax on the sale of software and digital services provided by non-resident companies as part of the Finance Law for 202n[69].

Turkey has introduced a 7.5% tax on digital services, which can be reduced to 1% by the President and is applicable from 1 March 2020. The tax targets revenue from online advertising, the sale of digital content such as videos or games, and revenue from online platforms. Companies liable for this tax are those with a worldwide turnover of more than 750 million euros and more than 2.3 million euros in Turkeyn[70].

Other countries such as Israel[71] and Poland[72] are considering introducing such a tax. Poland plans to introduce an "advertising contribution", which would come into force on 1 July 2021 and whose rate would vary from 2% to 15%[73]. Israel is considering strengthening the existing notion of virtual permanent establishment by creating a tax on digital services inspired by the French model[74].

[67] Austrian Digital Tax Act 2020, Federal Law Gazette I № 91/2019 (DiStG 2020) and ordinance DiStG 2020-UmsetzungsV, Federal Law Gazette II № 378/2019. https://www.bmf.gv.at/en/topics/taxation/digital-tax-act.html
[68] Finance Act 2020 No. 8 of 2020, Part II, 12E, https://www.kra.go.ke/en/helping-tax-payers/faqs/digital-service-tax-dst
[69] https://www.orbitax.com/news/archive.php/Tunisia-Finance-Law-for-2020-A-40494
[70] Law number 7194 "Digital Services Tax and Amendment of Certain Laws and the Decree Law numbered 375" published in the Official Gazette of Turkey on 7 December 2019 under number 30971
[71] Wolters Kluwer Israel - Multinationals To Be Taxed In The "Next Months" - January 9, 2019; Globes - Israel Google, Facebook could face huge Israel tax bill - April 28, 2019
[72 / 73] https://wts.com/global/publishing-article/20210205-polish-digital-services-tax~publishing-article?language=en
[74] https://www.orbitax.com/news/archive.php/Israel-Considering-Digital-Ser-37668

2. ITALY

- **(A)** Italy has changed its definition of permanent establishment via the 2018 Finance Act[75].

  The existence of a permanent establishment is presumed where there is a significant and continuous economic presence in the territory of the State and where that presence is constructed in such a way that it does not create any physical presence in the territory of the State.

  According to Italian doctrine, this extension is not incompatible with the tax treaties signed by Italy insofar as it does not aim to create a new case of recognition of a permanent establishment, but only constitutes an anti-abuse mechanism[76]. The Italian Senate adds that the purpose of this provision is to prevent taxpayers from setting up schemes that prevent the qualification of a permanent establishment[77].

- **(B)** Furthermore, Italy introduced an optional enhanced cooperation procedure in 2017. Digital companies can opt for this procedure, which aims to allow collaboration between companies and the tax administration in order to, on the one hand, determine the amount of tax due by these companies in Italy and, on the other hand, avoid litigation and the associated criminal/fiscal penalties.

This applies to companies belonging to multinational groups with worldwide consolidated revenues of more than EUR 1 billion and sales of goods or services in Italy of more than EUR 50 million per year.

3. AUSTRIA

Australia has introduced the Multinational Anti-Avoidance Law 2015 which came into force on 1 January 2016[78].

The aim is to prevent multinational companies from structuring themselves in such a way that they escape Australian corporate tax while still achieving a significant turnover in Australia. This legislation does not specifically target digital companies, but they are nonetheless affected.

The scheme applies where:

- The foreign entity supplies goods or services to an Australian consumer;
- An Australian entity is associated with, or commercially dependent on, the foreign entity and carries out an activity directly related to the supply of those goods or services;
- All or part of the income derived by the foreign entity from the activity in Australia is not attributable to a permanent establishment in Australia;
- One of the main purposes of the chosen structuring is to achieve a tax gain under Australian common law.

In this case, it is intended that the entire business is conducted in Australia as if the company had a permanent establishment.

[75] Law No 205 of 27 December 2017, Amendment of Article 162 §2, f bis TUIR by the Finance Law for 2018 Bloomberg tax Italy - INSIGHT/ Tax Assessment of Deemed PE in Italy-Management of Reputational Risk - 24 December 2019;
[76] Order of Chartered Accountants and Accounting Experts of Rome, New definition of permanent establishment in the Tuir, 8 November 2018
[77] Art. 1er bis, Decree-Law. 24 April 2017, no. 50. Urgent provisions on financial matters, initiatives in favour of territorial entities, further interventions for areas affected by seismic events and measures for development. It was amended and ratified by Law 96/2017.
[78] https://www.legislation.gov.au/Details/C2015A00170

This has prompted some multinationals to comply (44 as of 30 June 2018).

This resulted in A$7 billion (4.2 billion euros) of turnover being added back into the Australian tax base, not including the VAT implications[79].

This Australian example perfectly demonstrates the usefulness and effectiveness of introducing an abuse tax in France, as we propose.

4. INDIA

- **(A)** India introduced an Equalisation Levy on income derived from online advertising and related services by non-residents at a rate of 6% in 2016. Since 1 April 2020, the scope of this tax has been extended and applies at a rate of 2% to the online sale of any goods or the provision of any services by or through a non-resident e-commerce operator[80].

- **(B)** India has opted for the introduction of a withholding tax which came into force on 1 October 2020.

  The withholding tax is 1% on the gross amount of the sale of goods or services facilitated by digital and electronic facilities or platforms.

- **(C)** Additionally, India introduced the concept of "significant economic presence" in 2018, the implementation of which was postponed to 1 April 2022 by the Finance Act 2020. The application thresholds have just been published by the Ministry of Finance[81].

5. THE UNITED KINGDOM

A tax on diverted profits ("Diverted profit tax") was introduced in 2015. The current rate of 25% will be increased to 31% from 1 April 2023 as a result of the increase in the rate of corporation tax from 19% to 25%, in order to maintain a dissuasive differential to discourage profit diversion in the UK. In addition, the UK has created a tax disclosure procedure for diverted profits which came into force on 10 January 2019.

This procedure is intended to encourage multinationals to approach the UK tax authorities with a view to making tax arrangements. Companies also avoid a 30% late payment penalty in addition to the Diverted Profit Tax and avoid criminal prosecution[82].

6. ISRAEL

Israel introduced the significant economic presence test in 2016 for online services provided remotely to local users by companies not resident in Israel. The Circular[83] introducing this criterion provides the elements for considering that a foreign company has a significant digital presence in Israel, such as:

- A large number of Internet service contracts with Israeli residents;
- A large number of Israeli customers use the digital service;
- The online service is tailored to Israeli users (e.g. use of Hebrew language, style, use

[79] Senate - Comparative Legislation Study No. 288 - Collection of summary notes from March to June 2019 - 2 July 2019
[80] https://www.bdo.global/en-gb/microsites/tax-newsletters/corporate-tax-news/issue-55-june-2020/india-taxing-the digital-economy-indian-equalisation-levy-2-0
[81] https://www.incometaxindia.gov.in/communications/notification/notification_41_2021.pdf
[82] HMRC - Guidance Profit Diversion Compliance Facility Published 10 January 2019
Bloomberg tax - U.K. Companies Can Avoid 'Google Tax' Penalties Under New Program – 10 janvier 2019
[83] Administrative Circular N° 04/2016 of 11 April 2016

of Israeli currency, etc.);

- High web traffic by Israeli users. Close correlation between the consideration paid to the foreign company and the level of internet usage by Israeli users.

This criterion applies in the absence of a double tax treaty.
The administration's Circular has no legislative value, but it gives the administration's interpretation of this issue[84].

7. NIGERIA

Le projet de loi de finances pour 2020, qui a introduit le principe de la présence économique The Finance Bill 2020, which introduced the principle of significant economic presence (SEP) in the tax base of non-resident companies operating in the digital services and e-commerce sectors, has been enacted. On 29 May 2020, the Nigerian Ministry of Finance issued a legislative order, applicable retrospectively from 3 February 2020, defining and implementing the concept of SEP. According to the order, a non-resident company will have a significant economic presence in Nigeria if it has a gross turnover or revenue of more than NGN25 million ($64.5K) from four types of digital activities:

- The provision of streaming or downloading services of digital content to persons residing in Nigeria;
- The transmission of data collected on the activities of Nigerian users on a digital interface (websites or applications);
- The provision of goods and services directly or indirectly through a digital platform; or
- The use of a Nigerian domain name or URL registered in Nigeria, or if it has a "targeted and sustained interaction with people in Nigeria by customising its page or digital platform" for the Nigerian market.

The order will not apply to companies based in countries with which Nigeria has a tax treaty.

[84] *https://tax.thomsonreuters.com/blog/israel-preparing-digital-services-tax-modelled-off-pending-french-proposal/*

PART 3
PROPOSED SOLUTIONS

The table below is illustrative. An extraordinary market capitalisation, considerable turnover, substantial profits and effective tax rates that remain very low despite a growing tax presence in the US.

	GOOGLE[85]	AMAZON[86]	FACEBOOK[87]	APPLE[88]	TOTAL
Market capitalisation 2020 (billions EUR)[89]	978	1348	778	1861	4965
Turnover 2020 (billions EUR)	151	318	71	227	767
Profits 2020 (billions EUR)	33	18	24	47	122
Effective tax rate 2020	16.2%	11.8%	12%	14.4%	

Our solutions do not differ from those proposed in 2017, because at this stage of the deadlock of the international bodies, the EU and the OECD, there are solutions for France that it can implement independently.

We have the capacity to take our destiny into our own hands on this subject and on the fiscal level. Were we not able to implement the GDPR?

When discussing taxation with politicians or members of the administration, they seem to be struck by a mysterious paralysis.

If you listened to them, everything would depend on international bodies, Europe, the OECD. The only thing missing is the UN.

Yet our ever-growing General Tax Code was not drafted with the prior approval of these bodies. It contains a multitude of international tax provisions and anti-abuse clauses. And all of a sudden, we have lost all capacity to act, all fiscal sovereignty in the digital field?

Indeed, we have been able to tax digital services and France is willing to accept this provision. France has fallen out with the United States. But the quarrel with America was precisely the reason put forward for not taking any other measure independently, for example, to reject the concept of virtual permanent establishment. For this reason, but also in line with previous decisions, the risk of contravening the conventions was put forward.

[85] *Google 2020 Annual Report*
[86] *https://ir.aboutamazon.com/news-release/news-release-details/2021/Amazon.com-Announces-Fourth-Quarter-Results/*
[87] *Facebook communication - results year 2020*
[88] *Apple annual report*
[89] *Nasdaq and companiesmarketcap.com*

However, when France wishes, it introduces, during treaty renegotiations, the purely French clauses that the legislator has voted on (such as the under-capitalisation type under Article 212 of the CGI or the taxation of profits made outside France under Article 209 B of the general tax code). These domestic provisions, which are contrary to the tax treaties, have been introduced in all the treaties renegotiated by France. With time, they are therefore fully applicable. Since our September 2017 report, we have already lost three years of treaty renegotiations.

Let us shake up conservatism and, despite the evolution of the Fifth Republic, give Parliament a real role and real freedom in this area. For once, let us not let Bercy write the tax law alone. Let us take up Jean-François Copé's intelligent concept of legislative co-production.

France can vote and apply our proposals very quickly. They will have an immediate effect.

All it takes is the will to do so.

These proposals are articulated in a triptych.

SOLUTION 1: THE VIRTUAL PERMANENT ESTABLISHMENT

As we proposed in 2017, this is about providing our domestic law with modern provisions that allow us to grasp the reality of the digital economy.

The concept of permanent establishment first appeared in Prussian tax legislation in 1885 and was taken up by the League of Nations in 1925. It is based on the idea of a physical presence in a State. It is therefore a 19th century concept and appeared at a time when dematerialisation did not exist.

Digital technology, when deployed in France by a server located outside of France, by means of a site located outside of France, held by an entity located outside of France, reaches French users or customers, without any physical presence of any kind in France. This concept of virtual permanent establishment is taken up by the latest European Parliament resolution of 29 April 2021 (see page 17).

The economic activity is located in France, but the shop, the hangar or the premises do not exist. They are dematerialised.

There is therefore no provision to date to capture profits made in France. Even though these provisions exist in terms of VAT, since 2015, in B2C relations, VAT is due in France when the customers are resident in France. The VAT issue was logically settled by a European directive since VAT harmonisation is provided for in the European treaties. This obligation to harmonise does not exist in the area of direct taxation, which explains the slow evolution of European law in this area since the Neumark report of 1962 and the subsequent appearance of directives aimed at direct taxation but requiring the unanimous agreement of the Member States (mergers, parent-subsidiary regime, royalty interests, arbitration agreement which is not a directive). The list is unsatisfactory.
There is therefore no reason for France to wait for a European initiative to harmonise its own domestic law. Article 209 of the General Tax Code, which is the basis for the taxation of capital

companies in France, was not written with the authorisation of the European authorities and is obviously not derived from any directive.

The OECD only produces "soft law" and in no way constitutes a supranational body to which France has delegated part of its sovereignty. One might even add that, as regards the OECD as an international organisation, bringing together representatives of the tax authorities of the various Member States on tax issues, its democratic legitimacy is questionable. Since the Magna Carta in 1215, the vote on taxes taken from the English sovereign has been one of the prerogatives of national representation, of popular sovereignty, and therefore of the people.

This inability to modernise our domestic law raises questions. Refusing this obstacle, when in fact no obstacle exists, is simply incomprehensible. Even if, under the Fifth Republic, the tax vote has become a form of registration of provisions written in Bercy and ratified by the government, Parliament must be given back its original power, especially when the aim of the provisions is not to create public expenditure but, on the contrary, to increase revenue. The taxpayers who pay their taxes instead of GAFA would not understand this.

Of course, it will be retorted that tax treaties will oppose such a definition of permanent establishment. However, as we have already indicated, France knows precisely how to include these definitions in treaty renegotiations.

Above all, this modernisation will give weapons to activities carried out from States without tax treaties, often tax havens, which use digital technology to trade with French customers. Below are two examples:

- Online games are most often located in the Isle of Man or Gibraltar. These are tax havens. The virtual permanent establishment can make their presence taxable in France.

- Transactions in crypto assets are often conducted from tax havens. For example, ICOs (Initial Coin Offering) are conducted from the British Virgin Islands. The virtual permanent establishment can affect these transactions. It is clear from the considerable increase in the value of Bitcoin that these issues are important.

We are not going to quote Marc Bloch and his book "The Strange Defeat" (this has been done enough with the Covid crisis), but once again, it is as if there is a paralysis at a certain level of state decision-making. A kind of nostalgia for a world before, which radically prohibits any innovation, any adaptation to a world after. Our tax system is akin to the Maginot Line that tries to contain the frontline while modern weapons and motorised divisions are moving at full speed towards France.

This virtual permanent establishment would be recognised on the basis of criteria that remain to be defined and discussed:

- The number of contracts with French residents for the provision of direct or indirect services;

- The number of French customers using free or fee-based services;

- The amount of traffic used by French customers;

- The adaptation of the site for services used in France;
- The correlation that might exist between the amounts paid by the foreign owner or licensee company for the use of the medium to another company and the level of use of the services in France.

Note that creating the obligation to declare a permanent establishment is not a panacea.

It will then be necessary to determine its taxable income. This is the purpose of proposal 3 below.

SOLUTION 2: CREATE A TAX ABUSE

The English did it. The English did it, the French didn't even dream of it!

The British have introduced a "diverted profit tax". The Australians did the same thing. It brings in about £300 million a year to the British Treasury. We have already lost 3 1/2 years since the 2017 report. That's potentially €1 billion in tax revenue, but it is also an incentive to adopt more virtuous behaviour.

What is it about? A specific tax on profits diverted to France.

This tax would be at a dissuasive level, higher than the corporate tax. The tax rate will be 33% in 2021 as the tax rate is reduced to 26.5% (excluding the 3.3% CSB applicable to the corporation tax).

This tax would be collected by the procedure of ex officio taxation in order to determine the income and expenses attributable to the French operation. This would reverse the burden of proof on the foreign taxpayer who would then have to prove that the profit determined by the tax authorities is overstated.

This tax is not a corporate tax. It is a tax of a purely internal and fiscal nature that punishes abuses. For the purists who would once again risk invoking the existence of tax treaties to do nothing, we have a tax of 3% on the market value of buildings held in France by foreign companies under Article 990 D of the General Tax Code. This tax is not in conflict with international conventions by nature. The fact that it has been drafted surely demonstrates that it is judged that it could be. The one we are proposing can be part of the general tax code too.

This tax would apply to all taxpayers, regardless of their place of residence. So it would apply to taxpayers resident in France as well. Let them be reassured, we have no knowledge of French digital groups that have set up such artificial and convoluted arrangements.

“Name and shame” provisions could be added to damage the image of corporate groups that practice this type of tax evasion.

A significant digital presence in France, without having declared a taxable presence there, even though there is a virtual permanent establishment in economic terms and significant economic substance, would allow the foreign company to be included in the tax. Provision could be made for a payment solidarity with companies of the group established in France, as long as they participate in artificial transactions with the foreign companies (for example by invoicing support services).

Without a tax presence in France, the tax would be recoverable from French customers as a deduction from the amounts due to the foreign companies concerned.

Coupled with the provisions on virtual permanent establishments, the aim of this tax is to encourage the declaration of a taxable presence in France. The fight against artificial arrangements is one of the future objectives of the European Commission, which encourages States to take national measures where they can (Communication of 18 May 2021, see page 17).

SOLUTION 3: PROFIT SPLIT

DETERMINE THE TAXABLE INCOME OF FOREIGN COMPANIES IN FRANCE USING THE TRANSFER PRICING TECHNIQUE FROM THE OECD COMMENTS

There is nothing revolutionary about this proposal, since the techniques for determining taxable income by means of transfer pricing, using methods developed by the OECD, are very common practice for tax authorities when auditing international groups and are now frequently used by tax judges and public rapporteurs in their conclusions.

As highlighted in an excellent report by Bénédicte Peyrol, Member of Parliament, on international tax evasion by companies, our general tax code is not modern and transfer pricing is dealt with in a lapidary manner in Article 57 of the general tax code.

It has always seemed to us that there should be clear rules of the game in tax matters and that, even if the practice of controls makes it possible to rely on these OECD methods, it would be healthy for these methods to be included in our tax law, in order to receive a legal support that is more constitutional and more in line with the principle of the hierarchy of norms, rather than making a piece-meal administrative instruction inspired by these methods.

Once again it is a question of putting Parliament back at the centre of legislative production, of setting the record straight and of not leaving the executive alone in charge of such an important issue, with considerable financial stakes, or more precisely, its administration.

As we mentioned previously, the use of the net operating margin method, which the tax authorities use extensively in their audits, is likely to be very disappointing in digital matters. Especially if this method, which is based on the use of benchmarks to determine target net operating margins (referred to here as arm's length), and these benchmarks are French, given the weakness of our digital industry and its still nascent profitability, the use of these benchmarks as a reference for taxing the profits of GAFAM or BATX in France is likely to prove very unproductive in terms of tax revenue, both in terms of corporate tax and local taxes with the CVAE.
We explained that the philosophy of Pillar 1 of the OECD's work corresponds to a kind of ultra-

simplified "profit split", aimed in essence at recognising that it was necessary to remunerate local intangibles; in digital matters, for example, the users who, when it is free, are the "product" as Tim Cook explained it.

For the time being, in the absence of US participation in Pillar 1, we seem to be at a standstill in this area, although the proposals of the new Biden administration seem to be charting a new course in global taxation. In any case, things are moving and they seem to be moving in the right direction.

But while waiting for all this to come to fruition, we can easily use the "profit split" method which, much better than the TNMM, allows us to recognise the full value of what is happening in France.

Once again, this is a classic method used by many international groups, particularly American ones. This method is well known to the control services and in particular to the DVNI. If it is used, it will not create any competitive disadvantage for France. In particular, because many foreign groups already use it on our territory. It is up to our control services to use it in a more systematic way from now on.

If we want it, Pillar 1 is now. But really..

Our proposal, as in 2017, is to modernise our ultra-out-dated Article 57 of the General Tax Code by including a reference to OECD methods.

Then, as Bénédicte Peyrol suggested in her report, the tax authorities should issue an instruction commenting on these provisions for use by digital companies (to date, the authorities have only issued an instruction for use by SMEs on transfer pricing).

The administration could work with specialised valuation firms that know how to use this method and have experience of it, with a dedicated budget. It could then issue a clear methodology that can be used by auditors in the field and that protects taxpayers in good faith on the basis of the provisions of Article L 80 A of the General Tax Code (taxpayers can invoke the comments of published administrative instructions).[90]

[90] *Berggruen Institute. A Data Dividend that works : steps toward building an Equitable Data Economy*

SYNTHESIS OF THE THREE PROPOSALS

These three proposals:

- Virtual Permanent Establishment,
- Abuse Tax
- Profit Split

fit together like the three blades of a razor.

The virtual permanent establishment gives France the possibility to tax, the abuse tax hits artificial arrangements and the profit split values French intangibles like users and their data. The debates on the digital economy have gained ground. The tax revenues collected during transactions concluded by the Minister of Action and Public Accounts with GAFA following tax audits showed that it was no longer impossible to recover something, that it could be done without reprisals and mass destruction, neither from GAFA, who did not blacklist our territory as some people liked to believe, nor from the American tax authorities, who were only moved by our tax on digital services (because of its clumsy nature in many respects). The Covid crisis has made us aware of the growing weight of digital technology in our economy, and alas, of foreign digital technology, be it Tik Tok, Zoom or Teams virtual meetings, Amazon deliveries, etc.

And once again, if this growing share of the digital sector in France pays neither corporate tax (at a time when Great Britain, for example, is raising its corporate tax rate, which shows the importance of this tax), nor the CVAE, which is a fundamental resource for our local authorities (given that, due to their lack of physical presence, they have neither property tax nor CFE on many digital activities), the revenues of the State and local authorities will be heavily hit, but competition will also be distorted to the detriment of our digital companies (imagine 15 years without the tax that you would receive today?). Above all, the State will take money from those who remain, further handicapping their capacity to modernise and the transition of our industries to digital.

The relocation of our industry and the regaining of our economic sovereignty also require an effective implementation of the taxation of foreign digital companies, GAFAM in particular, which offer their services to French customers and users. We want France not only to be a start-up nation but also to become a real player in the digital sector, in AI and quantum computing. We refuse the fate predicted by Nicolas Baverez in his book "les lettres béninoises", that of a third-world France, dependent on its creditors and the IMF. This means regaining our industrial sovereignty, of which digital technology is obviously a part. Rather than imagining a post-Covid punitive tax aimed at creating an exceptional tax on high incomes when one has already been created by the Fillon government, let's find the way to regain fiscal sovereignty by really taxing GAFAM. This desire for more effective and fairer taxation to finance the deficits of the health crisis and the recovery plans is already the ambition of the Biden administration. Our solutions are simple.

They are quick to implement.

They make money.

The forces for action exist in Parliament and can create consensus.

France currently has a number of leading digital companies such as OVH, Doctolib, Mano Mano, Swile, Openclassrooms, Blablacar[91].

In 2020, 12 start-ups raised €100 million in funding and, despite the Covid crisis, fundraising by French digital companies reached €5.4 billion .

It is time for the State to put an end to the distortion of competition caused by the tax avoidance of certain foreign digital giants so that all these French companies can maximise the effects of their fundraising and compete on equal terms with their competitors.

[91] *Les Echos - Fundraising: 2020, a record year for French tech - 13 January 2021*

CONCLUSION

ANAÏS VOY-GILLIS

Anaïs Voy-Gillis is a doctor in geography and an associate researcher at the CRESAT (University of Haute Alsace). Her work focuses on the challenges and determinants of the reindustrialisation of France. She is a director of June Partners where she conducts operational consulting missions for industrial clients. She co-authored *Vers la renaissance industrielle* with Olivier Lluansi, which was published by Editions Marie B.

The last decade has been marked by several social movements, reminding us of the need to link the notion of prosperity to a territory and to the people who occupy it, and that companies cannot sustainably bypass the democratic framework of states. The COVID-19 crisis reinforced this need, as did the need to revive a strong and sovereign national industry. Consequently, developing a tax system adapted to digital companies is in line with the strong demand for the regulation of economic and financial flows from our fellow citizens.

By developing the immaterial economy, we thought that we would create enough value to compensate for the deindustrialisation of Western societies and that the detachment between places of production and places of innovation would not have lasting consequences on the ability to preserve our social model. We also thought that the international division of labour would be an 'eternal' pattern: production operations would remain in low labour cost countries and developed countries would specialise in advanced technologies, tasks considered to have high added value, the creation of concepts and design, etc. However, we have not only relied on our rents, but we have also stopped investing in factories, training and innovation, so much that we have not been able to imagine the world of tomorrow as new constraints, particularly environmental ones, have become more and more present. By de-industrialising, by losing the link with "doing", we have permanently damaged our ability to bounce back and, at the same time, we have not equipped ourselves with the tools to create and regulate the new economy to which we aspire. Moreover, we thought that the technologies integrated into goods such as computers, vehicles, etc., would be sufficient to create value to replace that which we would no longer create by relocating our production units. We also thought that the barriers to entry in the key sectors of our economies were too high for new entrants, digital companies but also countries such as China that are coming to position themselves on new generations of products, to develop there. With this approach, we also failed to grasp the risk of disintermediation between our manufacturers and their customers and that these new entrants were likely to upset the rules of a game that we thought we had mastered.

Thus, and beyond the democratic challenge they pose, large digital companies have contributed to the detachment between material and immaterial and to the fragmentation of societies through an increase in inequalities of income and financial capital, but also geographical inequalities. By concentrating certain activities and seeking the best skills to ensure the continued development of their key functions, they have encouraged an increase in land rents, excluding and impoverishing part of the population in the peripheries. These divides, which can be found in many Western societies, are the cement for the rise of identity-based nationalist parties. There is also a tax divide between companies that use every mechanism to avoid taxes and the SMEs/ETIs, which are rooted in the territories, aware of their role and often have little or no means of evading national taxation. Thinking about the taxation of large digital companies therefore also means looking for levers to reduce these inequalities in a sustainable way. Taxation must make it possible to reinject part of the rents into the economic circuit and the proposals in this report have been designed with this in mind in order to find the most objective way of apprehending these companies in terms of both the method of taxation and the tax base.

The feeling of injustice is a powerful vector of mobilisation as illustrated by the Yellow Vests movement. Yet, how can we hope to rebuild a spirit of social and territorial cohesion, if we do not find the levers to reduce the feeling of fiscal injustice? At the dawn of the 1980s, we believed that the future of our societies lay in an immaterial economy where factories no longer had a reason to exist. Companies legally relocated their production, then their research centres and now their head offices. This last phenomenon is further accentuated by the situation of tax competition between the member states of the European Union. Many companies have de-territorialised, becoming almost stateless in some cases, and have thus ceased to contribute significantly to the development of their country of origin.

Beyond the question of the social model, there is also the question of financing the transformation of our consumption model in order to move towards greater sobriety, and fair taxation must be a lever for financing and reorientation. We must also include geopolitical and geostrategic elements in our approach, and not just economic ones as has long been the case. Without a global, cross-cutting and multi-scalar approach, we will not be able to provide the right answers to the problems. For example, large companies, whether in the digital sector or not, are taking advantage of the lack of European tax harmonisation, thereby further weakening European cohesion. The global approach must also enable us to break a myth which suggests that the immaterial economy is independent of material infrastructures and therefore has nothing to do with the industrial world. On the contrary, in order to develop their services, these companies rely on data storage capacities, cables, especially submarine cables, satellites, etc., which pose real challenges in terms of sovereignty and which require real industrial skills and know-how. It is therefore difficult to consider the issue of regulation of these companies without integrating these strategic questions, especially at a time of COVID-19 when the word sovereignty is once again central to the public debate.

Re-anchoring value in our territories is an emergency. By developing the idea that France could be a start-up nation, we have missed out on whole sections of the population who see the current period as an injustice. We have not succeeded in creating a shared imagination. And yet, only an imagination can create an atmosphere conducive to innovation, to link a dreamed future with an assumed heritage, to bring together those who project themselves into a globalised world and those who reside in a territory, sometimes with difficulty in leaving it and with the feeling of having been left behind. Having a tax system that is adapted to contemporary issues is part of the response that states must provide to their citizens.

Thus, the principles proposed in this report are clear and concrete, and must be the subject of a collective and relentless fight. It is true that companies operate according to the rules of the market, but at a time when humanity is facing its greatest challenge, the ecological transition, they must also put themselves at the service of a project that goes beyond them: the collective interest. There is therefore no objective reason why companies operating in a territory should not contribute to its development through appropriate taxation.

DIGITAL TAXATION, THE RETURN LEG

3 solutions that fit together like the three blades of a razor:

- **Virtual Permanent Establishment,**
- **Abuse Tax**
- **Profit Split**

The virtual permanent establishment gives France the possibility to tax, the abuse tax hits artificial arrangements and the profit split values French intangibles like users and their data.

1 VIRTUAL PERMANENT ESTABLISHMENT

Would be recognised on the basis of criteria that remain to be defined and discussed:

- The number of contracts with French residents for the provision of direct or indirect services;
- The number of French customers using free or fee-based services;
- The amount of traffic used by French customers;
- The adaptation of the site for services used in France;
- The correlation that might exist between the amounts paid by the foreign owner or licensee company for the use of the medium to another company and the level of use of the services in France.

Note that creating the obligation to declare a permanent establishment is not a panacea.
It will then be necessary to determine its taxable income. This is the purpose of solution 3 below.

2 TAXE ABUSE

This tax would be collected by the procedure of ex officio taxation in order to determine the income and expenses attributable to the French operation. This would reverse the burden of proof on the foreign taxpayer who would then have to prove that the profit determined by the tax authorities is overstated.
Coupled with the provisions on virtual permanent establishments, the aim of this tax is to encourage the declaration of a taxable presence in France.

3 PROFIT SPLIT

(DETERMINE THE TAXABLE INCOME OF FOREIGN COMPANIES IN FRANCE USING THE TRANSFER PRICING TECHNIQUE FROM THE OECD COMMENTS)

Once again, this is a classic method used by many international groups, particularly American ones. This method is well known to the control services and in particular to the DVNI. If it is used, it will not create any competitive disadvantage for France. In particular, because many foreign groups already use it on our territory. It is up to our control services to use it in a more systematic way from now on.
The administration could work with specialised valuation firms that know how to use this method and have experience of it, with a dedicated budget. This tax "vade mecum" would thus make it possible to value the digital presence in France, to determine the share of profits attributable to this digital exploitation carried out in France, as a function of the turnover that is achieved on our territory.

DIGITAL NEW DEAL
THE NEW DEAL THINK-TANK

The aim of the Digital New Deal think tank is to shed as much light as possible on the changes taking place within the phenomenon of "digitalisation", in the broadest sense of the word, and to draw up concrete courses of action for French and European companies and public decision-makers. Supported by the expertise of its authors and their inclusion in the public debate, the think tank's work will be able to contribute to the development of French and European thinking on digital regulation in order to establish a balanced and sustainable framework.

THE BOARD OF DIRECTORS

The members of the Digital New Deal Board of Directors are all founding members. They come from diverse backgrounds and are directly involved in the digital transformation of companies and organisations. With their common interest in digital issues, they have decided to deepen their debates by formalising a production and publication framework within which the complementarity of their experiences can be put at the service of public and political debate. They are personally involved in the life of Digital New Deal.

Arno Pons, General Delegate, together with Olivier Sichel, Founding President, steers the strategic orientations of the foundation, and supervises a project manager who ensures the day-to-day coordination of all the think tank's activities.

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