ECONOMIC SECURITY OF THE EUROPEAN UNION IN THE LIGHT OF THE DIGITAL BUSINESS MODELS APPLIED BY THE MULTI-NATIONAL ENTERPRISES

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Abstract. The issue of economic security and fiscal matters are closely connected to each other, especially taking into account the massive non-taxation of the digital business models, which can be observed in the present economic reality. The non-effective taxation of the digital business models together with fiscal losses caused by this phenomenon are nowadays as high on the international, political agenda as e.g. climate change. European Union has been even called as "vulnerable" to tax planning activities, made by digital enterprises. The essence of the discussed in the Article issue is that the fundamental rules of the international tax law were created in the late 19th century and well-established during the 20th century – in the reality, in which the digital business models could not have been even predicted. As a result of application of these outdated rules, the income generated in the source state cannot be there taxed. Furthermore, this activity does not constitute a breach of tax law and cannot be perceived as tax evasion or tax avoidance. The European Commission initiated the proceedings against Ireland for illegal state aid, received by Apple in the amount of 13 billion EUR (taxes unpaid in relation to transfer pricing rules, unlawfully approved by the Irish tax authorities). Almost at the same time, as a result of D. Trump's tax reform, Apple agreed to pay voluntary in the U.S. 38 billion USD in taxes, invest 350 billion USD and create there over 20.000 jobs. In Spring 2018, as a result of the demand requested by the Member States, the European Commission presented a project to overcome non-effective taxation of the digital business models in the European Union. However, the adoption of the project is unlikely to happen – for the reason of the requirement to reach unanimity between states (until now some states expressed objections or even rejected the project), as well as grounding the long-term solution on the idea, which has already been rejected by the Member States in 2011. In the article the Author describes the reasons for a lack of effective taxation of the digital business models in the source state, outlines the essence of the economic security and influence on it made by the tax planning schemes, applied by digital enterprises, as well as drafts the particular position of the Multi-National Enterprises in the post-globalised world. In the article are also presented means of reaction, coined on the international and European level to overcome that challenge, posed before the modern societies. The Author stresses also that having regard these particularities of the income taxation, in the international tax law doctrine more and more often the idea of abolishing income taxes is taken into consideration, especially in relation to the CIT (corporate income tax).

Keywords: digital economy, digital business models, economic security, international tax law, sovereignty, European Union, multinational enterprises.

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Introduction

"Europe must learn to defend its economic interest much more firmly – China does it, the U.S. does it. You cannot take the benefit of doing business in France or in Europe without paying the taxes that other companies – French or European companies – are paying".[2]

Nowadays, taxation of the digital economy is as high on the global, political agenda as these matters, which have been traditionally recognized as the most vital issues of the international society, like the climate change.[3] Fundamental institutions of the international tax law were created in the 19th and developed in the 20th century.[4] The fair and rational manner of tax claims' allocation could be then grounded on a physical presence rule, because traditional business models were the only way to carry out business activities.[5] In contrary to the traditional business models, based on a physical presence, the basic feature of the modern, digital business models is a lack of physical presence, while pursuing economic activity and generating income in the territory of a certain jurisdiction. In such a case, the profit, generated on a wide scale, remain non-taxed in the source state. As a result of that rules, it was possible for Apple to tax its EU-sourced income on the effective level of 0,005%.[6] Almost at the same time, as a consequence of the D. Trump's tax reform and new incentives, implemented to attract to the U.S the capital accumulated offshore – Apple agreed to pay in the U.S. 38 billion USD in taxes, invest 350 billion USD in the U.S. and create there over 20.000 new jobs over

2 Bruno Le Maire, Finance Minister of France, Press statement for Bloomberg, 7thAugust 2017.

3 Basing on the example of the G20 Summit in Brisbane, Australia – See gen.: M.A. Kane, *A defense of source rules in international taxation*, "Yale Journal on Regulation" 2015 Iss. 2, Art. 4, p. 312.

4 Currently used in the international tax law fundamental institutions, were coined mainly in the late 19th and early 20th century, such as German concept of the permanent establishment (Germ. *Betriebsstätte*), which was implemented to the treaty on avoidance of double taxation, concluded between Prussia and Austria-Hungary in 1899. See gen. A.A. Skaar, *Permanent Establishment: Erosion of a Tax Treaty Principle*, Boston 1991, p. 75.

5 E.g. through an office, a factory, a workshop, a mine, a quarry. This exemplification is still included in the OECD Model Tax Convention, as well as in all of the treaties on avoidance on double taxation.

6 According to the European Commission, income of Apple was taxed in Ireland in 2014 with an effective tax rate 0,005%, what was deemed to be an illegal state aid. Ireland was obliged to exact from the enterprise 13 billion EUR in taxes. For failure in fulfilling that obligation, the Commission referred Ireland in 2017 to the Court of Justice of the European Union. See: European Commission, *Press statement of the European Commission of October 4th*, 2017, online: http://europa.eu/rapid/press-release_IP-17-3702_en.htm [access: August 15th, 2018]. However, it should be stressed that as low tax rate is caused not only by the outdated rules of the international tax law, but also incentives granted Apple by the Government of Ireland and concerning applied transfer pricing rules. The outdated rules made it much easier, because Apple must have focused on receiving an illegal state aid just from one tax administration.

the next five years.[7] In such a reality, new challenges have been posed before the economic security of states, including European Union as an independent subject of the international relations.

The purpose of the Paper is to answer to the question what is the significance of the effective taxation of the digital business models, implemented on a large scale by the Multi-National Enterprises, for the economic security of state, in particular to draft that issue in relation to the European Union. The other question, posed in the Paper is whether currently undertaken by the international community actions are sufficient to tax digital business models in an effective way. To achieve that goal it is necessary to present the essence of double non-taxation of digital business models, scale of the revenue loss of national budgets, caused by the application of the digital business models by entrepreneurs. For the reason of a strongly limited length of the article, that latter issue will be just outlined. It should be also noted that in the Polish doctrine there has not been published any article, strictly concerning relation between economic security of state and the non-effective taxation of the digital business models. The adopted methodology consist of analysis of legal acts, international double tax treaties, official documents and recommendations of the OECD and the European Union institutions, international tax law and economic doctrine, papers and monographies concerning international relations and economic security, as well as economic data related to the digital business models.

1. Economic security of state and tax planning

Economic security can be defined as "a state of the national economy development, which ensures high efficiency of its functioning – by appropriate use of endogenous factors for economic development – as well as an ability to effectively oppose the external pressure, which may lead to disturbances in the national development".[8] The economic security has two different dimensions: the general dimension and the defensive dimension. The latter expresses an ability of a single state to protect itself from the endogenous economic interference, whereas the purpose of the economic security in the general dimension is to create conditions for the development of the economy, to strengthen international relations, to provide to the stability and to ensure the resilience to possible risks. The economic security

[7] The reason for the activity of Apple is the amendment in the U.S. Tax Code – Apple avoided paying in total 78,6 billion USD taxes in the U.S. Now the company can take benefit from the Trump's tax reform – *See*: J. Hoxie, *Commentary: Apple Avoided $ 40 Billion in Taxes. Now It Wants a Gold Star?*, Fortune January 19th, 2018, online: fortune.com [access: August 15th, 2018]. The Author invokes also data on 2017 lobbying expenditures of Apple (2,3 million USD), as well as Microsoft, Facebook, Alphabet – owner of Google (14 million USD).

[8] Z. Stachowiak, *Teoria i praktyka mechanizmu bezpieczeństwa ekonomicznego państwa. Ujęcie instytucjonalne*, Akademia Obrony Narodowej, Warszawa 2012, p. 33.

in the general dimension is considered to be both a certain state and an ongoing process[9]. In the economic doctrine a relation between the amount of fiscal assets of the state and the level of economic security in both dimensions raises no doubts. It is clearly stressed that an economic security can be improved as a result of e.g. reduction of the national deficit.[10] The main source of income for states are taxes – in the doctrine it is even stressed that the tax collection is an efficiency ratio of the state's activities.[11] Taxes perform not only fiscal function, but also are an incentive to encourage entities under the state's jurisdiction to undertake certain actions. For instance, the use of tax incentives to increase innovation activity is being perceived as one of the tools, which may be implemented to achieve an acceptable level of economic security.[12] However, it should be noted that the strategy is effective only when it is implemented intentionally and does not lead to unintended loss of tax income. Therefore, each kind of taxpayers' activity, which can provide to the reduction of tax income and which was unintended by the state, should be treated as a threat to its economic security. Although the budgets of the European jurisdictions are based on value added tax and excise tax, income taxes are also important element of the fiscal income and losses in that scope are a threat for the development of the national economy as well as are a symptom of a lack of the possibility of a state to protect itself from the endogenous economic interference. On the other hand, the European jurisdictions seem to be in the difficult situation – existing rules of the interpretation of the tax law and its nature as a branch strongly restricting the private ownership, limits the possibility to burden taxpayers with consequences of undertaking actions not resulting in creation the tax burden in a certain amount. In general, as far as a taxpayer's activity does not lead to the tax evasion (direct breach of the tax law, e.g. non-disclosure of income, tax frauds), that activity is legal, even if it results in the fiscal losses and could be moral reprehensible. Besides the tax evasion, in the tax law doctrine there are also used the other terms to classify the taxpayers' actions, t.i. tax savings (legally indifferent behaviour, which influences the taxpayer's situation), tax planning (also known as tax optimisation; exercising of all tax reductions and exemptions available by law), tax avoidance (being also called

9 Ibidem, p. 34.

10 D. Piekarz, *Polityka i strategia bezpieczeństwa ekonomicznego Polski w latach 2004-2014*, Bel Studio, Warszawa 2017, p. 120.

11 Cz. Jędrzejczyk, *Perspektywy zwiększenia wpływów z VAT w Polsce w aspekcie systemów informatycznych*, [in:] A. Jackiewicz, A. Traszkowska-Dmoch (ed.), *Bezpieczeństwo ekonomiczne państwa. Uwarunkowania, procesy, skutki*, CeDeWu, Warszawa 2017, p. 51.

12 A. Melnikov, I. Viktorovna, V.I. Trysyachny, S.A. Aydaeva, V.V. Rudenko, *State Policy Priorities for Economic Security Provision among Processing Industries*, Journal of Politics and Law, No. 3/2017, Vol. 10, p. 113.

an indirect violation of tax law).[13] These three categories – in contrary to the tax evasion – are legal, however the last one often is subject to the special regulations, aimed at overcoming that phenomenon –these legal institutions have been adopted both on the European[14] and domestic level[15] to fight the tax avoidance strategies, especially these having an aggressive nature.[16]

2. Particular position of the Multi-National Enterprises in the post-globalised world

Nowadays, completely new challenges have been posed before the international community to achieve a state of the national security, which in the globalized world arises even acuter than ever before.[17] These problems go far beyond the traditional concept of sovereignty based on the territorial principle. A comprehensive nature of the present international relations transformed that concept from the model based on self-independence, into the concept of sovereignty founded on the organized co-dependence, with the significant increase of private organizations, acting in particular in the field of economy.[18] Therefore the analysis of the economic security consists of taking into account actions performed by multinational enterprises, as well as other elements of the co-dependent world, such as economic competition between states.[19] Furthermore, as it is invoked in the doctrine, the increasing impact of private entities on the international relations and economic security is one of the results of the globalisation.[20] In the globalized world, multinational enterprises are equal to the independent states participants of the global power struggle[21] and were called as early as in 1989 as having a "special potential" in the international

[13] T. Nieborak, *The Tax Avoidance Clause: Do We Want it, Do we Need it?*, "Adam Mickiewicz University Law Review", Vol. 7/2017, p. 201.

[14] E.g. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, Official Journal 2016 L 193.

[15] E.g. general anti-abusive rules, special anti-abusive rules.

[16] Just as broadly discussed Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, Official Journal 2018 L 139.

[17] S. Volodymyr, *Diversification of Social Consciousness as a Threat to Information and Economic Security of a State,* "International Journal of Economics and Law", Vol. 3, No. 8/2013, p. 82.

[18] Z. Stachowiak, *Teoria i praktyka mechanizmu bezpieczeństwa ekonomicznego państwa…*, op. cit., p. 113.

[19] Ibidem, p. 114.

[20] K. Księżopolski, *Bezpieczeństwo ekonomiczne – przedmiot badań i praktyka*, [in:] M. Gębska, M. Kubiak (ed.), *Współczesne bezpieczeństwo ekonomiczne. Wymiar międzynarodowy*, Akademia Sztuki Wojennej, Warszawa 2016, p. 15.

[21] Ibidem, p. 123.

relations.[22] Whereas independent jurisdictions are perceived as main actors of the political-order-based international relations, in the post-globalised economic relations such a position is held by multinational enterprises (MNEs). As a result, MNEs have become an independent subject of the international policy – e.g. they are entitled to participate in certain international organizations, even holding voting rights.[23] In such a reality, an independent jurisdiction must choose, whether to transfer a part of its sovereign power to MNEs, or to fully and solitarily execute it – in order to control the development of MNEs, including a possibility of slowing them down. However, that latter choice could result in technological and economic marginalization of the state, since MNEs act and achieve a significant position in the sectors of high technologies, innovations and international finances.[24] The particularly strong impact of the MNEs on a national economy is also concluded with a statement, that competence of state to establish a detailed regulation on their activities and subordinating them to the effective state jurisdiction, is just theoretical.[25] MNEs are even being called the new, non-public centres of powers, which have a direct impact on the state policy, e.g. by exerting an financial impact on states.[26]That impact is possible for the reason of the current shape of the state economy, which is dependant mainly from the financial markets, on which MNEs held the main position. Therefore, nowadays, states must meet not only challenges related to the impact of the traditional, internal groups of interests – such as social classes and crucial economic sectors – but also must challenge the influence of powerful, international capital, represented mainly by the MNEs.[27]

3. Digital business models applied by the MNEs on the ground of the international tax law

On the ground of the international law, the empowerment to impose taxes is a core of the state's sovereignty, which does not result from any other external legal order and comes directly from the essence of the state.[28] By exercising that right, the sovereignty of a state may be expressed in the most comprehensive manner.[29]

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22 H.U. Walter, *International Economic Security*, World Bull. No. 5/1989, p. 51.

23 Z. Stachowiak, *Teoria i praktyka mechanizmu bezpieczeństwa ekonomicznego państwa…*, op. cit., p. 124.

24 Ibidem.

25 Ibidem, p. 127 and references to the international economic doctrine therein.

26 Ibidem, p. 127.

27 Ibidem, pp. 125-126.

28 P. Selera, *Międzynarodowe i unijne prawo podatkowe w kontekście opodatkowania przedsiębiorstw*, Wolters Kluwer Polska, Warszawa 2010, p. 55.

29 M. Dudzic, *Przegląd prac OECD związanych z BEPS w kontekście suwerenności państwa*, „Kwartalnik Prawa Podatkowego" No. 3/2014, p. 87.

Because the jurisdiction to tax goes far behind the state's territory, sovereign states are empowered to impose similar kind of taxes at the same time on the same taxpayer, for the same period, regarding to the same object of taxation. Hence, juridical double taxation is not forbidden on the ground of the international law, in particular by customary international law.[30] However, the juridical double taxation is assessed negatively and can even affect adversely on the freedoms in which the European Union has been grounded.[31] To present the way therein the juridical double taxation impedes the economic development, there are invoked examples of the economy of Libya or Cuba – states doing nothing to eliminate the juridical double taxation.[32] The bilateral tax treaties are the most popular measure of the avoidance of the juridical double taxation and consists of dividing the tax claims between two involved jurisdictions. All of the concluded bilateral treaties are based on the OECD or UN Model Tax Convention.[33] One of the categories of income on the ground of the OECD Model convention is a business profit(income received from direct business activities). According to the general rules, established both in the models as well as in all treaties – a business profit is taxable only in the residence state of the entrepreneur (Art. 7 OECD Model Convention), until the "permanent establishment" in the source state is established. The concept of the permanent establishment is based on the physical presence (so called "PE Threshold") and defined usually in art. 5 of a certain convention. Permanent establishment concept is called also a taxable presence of a non-resident, which is created by the "agreed minimum form of physical presence in that country".[34] Pursuant to art. 5 par. 1 OECD Model Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on. Art. 5 par. 2 OECD Model Convention gives examples of such activity, i.a. an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of extraction of natural resources. Only to sum up, the concept of permanent establishment was created in the late 19th century and through ages has been strongly grounded in the physical presence rule – either exercised directly by the entrepreneur or by its dependent agent. In the international tax law there is a lack of regulation, which

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30 K. Vogel, *Double Tax Treaties and Their Interpretation*, „Berkeley Journal of International Law", Iss. 1, Vol.4/1986, p. 8.

31 See generaly: A. Tim, *Zapobieganie podwójnemu opodatkowaniu dochodów z pracy najemnej w kontekście unijnej swobody przepływu pracowników*, [in:] A. Rogozińska-Pawełczyk (ed.) *Gospodarowanie kapitałem ludzkim. Wyzwania organizacyjne i prawne*, Łódź 2015, p. 195.

32 J. Banach, *Polskie umowy o unikaniu podwójnego opodatkowania*, C.H. Beck, Warszawa 2000, p. 58.

33 Z. Kukulski, *Konwencja modelowa OECD i Konwencja modelowa ONZ w polskiej praktyce traktatowej*, Wolters Kluwer, Warszawa 2015, p. 239. Even US Model Tax Treaty is similar to the OECD model tax convention. For the reason of the significant similarities between OECD and UN Model Tax Conventions, in the Article only the OECD Model will be invoked.

34 European Commission, *Expert group on taxation of the digital economy. Working Paper: Digital Economy – Facts & Figures*, Brussels 2014, p. 16.

would allow a source state to tax the income received in relation to a digital presence within its territory. It should be noted that the digital activity is not uniform and consists of i.a. transacting business with virtual currencies, providing digital goods and services or transacting business enhanced on the Internet.[35] For the purposes of the Article, the topic will be presented only on a general level, indicating some general problems of the taxation of these enterprises.The main issue is related to a lack of taxation of the business profits, received from direct business activities in the source state.[36] Actions undertaken by the MNEs in the scope of their business models *per se* cannot be regarded as tax evasion or even tax avoidance – the physical presence is not necessary to pursue economic activity by the digital entrepreneurs. The non-effective taxation of the digital business models is a result of outdated rules of the international tax law, in which the possibility to make business on a massive scale, without a physical presence, has not been foreseen. These enterprises simply have to do nothing not to pay taxes in the source state. Even the classical concept of tax avoidance cannot be applied in these cases and may be called as "reversed" – in the common cases, the artificial scheme leads to the less amount of taxes to be paid. In the digital business models the activity, which constitutes a permanent establishment and makes it possible to tax that income in the source state, will be treated as an artificial construction.[37]

The issue of effective taxation of the Multi-National Enterprises has been precisely analysed on the OECD level. The undertaken actions resulted in publishing in 2015 the Report, consisting of15 Action Plans – recommendations for the international society.[38] The first action plan was concerning taxation of the digital economy. As it is brilliantly concluded in the legal writing – OECD has rather "addressed" than "met" the challenges posed by the digital economy before the tax law, what is also in accordance with the title of the Report.[39] Even the idea

[35] A. Nellen, *Taxation and Today's Digital Economy*, „Journal of Tax Practice & Procedure", No. April-May/2015, pp. 18-19.

[36] It should be noted that such an issue is not the only one, related to the taxation of the MNEs. For the reason of the limited length of the publication, the other issues – like problematic recognition of the place of residence or taxation of the direct foreign investments – will be intentionally omitted.

[37] A. Tim, *Międzynarodowe planowanie podatkowe w e-biznesie*, [in:] M. Czajkowska, M. Malarski (ed.), *Funkcjonowanie e-biznesu. Zasoby, procesy, technologie*, Wydawnictwo Uniwersytetu Łódzkiego, Łódź 2015, p. 155.

[38] OECD, *Addressing the Tax Challenges of the Digital Economy. Action 1 – 2015 Final Report,* OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris 2015.

[39] M. Olbert, C. Spengel, *International Taxation in the Digital Economy: Challenge Accepted?*, „World Tax Journal", 2017 (Vol. 9), No. 1.

of Multilateral Instrument[40] does not solve the issue of non-effective taxation of the direct business activity carried out by digital enterprises. The European Union has been called "vulnerable" to tax planning activities, made by digital enterprises.[41] For the reason of a lack of proper tax regulations in the legal order of the Member States, the European Union had to apply rules concerning competition law and state aid, in order to react on the created fiscal losses. These actions, grounded in other branches than tax law, were not sufficient to solve the problem in a structured and systemic way. It should be also noted that the European Commission proceedings against Ireland was caused mainly by the unfair transfer prising rules, applied to Apple, rather than by the non-taxation of the digital business models. Even after the recovery of state aid, the income still will not be taxed in states, where it was generated. Therefore, a lack of effective taxation of the digital business models causes both fiscal losses for almost all of the Member States, as well as make it easier to receive illegal state aid – the income can be easy transferred and accumulated in one state, what makes it possible to negotiate by the enterprise only with one government.

The other actions of the European Union, concerning strictly tax law, are still just a proposal. Under the pressure of the majority of Member States, as late as in the spring 2018, European Commission presented action plan concerning effective taxation of the digital business models within the European Union.[42] The first, interim measure will establish a new kind of indirect tax – the digital services tax, imposed on gross annual revenues of largest digital companies carrying on business in the EU. The tax rate, applicable to the gross receipt (without a possibility to deduct expenses from the tax base), would be on a level of 3%. The second, permanent solution consists of two steps – the first one is to introduce a new concept of permanent establishment, based on the significant digital presence. Permanent establishment concepts, applicable in relations between the Member States, would be changed

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[40] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter: MLI) – multilateral convention, which has been prepared and negotiated under the auspices of the OECD, in order to change the rules of the double treaty agreements without a necessity to renegotiate each one. MLI entered into force on July 1, 2018, only in relation to 9 jurisdictions – i.a. to Austria, New Zealand, Poland, Serbia, Slovenia, Sweden, United Kingdom. The total number of signatories is 83. Such jurisdictions as United States are not involved in the initiative. See: OECD, *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Status as of 23 July 2018*, online: oecd.org [access: 15 August 2018].

[41] P. Tang, a Dutch Member of the European Parliament, prepared a special report on that issue and used that strong expression to describe the European Union actions. *See*: P. Tang, H. Bussink, *EU Tax Revenue Loss from Google and Facebook,* 2017, p. 3 online: https://paultang.pvda.nl/ [access: 15th August 2018].

[42] European Commission, *Communication from the Commission to the European Parliament and the Council "Time to establish a modern, fair and efficient taxation standard for the digital economy"*, Brussels, 21.3.2018, COM(2018) 146 final.

in a way of directive. In relation to the third-states, the European Commission recommended Member States to renegotiate and adjust their double tax treaties. The new permanent establishment concept would be grounded in a significant digital presence and would be created after one of the conditions concerning total revenue from supply of digital services to users located in the jurisdiction, number of users of the digital services, located in the jurisdiction or number of business contracts for the supply of digital tax services is met. The second step is grounded in the CCCTB idea (Common Consolidated Corporate Tax Base), which would be implemented to the direct tax systems of the Member States. These intra-EU solutions would be introduced in the way of a directive, adopted on the basis of special legislative procedure (art. 115 TFEU[43]), which requires unanimity in the Council. However, the European Commission proposal has already been rejected by the Nordic States (Denmark, Finland, Sweden), as well as strongly criticised by United Kingdom, Luxembourg, Malta and Cyprus.[44] Furthermore, the idea of CCCTB (the second step in the European Commission long-term plan) has been discussed from years and because of the different economic interests of the certain Member States, it still cannot be introduced.[45] One of the goal of the Austrian Presidency in the Council in the second half of 2018 is to "step up" plans of the EU to implement the effective strategy for taxation of the most significant digital business models.[46] H. Löger, Austrian Finance Minister, invokes even rhetorical arguments, according thereto "All of those in Europe who refuse to get results on the taxation of Google, of Apple, of Microsoft or of Amazon, will have to explain to their citizens why they reject fiscal justice".[47] Therefore the predictions should be stated that the clarification of the adoption probability of these measures will be accomplished in the nearest months. That would allow the Member States to take decision on implementing their own, independent from the EU actions measures to tax digital business models (also in the enhanced cooperation proceedings) or to follow the EU recommendations and establish a joint effort to overcome that issue.

The other option than closing gaps in existing system is abolishing the corporate income taxation. Although in the international tax doctrine there are presented

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[43] Treaty on the Functioning of the European Union, Consolidated Text "Official Journal of the European Union", 26.10.2012, C 326 pp. 47 et seq, hereinafter: TFEU.

[44] M. Andersson, K. Jensen, P. Orpo, *Nordic states urge U-turn on EU digital tax plans,* online: euobserver.com [access: 15th August 2018], A. Rhode, *Some (bad) news on the EU Digital Tax*, online: linkedin.com [Access: 15th August 2018].

[45] The CCCTB directive was rejected in 2011. See: European Commission, *Proposal for a COUNCIL DIRECTIVE on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121 final*, 2011/0058, Brussels 16.03.2011.

[46] J. Brunsden, *Austria ramps up push for EU-wide digital tax on Big Tech*, „Financial Times", July 16th, 2018, ft.com [access: 15th August 2018].

[47] Ibidem.

arguments on the necessity of such a solution (the approach is being described even as prevailing), corporate income taxation still has a great significance for developing countries, as well as is a backstop for the far-reaching individual tax progression – it makes it impossible to obtain indefinite (understood as boarded by the dividend distribution day) deferral of tax on business activity. Furthermore it is the additional barrier for the richest part of society to take benefits from pursuing economic activities in a form of corporation.[48] The other reason why taxation of the multinational corporation on their level should be maintained is – according to R.S. Avi-Yonah – the need to provide sovereign states with the ability to regulate behaviors of the taxpayers (by establishing incentives for the desirable behaviors or disincentives for the undesirable ones).[49] The international society seems to be deeply grounded in the idea of income taxes and doesn't intend to revolutionize the fundamental rules, established over one hundred years ago. Therefore, the other possibility to solve a lack of non-effective taxation of the digital business models is to depart from the multilateral means of avoidance of double taxation and to establish new rules, based on the unilateral means – at least only for the purposes of the taxation of the digital business models. Unilateral means are commonly applicable on a large scale when a state does not include multilateral tax treaties – either as a rule, resulting from the fiscal policy of a state (e.g. like Brazil) or when unilateral means are applicable only subsidiary, in a lack of an applicable double tax treaty (e.g. states like Poland).

4. Conclusions

According to J.N. Moore, in 1981 in the U.S. "no element of national security was more visible than the economic component of foreign policy and national security".[50] Such a statement it is still current, even after 30 years and even on the other continent. Taxation of the digital business models is one of the biggest threats for the economic security in the modern reality, which clearly showed a scale of fiscal losses caused by application of the outdated rules to the modern economy – just as effective taxation of Apple in the European Union on a level of 0,005%.[51] It should be noted that the biggest threats for the economic security are more and more often

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[48] See gen. R.S. Avi-Yonah, *Hanging Together: A Multilateral Approach to Taxing Multinationals*, „Michigan Business & Entrepreneurial Law Review", Vol. 5 Iss. 2, 2016, pp. 139-140.

[49] Ibidem, p. 141.

[50] J.N. Moore, *International economic policy and national security*, „Public Law Forum" No. 1/1981, p. 29. J.N. Moore invokes an example of 1980 election in the USA and i.a. so called "oil crisis".

[51] The Author would like to stress that the issue is more complicated and the low level of taxation is caused also by the state aid granted the company by Ireland. However, for a reason of the non-effective taxation of the direct business activity in the international tax law, Apple could do nothing to cumulate their income in Ireland and then negotiate with the Irish tax authorities to receive illegal state tax aid.

grounded in the digitalization and globalization.[52] The non-effective taxation of the digital business models lowers the level of economic security both in general and defensive dimension.[53] Such a phenomenon is particularly dangerous for these states, which do nothing to react on the challenges posed by the digital business models. In the most spectacular cases, the non-effective taxation has a global character and results in a significant revenue loss for state budget. However, digital business models are present also in the regional economy and are implemented by small and medium enterprises (e.g. transboundary online shops, app developers), being rather a natural way of doing business than an implementation of advanced tax strategies. The clearest example of the above conclusion is that in the European Union the effective average tax rate applied to the conventional transboundary business model is on the level of 23.2%. Digital business models are taxed with an effective tax rate of only 9.5%.[54] It should be noted that the European Commission proposal encompasses only the largest digital enterprises – just as the state aid based proceedings against Apple – and does not solve the problem in a structured and systematic way.

In the co-dependent world the tax competition between states has a significant impact on the decisions made by business entities, especially these acting on the multinational level. A global significance of the MNEs requires global coordinated actions to react on their tax strategies. In a lack of these, each sovereign jurisdiction should introduce rules protecting their national security in the best way. One of the possibilities is to abolish the income taxes and focus on property taxes or indirect taxes (like VAT). The other possibility is to close loopholes in the existing system. The latter way was chosen by both the European Commission, international community acting under the auspices of the OECD, as well as by single states – like the United States of America. Large states have greater possibility to create conditions to achieve the higher level of economic security than the smaller actors of the international society, acting independently. For that reason, according to A. Lubbe, the international economic security is based on alliances (which are an "aggregation of the potentials"[55]) – even the European Coal and Steel Community was primarily

[52] Not only invoked above the power of multinational enterprises, but also e.g. a lack of protection of the intellectual property rights on the Internet, see gen. R. Ash, *Protecting Intellectual Property and the Nation's Economic Security,* Landslide No. 6/2014, p. 23.

[53] Not only tax havens but also other states applying harmful tax policy in the world grounded on a tax competition between states see in cooperation with MNEs a big chance for their economic development. Also states introducing incentives for the MNEs to tax their profits take benefits from non-effective taxation of the digital business models in the European Union.

[54] European Commission, *Communication from the Commission to the European Parliament and the Council "Time to establish a modern, fair and efficient taxation standard for the digital economy"*, COM(2018) 146 final, Brussels, 21.3.2018, p. 6.

[55] A. Lubbe, *National Economic Security*, „The Polish Quarterly of International Affairs", No. 59/1997, p. 63. As examples of these economic alliances, the Author invokes not only the European Economic Community (nowadays: European Union), but also the Polish-Lithuanian Union.

grounded in the idea of the economic security.[56] In the economic doctrine it was recognized that the larger and the more involved in the world economy a country is, the easier is to ensure its economic security.[57] Therefore the idea of undertaking actions on the European Union level should be assessed positively. However, it should be noted that the modern economy requires from the European Union not only to deal with that issue, but – according to the title of J. Pinder's article from 1984 – to "master"[58] it. Currently undertaken efforts are far from calling it a "masterpiece", and the problem begins even in the first phase, being related to the requirement of the unanimity.

As it was clearly stressed before the era of digital, multinational business models – if a national security conflicts with free trade, the primacy should be given to the national security.[59] Hence, the effective taxation of the digital business models should be the highest priority in the European Union – even higher on the political agenda than the freedoms of the European market, being a fundament, on which the EU is grounded. There are three main possibilities to address the taxation of the direct business activity in the European Union – to implement uninform action on the European level, to build in the EU smaller alliances (grounded in the common or convergent economic and political interests) or to act by the Member States independently. Having regard the decentralized direct tax legislation in the European Union, as well as the necessity to achieve unanimity to introduce uniform rules in the whole European Union, consensus in that matter is being perceived as unlikely to be achieved. Furthermore, the initiative of the European Union to tax the digital business models seems to be introduced too late, in particular in comparison to the U.S. tax reform, and in not broad enough– it is focusing only on the largest MNEs from the certain sector. If the economic interests are different within the European Union (what can be a reason for a lack of unanimity in the common action), a cooperation on a sub-EU level should be urgently undertaken, e.g. in the way of the procedure of enhanced cooperation, established in art. 326 et seq. TFEU. Furthermore, single Member States may implement solutions to react on a lack of effective taxation of the digital business models independently, in the most comprehensive way, mainly by renegotiating the double tax agreements or besides that to established advanced unilateral means of avoidance of double taxation. However, the scope of these actions could not be effective from the view of the European Union economic security, if it would not be comprehensive enough

[56] See: J. Pinder, *European Economic Security: How Can We Master the Modern Economy*, „International Journal" No. 40/1984, pp. 129-131.

[57] Ibidem, p. 74.

[58] J. Pinder, *European Economic Security…*, op. cit.

[59] E.C. Ravenal, *The Economic Claims of National Security*, "Cato Journal", No. 3/1983, p. 731.

(especially when the free movements within the EU are broadly guaranteed).[60] We are living now on the edge of the new international tax law order, observing the twilight of the fundamental, income taxation concepts. That situation is crucial for the economic security of states. The particularly important question, which should be additionally considered by the international community is if the alternative tax policy systems are a better solution than just closing some loopholes in the currently applicable system, which was created over 120 years ago – when the digital reality was not described even in the literature.

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BEZPIECZEŃSTWO GOSPODARCZE UNII EUROPEJSKIEJ W ŚWIETLE CYFROWYCH MODELI BIZNESOWYCH UŻYWANYCH PRZEZ PRZEDSIĘBIORSTWA WIELONARODOWE

Abstrakt. Problematyka bezpieczeństwa ekonomicznego i spraw fiskalnych są z sobą ściśle powiązane, w szczególności biorąc pod uwagę występujące na szeroką skalę nieopodatkowanie cyfrowych modeli biznesowych, które może być aktualnie obserwowane we współczesnej rzeczywistości gospodarczej. Nieefektywne opodatkowanie cyfrowych modeli biznesowych, wraz ze stratami fiskalnymi spowodowanymi przez opisywane zjawisko, znajdują się współcześnie tak wysoko na międzynarodowej politycznej agendzie jak np. zmiany klimatyczne. Unia Europejska jest nazywana nawet „bezbronną" wobec czynności planowania podatkowego podejmowanych przez cyfrowych przedsiębiorców. Istotą omawianej problematyki jest to, że fundamentalne instytucje międzynarodowego prawa podatkowego zostały stworzone w późnym dziewiętnastym stuleciu oraz trwale ugruntowane przez wiek dwudziesty – w rzeczywistości, w której cyfrowe modele biznesowe nie mogły być nawet przewidziane. Jako rezultat stosowania przestarzałych regulacji dochód generowany w państwie źródła nie może być tam opodatkowany. Ponadto, taki efekt nie prowadzi do naruszenia prawa podatkowego i nie może być postrzegany jako uchylanie się od opodatkowania czy unikanie opodatkowania. Komisja Europejska wszczęła postępowanie przeciwko Irlandii o udzielenie nielegalnej pomocy publicznej otrzymanej przez Apple w wysokości 13 miliardów euro (wysokość podatków niezapłaconych w wyniku zasad obliczania cen transferowych, nielegalnie zaaprobowanych przez irlandzkie organy podatkowe). Niemal w tym samym czasie, na skutek reformy systemu podatkowego D. Trumpa, Apple zgodziło się zapłacić dobrowolnie w Stanach Zjednoczonych 38 miliardów dolarów podatku, zainwestować 350 miliardów dolarów oraz stworzyć tam ponad 20 000 miejsc pracy. Na wiosnę 2018 roku, na skutek żądań wystosowanych przez państwa członkowskie, Komisja Europejska zaprezentowała projekt mający na celu przezwyciężenie nieefektywnego opodatkowania cyfrowych modeli biznesowych w Unii Europejskiej. Jednak przyjęcie wskazanych reguł jest mało prawdopodobne – biorąc pod uwagę wymóg jednomyślności oraz już zapowiedziane zastrzeżenia, jak również oparcie rozwiązania długoterminowego na założeniu, które zostało już odrzucone na forum państw członkowskich. W artykule Autor opisuje powód braku efektywnego opodatkowania cyfrowych modeli biznesowych w państwie źródła, istotę bezpieczeństwa ekonomicznego i wpływ na nie wywoływany przez modele planowania podatkowego, stosowane przez cyfrowe przedsiębiorstwa, jak również zarysowuje szczególną pozycję międzynarodowych korporacji w zglobalizowanym świecie. W artykule zostały również zaprezentowane środki reakcji, stworzone na poziomie międzynarodowym i unijnym, aby przezwyciężyć to postawione przed współczesnymi społecznościami wyzwanie. Autor podkreśla, że mając na uwadze szczególne cechy podatków dochodowych, w doktrynie międzynarodowego prawa podatkowego coraz częściej pojawia się idea zniesienia podatków dochodowych, w szczególności biorąc pod uwagę CIT (podatek dochodowy od osób prawnych).

Słowa kluczowe: cyfrowa ekonomia, cyfrowe modele biznesowe, bezpieczeństwo ekonomiczne, międzynarodowe prawo podatkowe, suwerenność, Unia Europejska, międzynarodowe korporacje.