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ABSTRACT OF THE DOCTORAL DISSERTATION

"Digital Services Taxes in the Member States of the European Union and the legal limits of tax jurisdiction"

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The dissertation analyzes a new type of taxes introduced in some European Union member states (the so-called digital services taxes, DST). These instruments are an attempt to tax revenues from certain types of digitized economic activity, which have not been taxed in these countries so far due to the content of the tax treaties concluded.

The admissibility of introducing such taxes without renegotiating double taxation treaties has been highly controversial since the birth of the very concept of such action. Some of them result from the difficulty of applying the paradigm of jurisdiction based on territorial authority to social relations that are somehow detached from the spatial dimension, taking place "digitally". This is compounded by conflicts of interest between the individual states imposing taxes on these activities, as well as between states and taxpayers.

Nevertheless, interest in such taxes is growing as problems in the process of multilateral negotiations on the revision of the treaty system increase. Work on the introduction of DST is currently being carried out in Poland, among other countries. An important issue, which is also the main research problem of the thesis, is therefore the admissibility of unilateral introduction of digital services taxes by the Member States of the European Union in the light of the legal limits of the exercise of tax jurisdiction. Ostensibly, the admissibility of imposing such a tax is evidenced by the fact that the taxpayers of the DSTs introduced so far perform their obligations. The British tax has brought £2.9 billion to the budget since its introduction until 2024. For Austrian, Spanish, Italian, and French taxes, these amounts are €446.9 million, €1.1 billion,

€1.8 billion, and €3.2 billion, respectively. These amounts represent a small part of the budgets of these countries (from about 0.013% to 0.027%). However, in almost every case (except for Spain), they exceeded the pre-imposition estimates. These levies can therefore be considered effective in the short term. However, the voluntary performance of tax obligations does not prove that the imposition of such a tax by a given State is compatible with the legal limits of its tax jurisdiction. Firstly, an action of a taxpayer is usually required for a court to decide whether a given tax falls within these limits. The taxpayers, for various reasons, may not question the actions of the tax authorities. Second, individual governments of countries implementing DSTs have concluded an interim agreement with the US regarding these taxes. However, the idea of reform of the international tax law, on which it was based, did not come to fruition. As such, disputes between the United States and these countries may return in the near future. This position is confirmed by the recent actions of the United States towards Canada, the United Kingdom, and the European Union.

The problem described above, therefore, remains an unresolved matter. Prior scientific studies discuss many aspects relevant to its solution, but do not exhaust the topic. No attempt has yet been made to discuss it comprehensively. This dissertation aims to fill the identified research gap. Its purpose is therefore to analyze and evaluate digital services taxes introduced in the Member States of the European Union in the context of the legal limits of tax jurisdiction.

As part of the problem outlined above, it is crucial to identify the structural elements of these taxes that are important from the perspective of setting the aforementioned limits. It is also important to determine the characteristics of the user location connectors used in these taxes and the consequences of their use. This allows for an analysis of the consistency of DST with the boundaries set by the genuine link principle and international agreements.

In connection with the above, three detailed research questions were formulated:

1. What are the structural elements of the digital services taxes introduced in the European Union Member States, and how do they differentiate these taxes from the perspective of determining the legal boundaries of tax jurisdiction?
2. How does the user location nexus used in digital services taxes introduced in the European Union Member States differ from traditional tax nexuses, and is it compatible with the genuine link principle?

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3. To what extent do digital services taxes in the Member States of the European Union, interpreted in the light of their objectives, comply with and to what extent do they violate the Treaty norms limiting tax jurisdiction?

Answering the questions posed required use of various research methods. In order to determine the normative content of the analyzed taxes, the relevant national regulations were first analyzed using the dogmatic method. In addition, to determine what effects the taxes in question were intended by the legislators and what results they actually produced, the available legislative materials were analyzed, such as the justifications for the acts, the impact analyses prepared in the legislative process, as well as the draft laws with the analysis of subsequent amendments and the records of the discussions conducted in the course of the work on the regulations in the parliamentary committees and at plenary sessions of the Parliament. A critical analysis of the scientific literature from individual countries was also carried out, concerning the regulations introduced in Austria, France, Spain, Italy, and the United Kingdom. The part of the analysis leading to the determination of the normative content of the examined taxes and the purposes of their introduction can be considered as an examination of foreign law. In its shadow lies the use of the comparative method in a functional approach during preliminary research preceding the selection of a research problem. During this study, all currently existing digital services taxes were analyzed in order to identify a group of solutions convergent in terms of design and objectives in a way that is suitable for joint analysis. The inclusion of the United Kingdom in the study remains justified despite its subsequent withdrawal from the European Union, due to the status of this country at the time of the introduction of the British tax and its similarity to other taxes selected for the study. Next, the relationship of individual taxes on digital services with selected norms of international tax law, key from the perspective of the research questions, was examined. This part of the research was carried out mainly using the dogmatic method. In addition, the available empirical evidence on the behavior of taxpayers and other countries in response to the implementation of DST was used. With regard to the effects of the examined taxes, claims proven in economic sciences were also used, without using research methods specific to this field of science.

The whole of the considerations is divided into four chapters in a way subordinated to the main research goal of the work and the detailed questions posed. Chapter I introduces the terms necessary for the analysis and proper understanding of the legal limits of tax jurisdiction and the normative structure of the taxes under review. In particular, the most important findings on the impact of digitalisation on international tax law and the achievements of economic science and tax law on the concept of digital services taxes are briefly discussed.

Chapter II includes a discussion of the historical context of the creation of the examined taxes, the objectives of their introduction expressed in the content of legal acts and legislative materials, as well as a detailed dogmatic analysis of their construction. This part is descriptive and explicative. Its main goal is to enable answers to the first of the research questions. Secondarily, the findings contained therein also serve as a basis for further considerations.

Chapter II includes a discussion of the historical context of the creation of the examined taxes, the objectives of their introduction expressed in the content of legal acts and legislative materials, as well as a detailed dogmatic analysis of their construction. This part is descriptive and explicative. Its main goal is to enable answers to the first of the research questions. Secondarily, the findings contained therein also serve as a basis for further considerations.

As a result of the analysis, one key structural difference between the examined DSTs was determined: the object of the tax. In the British and Italian DST, the object of tax is revenue from a closed catalogue of services (which is also the tax base). In the other cases examined, the object of taxation is the provision of the service itself. Since turnover in the economic sense can be considered from both the income and consumption side, the adopted legislative technique should determine the legal classification of a DST as an income or consumption tax, justifying the distinction between the two types of such taxes. The variants of the "revenue" type show a greater similarity to income taxes. Taking into account the characteristics of underlying services, revenue as the tax base can be considered as a solution similar to simplified flat-rate taxes on certain passive income. Conversely, the "consumption" type DSTs should be classified as consumption taxes, showing characteristics similar to customs and excise duties. At the same time, the analysis of legislative materials leads to the conclusion that these taxes were not only intended to secure the existing tax base of a given country (an anti-abusive function), but to extend it to the hitherto untaxed part of multinational enterprises' income in the economic sense, related to the value created by users located in a given country. This value was understood not as the acquisition of services itself, but as the performance of activities of particular importance for specific business models: sharing personal data and creating content relevant to the creation of network effects.

Chapter III provides an analysis of DST's compliance with the genuine link principle as the primary limit of tax jurisdiction. Of particular importance in this context are the nexuses of users' locations used in these taxes. The relationship between a DST and the imposing state is analyzed from three perspectives: territorial, economic, and functional. This makes it possible to determine whether they meet the conditions of a genuine relationship in the light of international law.

As a result of the research, it was determined that the nexus used in DSTs differs from the traditional mechanisms used in income and consumption taxes. In light of the identified objectives of the introduction of DSTs, it was concluded that the nexus between the location of users is not only intended to link taxation to the place of the target market. The legislators intended to apply the tax to situations in which users significantly contribute to value creation by performing specific types of activity. Such an understanding differs from the market approach characteristic of consumer taxes and represents a departure from the link between taxation and the direct source of payment. This is even more different from the solutions used in income taxes. Traditionally, these links have been based on the physical location of the management centre, the assets used to perform economic functions, or the personnel performing these functions. The nexuses of the digital services taxes do not directly implement this paradigm. However, an interpretation of the DSTs' norms in the light of the identified objectives indicates that they treat certain specific actions of users as a type of intangible assets, significant from the perspective of tax law, and attribute to them a meaning similar to the factors indicated above.

In view of the above, it was concluded that the nexus of a "consumption" type DST, despite the identified differences from the existing solutions, in principle falls within the limits of substantive jurisdiction. Indeed, the services subject to the tax are offered in multilateral models, in which the territorial link with any of the parties to the market (including those not making the payments directly) must be regarded as equally relevant and sufficient to satisfy the territoriality requirement. Many more doubts are raised by the use of such a nexus in a "revenue" type DST. However, it was found that treating the value created by users in certain specific situations as an intangible asset, justifying the taxation of the associated income, is an attempt to adapt the principle of territoriality to a reality in which the actions of users take over the role previously played only by traditional factors of production. This is in line with the trend of modifying the paradigm of the exercise of jurisdiction in the conditions of a digitized economy in other areas of law. Moreover, given the intangible nature of the services, the location of users is one of the few elements that show a territorial link. The choice of this criterion for determining the place of taxation is therefore more rational than, for example, the location of the server. This fits into the contemporary, functional understanding of territoriality as a relationship with the state. The research, therefore, contradicted the common allegations regarding the extraterritorial nature of these taxes. The above conclusions were also supported by arguments resulting from economic analysis. It was pointed out that the special role of users may be considered as an element of "income generation" within the meaning of the concept of economic affiliation. These services are also specific cases of activities that give rise to location-related economic rents that would not be obtainable in any other country.

It was noted that the DST nexuses do not guarantee the existence of a sufficient connection for the exercise of enforcement jurisdiction in the light of international law. It was therefore considered that the exercise of enforcement jurisdiction in respect of such a tax would fall within the limits set by the genuine link principle only in respect of entities with a physical presence in the territory of the State concerned. In other respects, the control and enforcement of such taxes will be permissible only if there is an explicit legal basis resulting from an international agreement. This conclusion was supported by arguments resulting from a functional analysis. In particular, it was pointed out that the key problem is the lack of access to user location data, necessary for the application of DST, by entities other than taxpayers of these taxes. It was noted that this problem does not result from a lack of territorial link. On the contrary, the completely digital nature of the business means that all activities of taxpayers and users are recorded. From a purely technological point of view, DST could be a fiscal instrument providing the greatest surveillance capabilities. However, this potential cannot be exploited due to the current standards of legal protection of citizens' privacy, which force the restriction of storage and tracking of data relevant from the perspective of this tax.

Chapter IV compares the examined taxes with the limitations resulting from the voluntary treaty obligations of states, which are crucial for the possibility of unilateral implementation of digital services taxes. The consistency of DSTs with the provisions of double taxation treaties (taking the OECD Model Convention as a reference), European Union law, and World Trade Organization (WTO) agreements was examined. In the field of EU law, the analysis covers the fundamental freedoms, state aid rules, Article 110 of the Treaty on the Functioning of the European Union, and secondary law. The conclusions of the dogmatic analysis were supplemented by available empirical data on the consistency of the examined solutions with the analyzed provisions of international agreements.

With regard to double taxation treaties, it was found that the limits resulting therefrom can only be violated by "revenue" type DSTs. Only this type of digital services tax can be considered to meet the conditions of a "tax on income or part thereof" referred to in Article 2(2) of the OECD Model Convention or a "tax identical or substantially similar to taxes covered by the Convention" within the meaning of Article 2(4) of the OECD Model Convention. The object of the "revenue" type of DST proves that their tax base is a "substitute" for income taxation, as is the case with flat-rate taxes on dividends or interest. Such an interpretation is supported primarily by the characteristics of the underlying digital services, in particular, near-zero marginal costs. This is also indicated by the direct nature of these burdens. Conversely, in the case of "consumption" type DSTs, in which the object is the provision of the service itself, there are convincing arguments for the fact that the tax base is a substitute for the value created by users, and not for income. Similar conclusions concern the similarity of DSTs to taxes falling within the scope of a given treaty. It should be noted that in some countries (including Italy), double taxation treaties also explicitly cover taxes with a tax base more similar to DST than traditional income taxes. In such cases, it is more likely that the DST in question will be deemed to fall within the scope of the double taxation agreement. As the DST's nexuses are conflicting with the distributional norms of double taxation treaties, any DST falling within the scope of a given convention will be inconsistent with the limits of tax jurisdiction resulting from it.

It has also been shown that both types of digital services taxes introduced in the Member States of the European Union violate the limits of tax jurisdiction resulting from the EU treaties. Although they do not fall within the areas subject to positive integration, they violate the prohibitions of discrimination under two groups of EU law norms: fundamental freedoms and the state aid rules. In both cases, the controversial elements of DST are revenue thresholds in the definition of a taxpayer. From the perspective of fundamental freedoms, the actual levels of these thresholds result in a differentiation in the tax situation of a very narrow group of entities that are part of the largest multinational enterprises, most of which are not tax residents. From the state aid perspective, the imposition of an additional tax on this narrow group can be treated as a selective granting of benefits to all other entities operating on the market. In both cases, the identified objectives of introducing the examined taxes are not sufficient to consider them as permissible exceptions for the discriminatory regulations, which would make them compatible with the limits of the tax jurisdiction.

It has also been found that both types of digital services taxes introduced in the Member States of the European Union violate the limits of jurisdiction set by the provisions of the General Agreement on Trade in Services of 1994 (GATS), which require that services and service providers be treated equally with domestic entities and no less favorable than those originating in any other WTO member state. Despite some formal differences, this violation is of a similar nature to the norms of EU law. The above-mentioned provisions of the GATS prohibit covert discrimination. As in the case of breaches of EU law, it was found that the identified objectives of the introduction of DST do not justify the identified breaches.

Comparing the above conclusions with observations concerning the actions of taxpayers to date, it was concluded that the importance of the taxpayer's attitude for the effective collection of DST is of exceptional importance. Not only do they have the possibility of using several arguments to refuse to pay these taxes, but they can also, to a certain extent, conceal the information necessary to verify the correctness of the determination of the tax base. In the absence of cooperation, especially if the taxpayers' action consists of partially underestimating the declared amounts, and not in refusing to pay the tax altogether, the authorities will not be able to accurately verify the amount of the liability.

The conducted research also allowed for the formulation of guidelines, the fulfilment of which would allow for the unilateral implementation (and subsequent collection) of a digital services tax in a way that does not violate the legal limits of the tax jurisdiction. Firstly, the object of such a tax would have to be the provision of services itself, and not the revenues derived from it. Secondly, the revenue thresholds should be significantly reduced. Although it is not possible to indicate an unambiguous minimum value, the doctrine considers a threshold of 100,000 euros to be acceptable. Thirdly, the structure of the tax should be supplemented with norms extending the liability for it to other members of the capital group or the obligation to appoint a tax representative for entities that do not have a physical presence in the territory of the state.

It was noted that the implementation of these postulates would lead to a situation in which these taxes would not achieve their intended goals, and could even negatively affect the social sense of justice of the tax system (although they would generate some budget revenues). After ensuring that they are neither discriminatory nor incompatible with double taxation treaties, they can only constitute marginal taxes on consumption. However, failure to adapt DSTs to the limitations of tax jurisdiction discussed in the dissertation means that their effectiveness depends almost exclusively on the cooperation of international companies. This contradiction stems from the very notion of the digital services tax. Thus, in the current legal situation, DST appears to be only an ad hoc tool of political pressure, and not a rational instrument of tax policy.