# EFFECTIVE TAXATION OF THE DIGITAL ECONOMY: AN ANALYSIS OF THE GLOBAL TAX DEAL AND THE DOMESTIC TAX LAWS IN NIGERIA:

**Abstract**

*Globalisation has presented new challenges in relation to the administration of corporate tax. It is now easier for companies to carry out cross-border trade and dealings in two or more tax jurisdictions. This development encourages companies to shift profits from jurisdictions with higher tax rates to jurisdictions with lower rates. To address this, the Organisation for Economic Cooperation and Development (OECD) developed the Base Erosion and Profit Shifting Frameworks. One of the notable innovations of the framework, is the principle of Permanent Establishment (PE) to the effect that a company must pay tax in a jurisdiction where it has fixed or principal place of business. While this principle has worked remarkably well over the years of 'brick and mortar' business models, the development of digital technology has brought about newer challenges. Multi-national tech companies now carryout business in different countries without having a PE in such countries. In recent times, different countries including Nigeria have enacted municipal laws regulating the taxation of digital economies. The OECD in 2021 also developed the Global Tax Deal (GTD) to regulate taxation of the digital economy at the global level. This Paper discusses the domestic effort to ensure taxation of digital economy in Nigeria and highlights the challenges. It discusses the GTD is extensively with emphasis on its disadvantages for Nigeria and other low- and middle-income countries whose interests appears not to be well protected. The Paper concludes that there is need for regional collaboration to ensure the development of a Tax Deal that protects LMICs and specifically reflects and addresses their specific concerns and peculiarities.*

**Keywords**: Base Erosion and Profit Shifting Framework, Principle of Permanent Establishment, Taxation of Digital Economy, Global Tax Deal.

## 1. Introduction

Corporate tax remains critical when discussing the tax base of most countries of the world. As it stands, only 15 countries globally do not levy corporate tax[1]. A recent report in 2021 showed that Africa has the highest regional-average rate[2] with Comoros having the highest corporate tax rate of 50%. In administering corporate tax, governments are expected to follow the principles laid out in the OECD's Model Tax Convention on Income and on Capital (MTCIC)[3]. One of the major objectives of the MTCIC, is to rectify the problem of unduly taxing the same profit of companies by different tax authorities, simply because the transaction is carried out in more than one country. Simply put, the MTCIC set out to address the unfair practice of double taxation, which had previously been addressed by individual states entering into Double Taxation Agreements (DTA) which are usually bilateral agreements aimed at effectively and fairly taxing the profits of companies which are present in both states. The OECD MTCIC also contain provisions to determine the taxing rights of countries over companies which engage in multinational transactions[4]. Specifically, Article 5 contains extensive provisions on the concept of Permanent Establishment (PE). It defines the concept as *'a fixed place of business through which the business of an enterprise is wholly or partly carried on'*.[5] For clarity, Article 5(3) provides that a building site, construction or installation project will only constitute a PE where they have been in existence for more than 12 months. Instances in which a company will not be regarded to have permanent establishment in a state are also spelt out in the MTCIC[6]. The right of governments to tax the profit of companies on the basis of PE can be inferred from the provision of Article 7 which generally provides for

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[1] S. Bray, 'Corporate Tax Rates around the World, 2021' (Tax Foundation, 9 December 2021) < https://taxfoundation.org/publications/corporate-tax-rates-around-the-world/ > last accessed 3 July, 2022.

[2] Ibid.

[3] OECD, 'Model Tax Convention on Income and on Capital: Condensed Version 2017' available at ttps://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page1.

[4] A. Anjali, 'Taking a Walk Through The Concept of Permanent Establishment' (Tax Guru, 27 November 2019) < https://taxguru.in/income-tax/walk-concept-permanent-establishment.html > last accessed 3 July, 2022.

[5] Article 5(1)

[6] OECD MTCIC, Paragraph 4 and 4.1. Specified instances include: establishment solely for the purpose of storing, displaying or delivering goods of a company, an establishment used in maintaining stock for the purpose of processing by another enterprise, an establishment maintained by a company solely for the purpose of purchasing goods or collecting information. Notwithstanding the provision of Paragraph 4, Paragraph 4.1, states that the exceptions will not apply to an establishment maintained by a company and/or its subsidiary within the taxing state, in so far as the activities of both companies are complimentary.

Business Profits and empowers states to tax the attributable profits of companies that engage in multinational transactions where such profits are attributable to the PE within the taxing jurisdiction of the state[7]. In spite of the above provisions, tech giants have been able to carry on business and earn profits from several tax jurisdictions without necessarily having PEs in those countries. The digitalisation of businesses has thus made the rules of PE inapplicable. To address this development, the OECD developed the Global Tax Deal (GTD) in 2021 to ensure that tech giants do not evade corporate tax. Prior to the development of the 2021 GTD, some countries including Nigeria have however enacted laws to address the issues relating to taxation of digital companies. It is against this background that this Article discusses the domestic effort by Nigeria to ensure taxation of digital economy whilst highlighting the challenges in the domestic efforts. The OECD GTD is also discussed extensively with emphasis on its disadvantages for Nigeria and other low- and middle-income countries whose interests appears not to be well protected under the GTD.

## 2. Taxation of Digital Economy: The Nigerian Position

The development of technology in recent times has positively impacted several areas of human life. Notably, technology has played a significant role in improving the global economy. In 2018, the Nigerian Investment Promotion Commission noted that the Nigerian digital economy is expected to generate roughly $88 billion dollars in revenue and also create about 3 million jobs by the end of 2021[8]. Equally, in 2018 the World Bank released a report stating, that the Nigerian e-commerce sector (which is just an aspect of the digital economy) had a gross spending of about $12 billion and the revenue derived from this sector is expected to increase to an approximate $75 billion by 2025[9]. Although digitalisation has incited economic growth in many countries, it has also presented challenges which are unprecedented. In the current context, digital companies can now carry on business in several countries without having a PE or taxable agent and this development has made it imperative for countries including Nigeria, to develop a means of addressing this loophole in tax administration and income generation potentials. The primary statute which provides for the imposition and administration of corporate tax in Nigeria is the Companies Income Tax Act (CITA)[10]. Section 105 of CITA states defines a company to include 'any company or corporation (other than a corporation sole) established by or under any law in force in Nigeria or elsewhere.'[11] By the provision of section 9 of CITA and consistent with the MTCIC, profits of a company to be subjected to corporate tax in Nigeria must be attributable to a PE within Nigeria. Section 13 of CITA makes provisions for taxable profits but the term taxable profit is not defined. Nonetheless, in respect of Nigerian companies, the Act stipulates that the profits of a Nigerian company shall be deemed to have been accrued in Nigeria where it has either arisen or it has been received or brought into the Nigerian territory.[12] In respect of companies not registered in Nigeria, the Finance Act[13] has made significant amendments to CITA to the effect that such company will be taxable where it has significant economic presence (SEP) in Nigeria even if the company is not resident in Nigeria.[14] The determination of what constitutes of a company which is not regarded as a Nigerian company is to be made by an Order of the Minister of Finance[15]. This provision was the basis for the Companies Income Tax (Significant Economic Presence) Order of 2020[16]. Also, any uncertainty which may occur in determining non-resident companies (NRC) has been clarified by the Federal Inland Revenue Service (FIRS).[17] The FIRS Information Circular defines a NRC as a company other than a corporation sole, established by or under any law in force in any territory outside Nigeria.[18] It also clearly stipulates that NRCs shall be liable to pay tax on income derived from Nigeria and will be deemed to have a taxable presence in Nigeria[19].

By the provision of the SEP Order,[20] NRCs shall be deemed to have SEP where:

a) The NRC derives gross income of more than 25 million Naira or its equivalent in another currency in the year of assessment and engages in one or more of the following transactions:

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[7] See generally, the provisions of Article 5 and 7 of the MTCIC Condensed Version, 2017.

[8] Ogochukwu Isiadinso and Emmanuel Omoju, 'Nigeria: Taxation of Nigeria's Digital Economy: Challenges And Prospects' (Mondaq, 30 May 2019) < https://www.mondaq.com/nigeria/tax-authorities/810276/taxation-of-nigeria39s-digital-economy-challenges-and-prospects?login=true&debug-domain=.mondaq.com > last accessed 10 July 2022.

[9] World Bank Group, *Nigeria Digital Economy Diagnostic Report* (CC BY 3.0 IGO, 2019).

[10] Cap. C21. L.F.N 2004

[11] See the judgement of the court in *Offshore International v FBIR (Unreported) Suit No. FRC/L/36/75* decided on June 7, 1976.

[12] Section 13(1)

[13] Section 4 (a) and (b) of the Finance Act 2019; and section 7 of the Finance Act 2020.

[14] Section 13 (2) (c) and (e) and Section 4 (b) of the Finance Act 2019.

[15] This provision was inserted by Section 4 (c) of the Finance Act 2019.

[16] S.I. No. 9 of 2020.

[17] FIRS, '*Taxation of Non-residents in Nigeria',* Information Circular No. 2021/07 of 3rd June 2021.

[18] Ibid, Paragraph 2.0

[19] Ibid. at Paragraph 2.2.

[20] Para 1.

i) Streaming or downloading services of digital contents, including movies, videos, music amongst others to any person in Nigeria;
ii) Transmission of data collected about Nigerian users which had been generated from such users' activities on a digital interface including website or mobile applications;
iii) Provision of digital goods and services; and
iv) Provision of intermediation services through digital platform, website or online applications that link suppliers and customers in Nigeria

b) The NRC makes use of Nigerian domain name (.ng) or registers a website address in Nigeria; or
c) The NRC maintains a purposeful interaction with target persons in Nigeria for the purpose of customising its digital page or platform, and this may include; reflecting the price of its products or services in Naira or by providing options for payment in Naira.

For the purpose of determining the 25 million Naira gross income, the activities carried out by connected persons in the year of assessment must be aggregated.[21] Connected persons for this purpose include persons that are regarded as associates of the NRC under the Companies and Allied Matters Act, 2020 or persons that can be regarded as business associates under the provisions of the Order.[22] With respect to NRCs that provide technical or professional services of a specialised nature, such companies will be deemed to have a SEP in Nigeria when they receive the threshold of 25 million Naira as payment from either a resident of Nigeria or a company (other than a Nigerian company) which has a fixed base in Nigeria.[23] Although technical services do not extend to professional or consultancy services, it includes advertisement services; and the training or provision of skilled personnel.[24] The SEP Order also excludes payments made by NRC to an employee under a contract of employment; payments made to a person for teaching in an educational institution; and situations where a NRC is covered under a multilateral agreement between Nigeria and other country which is aimed at addressing the challenges of taxing the digital economy.[25] In sum, Nigeria levies digital taxes in two ways. First is on the profit of NRCs or digital companies which have SEP in Nigeria. The second manner is through Value Added Tax which NRCs are required to collect on digital services provided by virtue of Section 37 of the Finance Act, 2019.

From the above, it appears that Nigeria has put in place a commendable legal and administrative framework for the taxation of Nigerian digital economy. Nevertheless, there are notable challenges which hinder the effective implementation of the existing digital tax frameworks. Compliance has continued to pose a great challenge to the smooth administration of taxation generally in Nigeria. This problem has further been compounded, with the introduction of digital taxes which are levied on companies with little or no physical presence in Nigeria. There have been laudable efforts of the government to ensure compliance, such as the provision of Section 49 of CITA, which gives a Nigerian company the power to withhold taxes from payments which are to be made to an NRC that is in arrears of taxes to be paid to the FIRS. This provision was judicially approved in *Ama Etuwewe v FIRS*[26]. Similarly, Nigeria is also a signatory to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAC) and the Multilateral Competent Authority Agreement (MCAA) on the Automatic Exchange of Financial Account Information which are agreements aiding the FIRS to acquire and exchange financial information from other signatories in order to best determine the financial standing of taxable persons (NRCs inclusive) and how to tax the foreign income of such persons[27]. The above also forms the basis of the FIRS Income Tax (Common Reporting Standard) Regulations, 2019[28] which empowers the FIRS to receive information from well-above 100 countries where Nigerian taxable persons have bank accounts[29]. Notwithstanding these laudable efforts, the fact remains that whilst companies with physical presence in Nigeria can easily be compelled to comply with the tax provisions, NRCs can easily default with little or no means of enforcing sanctions for failure to comply.[30] Aduloju notes and we agree that tax collection is by far the most

[21] Para 1(5)
[22] See generally Paragraph 1 (6) of the Order 2020.
[23] Para 2.
[24] See generally the provision of Paragraph 2(2) of the Order.
[25] Paragraph 1(3)
[26] Unreported judgment delivered on Monday, 30 September 2019 in *Suit No. FHC/WR/CS/17/2019*, by Hon. Justice Emeka Nwite of the Federal High Court, Warri Division.
[27] Seun Adu, Olarenwaju Alabi and Ovo Efemini, 'FIRS Issues Regulations on Common Reporting Standards' (PWC Nigeria, September, 2019) <https://pwcnigeria.typepad.com/files/pwc-tax-alert_firs-issues-crs-regulations_sep2019.pdf > last accessed 31 July 2022.
[28] Statutory Instrument No. 28 of 2019.
[29] O.I Aduloju, 'Taxation of the Nigerian Digital Economy in view of the 2019 and 2020 Finance Act', [2021] 40 *SSRN* < https://ssrn.com/abstract=4002469 > last accessed 1 August 2022.
[30] Ogidan Rachel Oluwatosin, 'Taxation of the Digital Economy in Nigeria – Analysis of the

difficult phase of tax administration, particularly for digital transactions involving NRCs as the traditional local enforcement mechanisms are often limited and fail to effectively address enforcement issues peculiar to NRCs.[31] It is trite, that tax laws are only applicable within the territory of each country. The usual mode of enforcement in case of default is by levying distress, seizing the assets of defaulting companies, freezing the accounts of these companies or imposing fines. With NRCs having little or no physical presence in Nigeria, it is not easy for the tax authorities to utilize the above enforcement mechanisms. Whilst section 43(4) of the Finance Act 2020 seeks to address this problem by providing that a non-resident person, who makes supply of taxable goods and services in Nigeria, can appoint a representative for the purpose of its tax obligations, the mere fact that these companies can carry on business without a physical presence renders this provision largely ineffective.

One of the basic elementary principles of taxation is certainty. The laws regulating digital taxation in Nigeria, do not clearly define what amounts to the taxable profits of NRCs as well as the deductible and non-deductible expenses of these companies.[32] This makes it somewhat difficult for the FIRS to enforce compliance from these companies when the law does not provide comprehensively for the taxable profits of these companies. The high level of illiteracy in Nigeria also hampers the effectiveness of measures for efficient financial technology. This is apparent in the poor state of financial technology in Nigeria and the notable deficiencies in both the e-banking and e-payment services respectively.[33] The inadequacies have not spared the FIRS and tax authorities have hampered the ability of the FIRS to effectively carry out its duties, thereby encouraging tax evasion and inhibiting an effective tax collection system within the digital sphere, especially in the area of effectively tracking activities of digital companies.[34]

**3. Taxation Of Digital Economy: OECD'S Efforts**

The need to devise a means of taxing the world's largest tech companies has become apparent over the years and this has been one of the objectives of the OECD in the last decade. This is because, these companies, are typically taxed only in countries where they have physical presence largely excluding countries where they market their products and derive profit. The OECD Base Erosion and Profit Shifting (BEPS) Project was developed in 2013 by the Global 20 countries and over 60 member-countries of the OECD to make international tax rules more coherent, address the challenge of tax avoidance and to create a more transparent tax environment.[35] The BEPS initiative identifies 15 Action to address the issues including Action 1 relating to taxation of digital economy and Action 7 on PEs. The BEPS Inclusive Framework (IF) was established in 2016 to monitor and facilitate the development and implementation of standards on BEPS related issues.[36] In 2017, a multilateral instrument (MLI) to foster efficient implementation of tax treaty related BEPS measures without the need for individual bi-lateral tax treaty negotiations was signed and over 100 countries and jurisdictions have joined the MLI since 2017 and over 135 countries and jurisdictions are currently collaborating on implementation of the BEPS package.[37] The OECD first mentioned the term SEP in its 2019 Public Consultation Document.[38] The document identifies the tax challenges arising from the digitalisation of the economy and seeks to revise the rules concerning PE in light of the evolving peculiarities of digital technology and in respect of allocation of taxing rights and taxable profits. To this end, three proposals were developed namely: User Participation Proposal (UPP); Marketing Intangible Proposal (MIP); and Significant Economic Presence Proposal (SEPP). The UPP is to the effect that the threshold for allocating taxing rights and taxable profits to the user jurisdiction should be based on the significant value generated from the utilisation of the services of certain digitalised businesses through user participation.[39]. The rationale for this proposal lies in the fact that the continuous engagement and utilisation by users is pivotal to create value for the above digitalised

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Policy, Legal & Administrative Dimensions', [2021] 62, *SSRN* < https://ssrn.com/abstract=3977655 > last accessed 2 August 2022.

[31] Aduloju, 'Taxation of the Nigerian Digital Economy'.

[32] Gabriel Aliu, 'The Digital Economy and the tax landscape: Examining the evolutionary trends of law and policy in Nigeria' [2021] (4) (2) *ULR* < https://unilaglawreview.org/wp content/uploads/2021/02/Article-5.pdf > last accessed 5 August 2022.

[33] Okafor Endurance, 'Poor infrastruciture tops Fintech challenges in Nigeria- FairMoney CEO' *Business Day (*Lagos, November 23, 2021) <https://businessday.ng/companies/article/poor-infrastructure-tops-fintech-challenges-in-nigeria-fairmoney-ceo/> last accessed 5 August 2022.

[34] Aliu, 'The Digital Economy and the tax landscape'.

[35] OECD/G20 Inclusive Framework on BEPS, Fifth meeting of IF, Lima Peru 27-28 June, 2018 < https://www.oecd.org/tax/beps/flyer-inclusive-framework-on-beps.pdf > last accessed 5 August 2022.

[36] Ibid.

[37] https://www.oecd.org/tax/beps/, updated November, 2021. Accessed 01 November 2022

[38] Organisation for Economic Cooperation and Development, *Addressing the Tax Challenges of the Digitalisation of the Economy (Public Consultation Document)* 2019, < https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf > last accessed 21 July 2022.

[39] Specifically, social media businesses, search engines and online marketplaces

businesses.[40] Although the MIP also relies on active engagement of users to create value for digital businesses, it however has a broader spectrum than the UPP as it accommodates more digital businesses that deal in market intangibles for the purpose of value creation. MIP recognises two classes of intangibles created in user jurisdictions, the first being in relation to brand and trade name which plays a crucial role in the level of participation to be expected from users; while the second essentially involves the marketing of information typically derived from the customers activities such as; customer data, customer relationships and customer links.[41] Unlike the UPP and MIP, the focus of the SEPP is not on users but on the connection between the taxing jurisdiction and the company which makes profit from digital transactions. Its primary focus is thus on NRCs with SEP in a country on the basis of sustained interaction with that country through digital technology or other automated means.[42] Although the SEPP does not define SEP, it recognises revenue generation as the primary factor to be considered in determining SEP of digital companies whilst emphasising the consideration of other combining factors to determine SEP. Factors to be considered include: the existence of a user base and the associated data input; volume of digital content derived from the jurisdiction; billing and collection in local currency or with a local form of payment; the maintenance of a website in a local language; responsibility for the final delivery of goods to customers, provision of other support and after sales services; or sustained marketing and sales promotion activities to attract customers.[43] The SEPP provisions have been adopted by countries in taxing their digital economy and what amounts to SEP in these countries have been consistent with the consideration of revenue generation from the economic activity within the country alongside consideration of the other factors listed in the SEPP.[44]

The BEPS IF in a bid to consolidate efforts and create long-term solutions to address the challenges associated with taxing the digital tax environment adopted a two-pillar approach under the BEPS 2.0.[45] The first pillar covers solutions for determining the allocation of taxing rights and the second pillar is intended to design a system for payment of a minimum level of tax on profits by multinational enterprises (MNEs).[46] The BEPS 2.0 thus laid the foundation for the GTD. The GTD was developed by the finance ministers in the group of seven rich nations (G7) to gradually alleviate the strain on public finances and in the nearest future, stimulate economic growth- post COVID.[47] The GTD is expected fairly re-allocate taxing rights with respect to the profits of some of the largest MNEs and put an end to tax competition amongst states and the concept of tax havens.[48] The GTD is expected to solve the challenges of digital taxation based on the two-pillar strategy. Pillar one aims to distribute fairly, the profits of some the largest MNEs, by redefining the nexus for taxing these countries. Under international taxation, jurisdiction is classed into three namely residence jurisdiction, source jurisdiction and market jurisdiction[49]. The GTD is innovative because it provides for market jurisdictions to tax the profits of MNEs even where these companies do not have physical presence in those jurisdictions.[50] The GTD applies to some of the largest and most profitable MNEs in the world making a global turnover of above 20 billion Euros with over 10% profitability (i.e. profit before tax).[51] It however excludes MNEs in the extractive industry and in the regulated financial services sector. In addition, the GTD provides for the expansion of the scope of its application in relation to MNEs and the reduction of the global turnover threshold to 10 billion Euros after 7 years of its enforcement.

[40] Ibid at page 9.
[41] Ibid at page 12.
[42] Ibid at Para 51.
[43] Ibid.
[44] Michael Ango and Samuel Ibrahim, 'Taxing the Digital Economy based on Significant Economic Presence: A Guide for the Implementation of the Finance Act, 2019' *Business Day* (Lagos, 17 March 2020) 9.
[45] KPMG US, 'BEPS 2.0: What you need to know' < https://assets.kpmg/content/dam/kpmg/xx/pdf/2022/03/beps-what-to-know-flyer-web-final.pdf > last accessed 5 August 2022.
[46] OECD 2021 OECD/G20 Base Erosion and Profit Shifting Project Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy 8 October 2021 https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf last accessed 5 August 2022.
[47] Jan Strupczewski, 'Exclusive G7 to back minimum global corporate tax and support economy – draft' (*Reuters*, May 31, 2021) <https://www.reuters.com/business/retail-consumer/exclusive-g7-back-minimum-global-corporate-tax-vow-keep-support-economy-draft-2021-05-31/ > last accessed 6 August 2022.
[48] Ibid.
[49] Global Financial Integrity and ACODE, 'OECD Global Tax Deal: Key elements, opportunities and challenges' < https://www.acode-u.org/uploadedFiles/OECD-Global-Tax-Deal.pdf > last accessed 30 August 2022.
[50] Ibid.
[51] Ibid.

Reallocated profit will be taxable exclusively by the market jurisdiction under the GTD. A market jurisdiction is any country where the MNE earns at least a million Euros in revenue from its market. However, smaller market jurisdictions with a GDP lower than 40 billion Euros have a lesser threshold of at least 250,000 Euros[52]. The market jurisdiction is entitled to tax only 25% of the company's residual profits[53]. 'Residual profits' as used here refers to the taxable profits exceeding a threshold of 10% profit margin[54]. It is expected that the implementation of pillar one will bring about reallocation of about 125 billion Dollars to the market jurisdiction each year.[55] Pillar one requires signatories to the GTD to repeal unilateral measures developed for the purpose of taxing the digital sphere. In other words, countries which have implemented domestic digital services tax laws and SEP orders are expected to repeal these existing frameworks. To ensure tax certainty, all disputes arising from the GTD are to be resolved via the Mutual Agreement Procedure (MAP) which was first introduced under BEPS Action 14.[56] There is however provision for an alternative binding resolution mechanism, for countries that have little or no meaningful level of experience with respect to the MAP.[57] The focus of pillar two on the other hand, is to address tax avoidance practices of MNEs by shifting their headquarters to low-tax jurisdictions or tax havens, for the purpose of unfairly paying lower taxes. The OECD noted that countries lose about 4-10 % of the global corporate tax revenue annually, to BEPS practices[58] with about 240 billion Dollars being lost annually due to tax avoidance by MNEs.[59] Pillar two therefore imposes a global minimum tax rate of 15% for large MNEs earning over 750 million Euros. The GTD recognises that a country may impose top-up tax on a parent entity headquartered in the country in respect of the low taxed income of a constituent entity even where the threshold amount is not met. The pillar however excludes government entities, international organizations, non-profit organizations, pension funds or investment funds that are Ultimate Parents Entities (UPE) of an MNE Group or holding vehicles used by such entities, organizations or funds.[60] Pillar two is to be applied alongside recognized domestic tax rules. It incorporates the Income Inclusion Rule (IIR) and the Undertaxed Payment Rule (UTPR). The IIR empowers the home jurisdiction to impose a top-up tax on the parent company of a multinational if it pays less than the effective 15% tax rate in other jurisdictions. The UTPR, allows other jurisdictions where the MNE operates, to collect the top-up tax where the home jurisdiction has not collected the initial top-up tax or has a rate which is lower than the 15% effective tax rate[61]. The Pillar also incorporates the treaty-based Subject to Tax Rule, which allows the source jurisdiction to retain the taxing right on certain base-eroding payments such as; interests and royalties which benefit from reduced withholding tax rate under bilateral treaties. Specifically, the Rule states that member countries that impose a rate less than 9% of interests and royalties are expected to modify their treaties to enable developing countries tax such payments.[62]

The carve-outs rule which will reduce the tax base on which the 15% minimum rate will be applied is recognised under pillar two. This is to be achieved by exempting low-taxed activities which have real substance. For instance, under Pillar two, a company will be able to deduct 5% of employee compensation costs and tangible assets from the taxable amount on which the home jurisdiction can levy top-up tax on.[63] The OECD has reported that the implementation of Pillar two, will lead to the generation of about 150 billion Dollars as additional corporate tax revenue globally.[64] Pillar two is also expected to significantly address the international tax problems of tax avoidance and tax competition.[65] In this regard, it is generally believed that avoiding taxes by typically shifting profits, from high tax jurisdiction to low tax jurisdictions or tax havens, will be eliminated

[52]OECD, 'Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation' < https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf > last accessed 5 August 2022.
[53] Ibid.
[54] Global Financial Integrity and ACODE, 'OECD Global Tax Deal'.
[55] Ibid.
[56] OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing, 2013) 23.
[57]OECD, 'Two-Pillar Solution to Address the Tax Challenges'.
[58] Global Financial Integrity and ACODE, 'OECD Global Tax Deal'.
[59]Organisation for Economic Cooperation and Development, 'Base Erosion and Profit Shifting Framework' < https://www.oecd.org/tax/beps/ > last accessed 1 September 2022.
[60] Global Financial Integrity and ACODE, 'OECD Global Tax Deal'.
[61] Julie McCarthy, 'The new Global Tax Deal is bad for development' (*Brookings*, May 16 2022) < https://www.brookings.edu/blog/future-development/2022/05/16/the-new-global-tax-deal-is-bad-for-development/amp/ > last accessed 7 September 2022.
[62] Global Financial Integrity and ACODE, 'OECD Global Tax Deal'.
[63] Ibid,12.
[64] Ibid.
[65] Didier Jacobs, 'Are the global tax proposals in the interests of low - and middle-income countries?' (*Oxfam America*, 16 August 2021) < https://webassets.oxfamamerica.org/media/documents/Global_Tax_Proposals_Oxfam.pdf > last accessed 5 September 2022.

by the imposed global minimum tax rate. The unhealthy practice of reducing corporate tax rates to attract foreign investments is also expected to be eliminated.[66] As of today, a 137 from the 141 member-countries of the OECD have ratified the GTD. This figure represents more than 90% of the world's economy[67]. The four jurisdictions refusing to accept the GTD are Nigeria, Kenya, Pakistan and Sri-Lanka. These countries have raised certain concerns, which justify their position that the GTD is not beneficial to developing countries.

**4. Concerns about THE OECD'S GTD**

Since the GTD was developed, experts have raised concerns about the suitability of the GTD for the low-and-middle income countries (LMICs).[68] To start with, the negotiation process of the GTD has been largely criticised for lack of transparency and inclusion. A significant portion of the GTD was negotiated by the G7 and G20, before it was introduced to the OECD IF.[69] The corollary effect of this, is that it encourages the view that the GTD reflects the interest of the developed countries as opposed to the LMICs. Bucher noted that the GTD is 'no more than a G7-money grab' a kind of deal or no deal option from rich countries to developing countries and which leaves the developing countries almost helpless.[70] The membership of the OECD IF shows that only 23 African countries participated in the GTD meaning that about 52% of the total 54 African countries are not members of the OECD IF. In addition, 38 out of the 46 Least Developed Countries (LDCs) are also not part of the OECD IF. This means that 78% of the global LDCs were not included in the process of brokering the GTD.[71] With respect to pillar one, experts have raised certain concerns as regards the scope of MNEs covered by the GTD. Many MNEs working in the African continent are clearly excluded. The exclusion of MNEs in the extractive industry is significant for countries in Africa. This is largely because majority of the MNEs operating on the continent engage in extraction. MNEs in this sector should not be given this privilege of exclusion as they are more susceptible to illegal financial flows arising from the high prevalence of corruption in most countries in Africa.[72] Also, the reallocation rule applies to a meagre portion of the residual profits of the MNEs. it is projected that about 140 million Dollars will be reallocated to low income countries, while 8 billion Dollars will be reallocated to middle income countries.[73] These figures are not likely to incite the structural changes needed with respect to redistribution of corporate tax on the global scale. The fact that the pillar requires countries to remove digital services tax and other similar measures for taxing MNEs domestically is also a major concern, in this regard. In Kenya for instance, repealing the 1.5% digital services tax levied on 89 companies, will see about 77 companies not paying any tax, as only 11 of the total 89 will fall within the ambit of Pillar 1.[74]

Another concern relates to the dispute resolution measures under the GTD. Kenya and Nigeria are against the mandatory dispute resolution mechanism as they believe that the mechanism. can potentially impede sovereignty of LMICs and favour the developed countries and MNEs since disputes are expected to be resolved at the residence or home jurisdiction of MNEs.[75] More importantly, the 15% minimum rate under the GTD has been the subject of controversy. The rate is considered to be too low to spur economic growth in LMICs post the coronavirus pandemic. This is even more so that the average global corporate tax rate is 25%. A minimum rate of 15% is therefore considered too little to curb the unhealthy practice of tax competition and avoidance which it seeks to eliminate.[76] The substance carve-outs provisions in the GTD may if not carefully implemented foster rather than eliminate tax competition. This is because the rule allows companies to shift sufficient operations which may defeat the purpose of the minimum tax rate. The Top-up tax provisions also raise concerns about encroachment on sovereignty of LMICs. Specifically, the IIR will encroach on the sovereignty of the LMICs as

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[66] Tax Justice Network, 'Tax competition and the race to the bottom' (*Tax Justice Network*, 14 November 2020) < https://taxjustice.net/topics/tax-competition-and-the-race-to-the-bottom/ > last accessed 7 September 2022.

[67] OECD, 'Two-Pillar Solution to Address the Tax Challenges'.

[68] McCarthy, 'The New Global Tax Deal is bad for development'.

[69] Tove Maria Ryding, 'Who is really at the table when global tax rules get decided?' (*Eurodad*, October 2021), < https://d3n8a8pro7vhmx.cloudfront.net/eurodad/pages/2492/attachments/original/1633674614/global-tax-rules-october.pdf?1633674614 > last accessed 10 September 2022.

[70] Annie Thériault, 'OECD Inclusive Framework agrees two-pronged tax reform and 15 percent global minimum tax: Oxfam reaction' (*Oxfam International,* July 1, 2021) < https://www.oxfam.org/en/press-releases/oecd-inclusive-framework-agrees-two-pronged-tax-reform-and-15-percent-global-minimum > last accessed 10 September 2022.

[71] Global Financial Integrity and ACODE, 'OECD Global Tax Deal'.

[72] Ibid. 7.

[73] Jacobs, 'Are the global tax proposals in the interests of low - and middle-income countries?'.

[74] Ayenat Mersie, 'Kenya spurns global tax deal, saying number need 'interrogation'', (*Reuters*, 13 October 2021) < https://www.reuters.com/article/global-tax-kenya-idAFL8N2R92ZI > last accessed 15 September 2022.

[75] Carlos Mureithi, 'Why Kenya and Nigeria haven't agreed to a historic global corporate tax deal', (*Quartz Africa*, November 2, 2021) < https://qz.com/africa/2082754/why-kenya-and-nigeria-havent-agreed-to-global-corporate-tax-deal/ > last accessed 15 September 2022.

[76] Jacobs, 'Are the global tax proposals in the interests of low - and middle-income countries?'

the minimum tax is expected to be collected by the countries where multinationals are headquartered. The headquarters of MNEs is are mostly in developed countries with the resultant effect that the developed countries will impose the minimum tax. Jacobs posits that the OECD has notably been guilty of this colonial era-like trend and notes that the OECD has not been flexible to give due consideration to the interest of LMICs and their sovereignty. In his words, the arrangement is one that 'is neo-colonialism, pure and simple. It reminds us why global tax rules should be developed by the United Nations, not the OECD.'[77] Although pillar two embodies the UTPR and the subject to tax rule, the UTPR provision only takes effect where the home jurisdiction has failed to impose the minimum tax. The ripple effect here is that LMICs which are often the source and market jurisdiction are expected to give up their sovereign rights to implement domestic measures to curb the tax avoidance practices. The subject to tax rule is therefore a poor consolation prize for LMICs losing these rights, because it is less comprehensive, as it only applies to specific base-eroding payments from the wide spectrum of 'tax-avoiding payments.'[78]

**5. Conclusion**

There has been a significant shift in the traditional view that the profits of a company are not to be taxed in a foreign jurisdiction, because such company pays tax in the residence jurisdiction. The traditional view appears unfair and ineffective especially with developmental trends and technological advancements. Efforts to find a viable solution to the problem posed by technology within the tax sphere have led many countries to formulate domestic measures to tax the digital economy. This appears to have created a more complicated problem resulting in inconsistency of tax rules and the risk of uncertainty. To address this problem at a global level, the OECD has over the years embarked on projects to address the issue and more recently, has developed the GTD as a long-lasting solution. Both the domestic and international efforts are not without challenges. The fact that the GTD requires countries with domestic frameworks and initiatives to give up their frameworks means that both systems cannot be complimentary to cover their respective shortcomings. The GTD has particularly been flagged as an arrangement which neither protects nor takes into consideration the interests and peculiarities of LMICS. Nigeria is one of the four other governments that have decided not to join the GTD and instead have decided to continue with their domestic initiatives and frameworks. While this action at first glance, may appear misguided, a closer look at the GTD reveals that there are indeed genuine concerns about the GTD which needs to be addressed as the cons outweigh the pros for developing economies. With this stance however, the FIRS is expected to continue to face the challenge of enforcing the tax laws on NRCs which are some of the biggest MNEs in the world. The level of enforcement will determine the success or otherwise of the extant frameworks. In terms of possibility of enforcement by international sanctions, it is as clear as day that Nigeria's position at the international level does not reflect that it has the requisite political and economic clout to compel defaulting MNEs to comply with its tax laws.

In light of the above, the way forward appears to be a strong push for the development of regional or sub-regional Agreement on taxing the digital profits of the biggest MNEs. Such agreement will expectedly better protect the interest of African countries, taking into account their peculiarities. An arrangement by the African Union (AU) or the Economic Community of West African States (ECOWAS), will better represent the interest of African countries, as opposed to that reached by the OECD which its membership shows the under-representation of the African continent. Moreover, a regional digital tax may be easier to enforce, will encourage certainty and by extension, encourage foreign investment. In the alternative, Nigeria can liaise not only with Pakistan, Kenya and Sri Lanka but other LMICs which are members of the OECD IF to raise a formidable force to push for a renegotiation of the terms of the GTD to address their genuine and fundamental concerns. Whether this will be possible to achieve, is left to be discovered, in the near future.

[77] Ibid, 4.
[78] Ibid, 4.