LITERATURE REVIEW

Tax and the Digital Economy: Challenges and Proposals for Reform, W. Haslehner, G. Kofler, K. Pantazatou & A. Rust (editors), Series on International Taxation 69, Wolters Kluwer, 2019

The work of the OECD on the Base Erosion and Profit Shifting (BEPS) Action 1 that addressed the taxation of the digital economy was evidently commendable. It was the result of the first recorded experience of various countries (developed and in different stages of development) coming together to discuss direct and indirect tax challenges related to the discovery and adoption of new technologies. The final report of this work, however, left much to be desired as participating jurisdictions failed to achieve consensus on how to actually tax those revenues and profits generated by the digital economy. Since then, and especially after the release of the 2018 interim report on digitalization by the OECD, scholarly publications have attempted to 'fill the void' between the general concept of taxing the digital economy and the specific paths to achieve that goal. One of the publications that succeeds in that endeavour is this book that not only contains a thorough analysis of international tax challenges arising from the digitalization of the economy but also provides insightful proposals to address those challenges.

In their preface to this book, the editors divide the subsequent chapters into four sections. Chapters 1 through 4 explore the interim report of the OECD, released in 2018, and analyse 'the legal framework that proposals must abide by when trying to adapt international tax law to the digital economy'.[1] Chapters 5 through 7 contain critical analyses of proposals for adapting the current tax systems to the digital economy.[2] Chapters 8 through 10 explore certain phenomena of the digital economy that demand special attention 'because they have revolutionized the way business relationships are construed'.[3] Lastly, Chapters 11 through 13 are dedicated to national tax policy concerns related to possible human rights violations associated to innovations such as big data and artificial intelligence.[4] This structure serves the book well – while the first part is concerned with presenting the landscape of international taxation in which possible ideas may be implemented, the second and the third sections delve into those ideas, the former at a general level and the latter at a specific, sectorized level. The final part of the book serves as an important reminder that any and all proposals regarding international taxation must operate in synergy with domestic tax law and with other branches of law.

In the first chapter of the book, Eric Robert summarizes the policy issues that were present in BEPS Action 1 and provides an overview of the 2018 interim report on digitalization by the OECD. The author highlights that, in the aftermath of BEPS Action 1, many countries 'unilaterally moved to take steps to introduce fragmented measures aimed at taxing digitalized activities and highly digitalized business models',[5] which is certainly a pattern that we continue to see today, especially regarding the budgetary pressures suffered by many countries during and in the aftermath of the 2019 Coronavirus disease (COVID-19) pandemic. The author also describes the concerns of the OECD as they were expressed in the 2018 interim report which referred to further work that was still necessary on the analysis of the valuable contribution of certain characteristics of highly digitalized business models and digitalization more broadly. In part, it could be thought that the proposals of the OECD in Pillar One (the 'Unified Approach') address some of the author's concerns, especially what is referred to in this chapter as an issue with how the rights to tax are shared among countries. In reviewing Pillar One, however, stakeholders seem uncertain whether the Unified Approach can actually provide different countries, including the United

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1 *See* W. Haslehner, G. Kofler, K. Pantazatou & A. Rust, *Preface and Acknowledgments. Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol. 69), xxiii-xxiv (W. Haslehner, G. Kofler, K. Pantazatou & A. Rust eds, Wolters Kluwer 2019).

2 *Ibid.*

3 *Ibid.*

4 *Ibid.*

5 *See* E. Robert, *Chapter 1: The 2018 OECD Interim Report,* in *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol. 69), 4 (W. Haslehner, G. Kofler, K. Pantazatou & A. Rust eds, Wolters Kluwer 2019).

States, with a single, well-defined path forward for allocating taxing rights considering the growing development of the digital economy.

In Chapter 2, Juliane Kokott discusses the 'genuine link' requirement for source taxation in public international law as applied to digital economy taxation.[6] The author relies on principles established by the Permanent Court of International Justice (PCIJ) in its *Lotus Case* and the International Court of Justice (ICJ) in its *Nottebohm Case* to provide a definition for the 'genuine link' described in the title of the chapter.[7] The author then explains the legal perspective of the United States on this subject, also in the realm of public international law, but with a clear application to international tax law.[8] What follows is a very interesting analysis of territoriality and source taxation, particularly concerning the 'genuine link' premise as applied to concepts such as 'substantial nexus' and 'significant digital presence'.[9] The author then concludes by stating that, even though income taxation 'presupposes a genuine link to the taxing state', discussions about taxing the digital economy demonstrate that 'state practice is becoming more lenient'.[10] In addition, the author suggests that if 'some link' can be established through at least a so-called intangible presence, 'apportionment can contribute to a fairer distribution of tax revenues between EU Member States'.[11] There is general consensus with the comments made by the author in this chapter. The concept of a 'genuine link' or something similar for the recognition of taxing rights seems to be a basic principle of international tax law,[12] however, the fluidity of the digital economy and the difficulty of taxing it properly are poised to disrupt that principle. It could also be posited that international tax cooperation (not just EU-wide cooperation) may be necessary to ensure that any apportionment of the taxable base among countries is made in a manner at least as universally agreed upon as possible.

In the third chapter, editor and contributor Werner Haslehner comments on the EU and WTO law limits on digital business taxation. The chapter provides a broad analysis of challenges derived from the digitalization of the economy and the recent proposals to address those challenges. It then reviews the limits imposed by EU Member States, by the EU itself, and by the WTO on tax policymaking.[13] Again, developments in 2019 and since the beginning of 2020 are poised to at some points implement (e.g. Pillar One) and are unlikely to at other points implement (e.g. the idea of a Digital Services Tax (DST) at the EU level) some of the proposals discussed in this chapter, but its contribution to the debate of how to tax the digital economy remains valid and insightful today, particularly in terms of its comments regarding the restrictions on policymaking at the EU and WTO levels. One layer of those restrictions at the EU level, i.e. the internal market rules, limits tax policy in the sense of non-discrimination based on nationality and also indirectly on residence, which may be a problem for taxes designed to target globally active digital businesses. However, in analysing proposals to establish progressive turnover taxes, the author points out that 'even if such digital business turnover taxes were not designed to reach, effectively, only foreign taxpayers, the very fact that such a progressive tax on turnover does not comport with a fundamental principle of tax law – that is, the ability-to-pay principle – is likely to create validity difficulties'.[14] In terms of the WTO rules, one noteworthy contribution of the author is the comment about the application of the General Agreement on Trade in Services (GATS), particularly Article XVII(1) of GATS, to a special DST if designed as an indirect tax. The existing literature on international tax law does not typically make the connection between proposals that seemingly affect the cross-border or global taxation of revenues and WTO rules, and the author addresses that connection in a provocative and careful manner.

The discussion concerning the fairness of the taxation of the digital economy is the subject of Chapter 4 that was written by Gianluigi Bizioli. The author discusses the underlying assumption of the BEPS Action Plan more broadly (and of BEPS Action 1 in particular, as well as of the EU) that the current taxation of digital businesses is 'unfair' since only minimal to no taxes are being paid in many countries by companies engaged in the digital economy.[15] What follows is an analysis of the theoretical bases for that assumption which, in the author's view, may

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[6] *See* J. Kokott, *Chapter 2: The 'Genuine Link' Requirement for Source Taxation in Public International Law*, in *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol. 69), 9 (W. Haslehner, G. Kofler, K. Pantazatou & A. Rust eds, Wolters Kluwer 2019).

[7] *Ibid.,* at 10–13.

[8] *Ibid.,* at 13–14.

[9] *Ibid.,* at 17–20.

[10] *Ibid.,* at 23.

[11] *Ibid.*

[12] *See* B. J. Arnold, *The Evolution of Controlled Foreign Corporation Rules and Beyond*, 73(12) Bull. Int'l Tax'n 2 (2019).

[13] *See* W. Haslehner, *Chapter 3: EU/WTO Law Limits on Digital Business Taxation*, in *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol. 69), 25 (W. Haslehner, G. Kofler, K. Pantazatou & A. Rust eds, Wolters Kluwer 2019).

[14] *Ibid.,* at 31.

[15] *See* G. Bizioli, *Chapter 4: Fairness of the Digital Economy Taxation* in *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol. 69), 49–50 (W. Haslehner, G. Kofler, K. Pantazatou & A. Rust eds, Wolters Kluwer 2019).

be the principle of tax equality, two versions of the benefit principle (contractarian and exchange-based), and the ability-to-pay principle.[16] In its conclusions, the chapter states that the use of 'tax fairness' by the OECD and the EU is often rhetorical or pleonastic; that the standard of 'significant economic presence' is in accordance with the benefit principle; and that a final withholding tax (i.e. a tax that cannot be credited in the residence tax jurisdiction) would not find justification in either the benefit principle or in the ability-to-pay principle 'unless levied on the basis of a significant economic presence in the source jurisdiction'.[17] There is general consensus with the comments and the conclusions of the author. In particular, 'fairness' seems to be a politically charged buzzword in international taxation; it does not achieve a specific result because it does not possess a specific meaning. In addition, it has been used as a tool to advance certain ideas in policy discussions worldwide, such as the idea that multinational companies, even those outside of the realm of the digital economy, are somehow not paying enough taxes or that they should pay those taxes but have not because of elaborate tax planning strategies they devised with the assistance of their advisors and lawyers.[18]

In the fifth chapter of the book, Andrés Báez Moreno and Yariv Brauner use Benjamin Franklin's rule for decision-making (i.e. listing 'pros' and 'cons' of possible solutions with appropriate weights) as a background for discussing the tax policy for the digitalized economy. The authors do not propose solutions that depart from the basic architecture of the international tax regime but instead focus on and improve solutions that have been proposed or discussed in one way or another by the OECD and the EU between 2015 and 2017[19]: the nexus concept based on 'significant economic presence' (SEP) or 'significant digital presence' (SDP), the use of a withholding tax (WHT) on certain transactions (not only digital transactions) and the use of a 'digital equalization levy' (DEQL).[20] The authors then propose their own solution in the form of a low-rate, standalone, gross basis *final* WHT on services in the business-to-business (B2B) context that could be cross-border in principle but 'would be fairly harmless' if jurisdictions decided to also impose it at the domestic level.[21] In their conclusions, the DEQL is generally perceived as an inferior option from a policy-making standpoint; the notion of a virtual permanent establishment (VPE) that embodies the concepts of SEP/SDP in tax treaties is viewed as a structurally weak solution; meanwhile, the authors believe that their proposed WHT has a few serious drawbacks' that can be surmountable 'if the WHT is designed properly'.[22]

In Chapter 6, Georg Kofler and Julia Sinnig discuss equalization taxes and the general idea of a DST at the EU level. In their observations about equalization taxes, the authors state that they might be designed as 'quick fixes' for a broader problem of how to define a significant economic presence for digital businesses[23] (an issue that would also involve the appropriate apportionment of the right to tax revenues from those digital businesses). Also, the authors point out that any equalization tax should comply with international obligations (such as those of States under existing tax treaties, EU law, and WTO law)[24] and with other principles of tax policy design such as a targeted scope and a minimal cost of compliance and level of complexity.[25] In their comments on the idea of a DST at the EU level, the authors state that, even though it is supposed to fairly balance competition for businesses that are active in Europe, it raises a number of concerns 'regarding its incompatibility with international and EU [law], a number of policy questions and a myriad of technical issues',[26] all of which seems to be quite predictive of what would occur with the DST idea months later.

In Chapter 7, Peter Bräumann discusses the concept of a digital permanent establishment considering the EU Commission's proposal on taxing SDP. The author comments that the SDP 'does not appear as a surprise or groundbreaking novelty to the ongoing debates about an appropriate taxation of contemporary (partly or fully) digitized business models',[27] which is certainly true from an

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[16] *Ibid.,* at 50–57.

[17] *Ibid.,* at 65.

[18] *See* A. Christians, *Avoidance, Evasion and Taxpayer Morality*, 44(1) Washington U. J. L. & Pol'y 58 (2014).

[19] *See* Y. Brauner & A. B. Moreno, *Chapter 5: Tax Policy for the Digitalized Economy Under Benjamin Franklin's Rule for Decision-Making*, in *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol. 69), 70 (W. Haslehner, G. Kofler, K. Pantazatou & A. Rust eds, Wolters Kluwer 2019).

[20] *Ibid.*

[21] *Ibid.,* at 79–81.

[22] *Ibid.,* at 100.

[23] *See* G. Kofler & J. Sinnig, *Chapter 6: Equalization Taxes and the EU's 'Digital Services Tax'*, in *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol. 69), 117 (W. Haslehner, G. Kofler, K. Pantazatou & A. Rust eds, Wolters Kluwer 2019).

[24] *Ibid.,* at 121.

[25] *Ibid.,* at 122–126.

[26] *Ibid.,* at 144.

[27] *See* P. Bräumann, *Chapter 7: Digital Permanent Establishments on Its Way to Becoming a Reality? The EU Commission's Proposal on Taxing Significant Digital Presence*, in *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol. 69), 149 (W. Haslehner, G. Kofler, K. Pantazatou & A. Rust eds, Wolters Kluwer 2019).

academic and a policymaking viewpoint, although it could be argued that it is 'groundbreaking' in the context of its prominence in the public sphere. The author then addresses the questionable rationale behind digital Permanent Establishments (PEs), claiming that they are hardly digital in nature (i.e. that they rely on some sort of physical connection which would, in principle, defeat the purpose of the digital PE discussion)[28] and also claiming that the digital PE debate may actually shift income taxation to the demand side of business operations.[29] In terms of the EU Commission's proposal on taxing SDP, the author addresses those in minute detail, bringing additional insights into the inputs of previous authors in the book. In the conclusion of the chapter, the author states that 'the legal debate would certainly benefit from treating the motive of enhancing taxation rights for market jurisdictions more openly',-[30] and this remark is quite timely considering recent developments in international taxation. As pointed out by Lee Sheppard in 2019, 'the OECD doesn't represent the interests of small market countries, including its smaller European members, and could do more to make rules administrable for them'.[31] Perhaps there is something to this disconnection between the OECD and the interests of small market countries that lies behind the labels used in the digital PE debates.

In Chapter 8, Michael Tumpel and Johannes Kofler discuss the very important issue of taxing digital currencies. The authors provide a brief overview of the definition of digital currencies and the blockchain technology that enables them.[32] They also explore income tax and VAT issues associated with digital currencies, including those pertaining to exchanging and mining them, among others.[33] An interesting point the authors address in terms of mining digital currencies is the fact that miners not only receive transaction fees for their work but also an 'award' of 12.5 'newly system-generated bitcoins', which is likely not a remuneration under the VAT Directive but can constitute income for purposes of income taxation.[34] Ultimately, the authors suggest that the appropriate taxation of digital currencies relies on 'a good understanding of the cryptocurrency's specific legal structure as well as the business model that lies behind it'.[35] That is an interesting remark, and it is certainly applicable to other new and even only conceptual technologies[36] – any analysis of their appropriate taxation, whether from a domestic or international perspective, should be conducted considering their specific characteristics, which may, in turn, be unique among other new technologies.

In the ninth chapter of the book, Marie Lamensch addresses the issue of taxing remote digital supplies that are 'supplies of services and intangible fully effected online'.[37] The author provides interesting comments on the nature and activities of so-called 'digital suppliers', recognizing that the legal framework must adapt to their business model in order to allow for a fair and neutral taxation of their transactions. The author explores VAT compliance difficulties in the EU (e.g. difficulty to obtain proper information on customer identification and location)[38] associated with B2B electronically supplied services and VAT compliance difficulties in the EU associated with B2C electronically supplied services (with very interesting comments on the tax liability of digital platforms).[39] Finally, the author provides comments on the 2017 VAT 'e-commerce package' and on a recent EC proposal regarding VAT rates, concluding the chapter with a remark about how enforcement, particularly regarding 'non-EU taxable persons making supplies to EU non-taxable consumers', remains a major weakness of the existing and expected legislation.[40]

In the tenth chapter of the book, editor and contributor Katerina Pantazatou explores the topic of the taxation of the sharing economy. The author defines the sharing economy as 'an economic model in which individuals are able to borrow or rent assets owned by someone else',[41]

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[28] *Ibid.,* at 154.

[29] *Ibid.,* at 154–156.

[30] *Ibid.,* at 176.

[31] *See* L. A. Sheppard, *De-FANGed International Taxation*, 94 Tax Notes Int'l 1156 (2019).

[32] *See* J. Kofler & M. Tumpel, *Chapter 8: Tax Treatment of Digital Currencies*, in *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol. 69), 177–183 (W. Haslehner, G. Kofler, K. Pantazatou & A. Rust eds, Wolters Kluwer 2019).

[33] *Ibid.,* at 183.

[34] *Ibid.,* at 187–188.

[35] *Ibid.,* at 188.

[36] *See* our remarks about the international taxation of Autonomous Artificial Intelligence (AAI) in L. de Lima Carvalho, *Spiritus Ex Machina: Addressing the Unique BEPS Issues of Autonomous Artificial Intelligence by Using 'Personality' and 'Residence'* 47(5) Intertax 425–443 (2019).

[37] *See* M. Lammensch, *Chapter 9: Taxing Remote Digital Supplies*, in *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol. 69), 189 (W. Haslehner, G. Kofler, K. Pantazatou and A. Rust eds, Wolters Kluwer 2019).

[38] *Ibid.,* at 194–198.

[39] *Ibid.,* at 203–206.

[40] *Ibid.,* at 213.

[41] *See* K. Pantazatou, *Chapter 10: The Taxation of the Sharing Economy.* in *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol. 69), 215–216 (W. Haslehner, G. Kofler, K. Pantazatou and A. Rust eds, Wolters Kluwer 2019).

eliminating online platforms known as the 'retail exchange market' from this definition (because they focus instead on selling items to the ultimate consumer).[42] The author then explores several tax issues associated with taxing the platform itself and taxing the persons that provide services using that platform; one very interesting remark made in that context is about the '(potential) invisibility' of those service providers which ultimately increases the tax liability and exposure of the platforms themselves.[43] At the end, the author says that the EU should take action in the field of taxing the sharing economy in order to mitigate uncertainties and conflicts that arise from its current legal treatment.[44] There is general consensus with the comments made by the author on this topic; the tendency in tax policy regarding the sharing economy is to attribute tax liability primarily to the digital platforms themselves (because, from an administrative perspective, they are easier to control). This has certainly been the gist of more recent VAT reforms and proposals in Latin America.[45]

In Chapter 11, Viktoria Wöhrer discusses the challenges that may arise from a data protection standpoint in the implementation of alternatives to effectively tax the digital economy. In that regard, the author provides comments on the exchange of information standards and the mandatory disclosure rules that have been proposed by the OECD and implemented by the EU, emphasizing the increase in data collection that those legal provisions entail for taxpayers and tax administrations in general.[46] The author then discusses taxpayers' rights in the area of exchange of information and how those relate to EU data protection safeguards, a topic that is increasingly relevant in the field of digital law but which often does not receive proper attention in other fields, including tax and international tax law.[47] In the conclusion of the chapter, the author indicates that the 'large increase in the amount of third-party data available to tax authorities seems at first sight to be difficult to align with the objectives behind data protection'.[48] There is wholehearted agreement with this assessment. A visible trend in many jurisdictions, EU Members or not, seems to be the sacrifice of taxpayers' data protection rights for the benefit of the tax administration and its objectives, and the author's comments and concerns in this chapter appear to be very appropriate for addressing the legal implications of this sacrifice.

Chapter 12 contains the contribution of Joachim English on a topic that is of significance, specifically, the taxation of robots. In the beginning of the chapter, the author reminds us of the expected 'disruption of the labour market' that will arrive (with even more ubiquity) with the wide replacement of human workers with robots and AI.[49] In subsequent parts of the chapter, the author discusses the ideas of taxing robots as taxable persons, taxing the use of robots, and the scope of a 'robot tax' *per se*, citing the work of Xavier Oberson in the process.[50] Furthermore, the author provides comments on how robots and their operations factor into existing OECD standards for the attribution of profits to permanent establishments.[51] In the conclusion of the chapter, the author states that 'there is currently no compelling argument to make robots themselves taxable persons, neither for the purposes of income taxation nor for the purposes of indirect taxes on consumption expenditure'.[52] The author also comments that the realistic alternative at this point is to tax the *use of robots* as opposed to the robots themselves.[53] There is agreement with the contention of the author that granting legal personhood to corporations is not a basis for regarding them as taxable persons, although there is disagreement with the suggestion that no taxable personality can ever be granted to robots or that there is no theoretical basis for the granting of taxable personality to robots. Having said that, there is consensus with the conclusion that the taxation of the *use of robots* is the most realistic approach from a tax policy perspective at this point in time.

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[42] *Ibid.,* at 217.

[43] *Ibid.,* at 225.

[44] *Ibid.,* at 235.

[45] *See* e.g. G. O. Teijeiro and J. M. Vásquex, *Taxation of the Digital Economy: Argentina Perspective*, in *Tributação da Economia Digital: Desafios no Brasil, Experiência Internacional e Novas Perspectivas* 1127–1150 (R.V. Faria, R. Maitto da Silveira & A. L. Moraes do Rêgo Monteiro eds, Saraiva 2018). *See also* J. R. Galland & V. Ibarra, *Mexico's Digital Services Tax Regime*, 98(7) Tax Notes Int'l 807–810 (2020).

[46] *See* V. Wöhrer, *Chapter 11: Effective Taxation Versus Effective Data Protection?* in *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol. 69), 240–243 (W. Haslehner, G. Kofler, K. Pantazatou & A. Rust eds, Wolters Kluwer 2019).

[47] *Ibid.,* at 243–259.

[48] *Ibid.,* at 260.

[49] *See* J. Englisch, *Chapter 12: Digitalization and the Future of National Tax Systems: Taxing Robots?,* in *Tax and the Digital Economy: Challenges and Proposals for Reform* (Series on International Taxation vol. 69), 261–262 (W. Haslehner, G. Kofler, K. Pantazatou & A. Rust eds, Wolters Kluwer 2019).

[50] *Ibid. See also* X. Oberson, *Taxing Robots? From the Emergence of an Electronic Ability to Pay to a Tax on Robots or the Use of Robots*, 9(2) World Tax J. 247–261 (2017).

[51] Englisch, *supra* n. 49, at 278–279.

[52] *Ibid.*

[53] *Ibid.,* at 280.

Tina Ehrke-Rabel wrote the final chapter of this book and, in it, the author discusses the use of big data in tax collection and enforcement. The chapter contains a summary of the traditional scheme of tax collection and enforcement (with comments on the rights of taxpayers that must preserved by tax authorities or by applicable law in the face of administrative action), comments on big data analytics in tax matters, and legal concerns related to the use of big data analytics in tax matters, establishing the grounds for a proposal of legal actions to be taken.[54] In the final conclusions of the chapter the author provides insightful comments on how individuals in many societies around the world have fought for and acquired, after significant struggles, their own personal, individual freedoms and how the opaqueness of the manner that tax administrations use big data may infringe on those freedoms (insofar as they are translated into human rights).[55]

In accordance with what was stated in the beginning of this review, this book contains interesting comments on the taxation of the digital economy, however, it is more than just a compilation of those comments in the context that it also provides proposals and solutions to be adopted at the EU and worldwide levels. All the contributions made by the authors will surely find their audience in scholars and practitioners not only in Europe but in many different countries as they approach the ever-changing world of tax and its interplay with new technologies.

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[54] *See* T. Ehrke-Rabel, *Chapter 13: Big Data in Tax Collection and Enforcement* in *Tax and the Digital Economy: Challenges and Proposals for Reform*, (Series on International Taxation vol. 69), 285 (W. Haslehner, G. Kofler, K. Pantazatou & A. Rust eds, Wolters Kluwer 2019).

[55] *Ibid.,* at 334.