VAT ON PERSONAL DATA: IMPLEMENTATION CONCEPT UNDER INDONESIAN LAW AND INTERNATIONAL LAW

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Abstract

*This research aims to examine two key aspects: (1) the feasibility of treating personal data as an object of Value Added Tax (VAT) under Indonesianlaw; and (2) the possibility of its application under international trade lawand the forthcoming international tax law. This research is normative research utilizing conceptual and comparative approach, and it primarily serves as a descriptive study. The descriptive nature of this research helps elaborate the legal analysis of imposing VAT towards personal data. The author argues that personal data can be classified as a taxable object under the framework of the Value Added Tax on Electronic Commerce ("**PPN PMSE**") and possible under international Law (GATT and OECD).*

Keywords: *Tax, Personal Data, GATT, Taxable Object, Value Added Tax (VAT), PPN PMSE*

Intisari

Penulisan hukum ini dilakukan dengan tujuan untuk meninjau: (1) kemungkinan data pribadi untuk dapat dijadikan objek dari Pajak Pertambahan Nilai (PPN) dalam Hukum Pajak Indonesia; dan (2) kemungkinan implementasi Pajak Pertambahan Nilai tersebut berdasarkan Hukum Perniagaan Internasional dan Hukum Pajak Internasional. Penulisan hukum ini adalah penelitian hukum normatif dengan pendekatan konseptual *(conceptual approach)* dan pendekatan komparatif *(comparative approach),* serta memiliki sifat penelitian deskriptif. Sifat penelitian deskriptif digunakan untuk menggambarkan analisis hukum dariimplementasi peraturan PPN terhadap data pribadi. Berdasarkan analisis yang dilakukan, peneliti menemukan bahwa (1) data pribadi dapat digolongkan sebagai objek Pajak Pertambahan Nilai terhadap Perdagangan Melalui Sistem Elektronik ("**PPN PMSE**") dan dimungkinkan oleh hukum internasional (GATT and OECD).

Kata Kunci: Pajak, Data Pribadi, GATT, Objek Pajak, Pajak Pertambahan Nilai (PPN), PPN PMSE

A. Introduction

The internet landscape in Indonesia has been dominated by both foreign-based providers such as Google, Facebook, Shopee, Tiktok, and also homegrown

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unicorns including Gojek, Tokopedia, and Xendit.[1] It is evident that the Indonesian society is transitioning from a traditional 'brick-and-mortar' economy to a digital economy that does not require physical presence in each market countries.[2] This phenomenon is now popularly known with the term 'significant economic presence'. In this brand new economic system, goods or services transactions can be digitally concluded to consumers.[3] This has opened up new potential tax revenues for the government.

The Indonesian government's efforts to capture tax potential from the digital economy are reflected in the Government Regulation in Lieu of Law ("**Perppu**") Number 1 of 2020, that was later ratified as Law Number 2 of 2020.[4] According to this regulation, electronic transactions conducted to provide goods or services sold to digital consumers are referred to as "**Trade through Electronic System**" ("**Perdagangan Melalui Sistem Elektronik – PMSE**"). In the tax scheme for PMSE, foreign business actor that meets the criteria of significant economic presence are subject to Income Tax and Value Added Tax.[5] The implementation of the PMSE tax still faces various technical challenges,[6] and so far, only the implementation of Value Added Tax on Electronic System Trading has been carried out.

The rapid penetration of the internet into the hands of the public has made personal data an instrumental part of electronic transaction operations to support people's lives. Unicorn platforms are also considered as data-driven businesses, that

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[1] CNBC Indonesia, "Jokowi Sebut RI Punya 2 Decacorn & 9 Unicorn, Ini Daftarnya", *https://www.cnbcindonesia.com/tech/20220816112937-37-364133/jokowi-sebut-ri-punya-2-decacorn-9-unicorn-ini-daftarnya*, (accessed 21 September 2022).

[2] Brauner, Yariv, "Taxing the Digital Economy Post-BEPS, Seriously," *Intertax* 46, no. 7, (2018), 462.

[3] Brauner, 462.

[4] Sukardi, Ichwan & Jiaqian, Sophia She, "Taxing the Digital Economy in Indonesia", https://www.internationaltaxreview.com/article/2a6a6s9xb79f62ftcu41s/taxing-the-digital-economy-in-indonesia, (accessed 21 September 2022).

[5] Cai, Qiang, et al., "New Taxing Right in the Unified Approach: Old Wine in a New Bottle", *Intertax* 48, no. 11, (2020), 962.

[6] Firmansyah, Ahmad, "Kajian Kendala Implementasi E-Commerce di Indonesia," *Masyarakat Telematika Dan Informasi: Jurnal Penelitian Teknologi Informasi Dan Komunikasi* 8, no. 2, (2017), 135.

require data in their operations to provide services.[7] Personal data is generally defined as symbols, points, words, and codes attached to an individual's identity that can provide information to those who know the personal data,[8] as regulated by Article 1 number 1 of Law Number 27 of 2022 on Personal Data Protection ("**PDP Law**"). This brings us to personal data's new monicker as "data is the new oil", because it is considered to create economic value. Wicaksono explains that control over this data becomes important in the digital economy era because the effectiveness of digital business operations requires data, thus data can add to the valuation of a digital company and even be an asset that can be transferred.[9]

The PDP Law differentiates the transfer of personal data into two categories: transfers within the territory of the Republic of Indonesia and transfers beyond the jurisdiction of the Republic of Indonesia. Article 55 of the PDP Law stipulates that domestic transfers of personal data can be carried out as long as both the transferring party and the recipient implement personal data protection measures. Furthermore, Article 56 of the PDP Law requires that senders of personal data to countries outside Indonesia's jurisdiction must ensure that the destination country has personal data protection regulations that are equivalent to or better equipped than those of Indonesia, or at the very least that the recipient entity has an up and running adequate and binding personal data protection instruments. If these conditions cannot be met, Article 56 (4) of the PDP Law obligates the controller to obtain consent from the personal data subject to allow the transfer of their personal data. Given these regulations governing personal data transfer and the potential of the

[7] Trzaskowski discussed that data-driven businesses are "*These business models exist in both online and offline environments and usually rely on the monetisation of (1) personal data from surveillance of behaviour and/or (2) attention by means of personalised marketing, including targeted advertising*"; Further discussions, see Trzaskowski, Jan. "*Data-driven Business Models-Privacy and marketing*" from "Research Handbook on EU Data Protection Law". (Cheltenham: Edward Elgar Publishing, 2022), 207.

[8] Nugroho, Andriyanto Adhi, et al., "Personal Data Protection in Indonesia: Legal Perspective," *International Journal of Multicultural and Multireligious Understanding* 7, no. 7, (2020), 185.

[9] Wicaksono, Muhammad Rifky, "Menjaga Persaingan Usaha di Era Dataopoli", Media Indonesia, accessed on 26th March 2022

digital economy in Indonesia, the author wishes to explore the possibility of making such personal data transfers subject to Value Added Tax ("**VAT**").

In this research, the author aims to demonstrate that valuing personal data managed by Electronic System Operators **("*Penyelenggara Sistem Elektronik*/PSE")** can give the government a more central role in ensuring transparency in personal data protection for users[10]. This aligns with the principles of openness and individual participation proposed by the Organisation for Economic Co-operation and Development ("**OECD**") to protect the privacy of cross-border personal data transfers, as outlined in the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.[11] Valuing personal data can be achieved by requiring Electronic System Operators to compensate users whose personal data they control.[12]

Imposing tax on an object can indeed reduce the efficiency of using that resource. Efficiency can be defined as absolute welfare or wealth maximization[13]. On the other hand, the inefficiency of a product can create a substitution effect, replacing it with an alternative option.[14] Therefore, in the context of implementing taxes on personal data transfers, the author argues that it may create inefficiency in the use of personal data resources but, on the other hand, may provide benefit by

[10] Madhala, Prashanth et al., "Data-Driven Value Creation in Digitalizing Public Service" in *Public Innovation and Digital Transformation (1st ed.)*, ed. Väyrynen, Hannele et al., (London: Routledge, 2022) 92.

[11] Organisation for Economic Co-operation and Development (OECD A), "OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data," *https://www.oecd.org/sti/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm*, (accessed on 22nd September 2022).

[12] Zetzsche, Dirk A., "Taxing Data-Driven Business: Towards Datapoint Pricing," *World Tax Journal* 13, no.2, (2021), 219.

[13] Posner stated in his book that, "*In the less austere concept of efficiency mainly used in this book—called the Kaldor-Hicks concept of efficiency, or wealth maximization— (...)".* From this statement it can be derived that an economic efficiency would create wealth maximization; Further discussion, see Posner, Richard A., *Economic Analysis of Law (9th Edition)*, (Alphen aan den Rijn: Wolters Kluwer, 2014) 43.

[14] Posner. 903.

contributing in the efficiency of personal data protection, creating welfare for society.

The inefficiency created by this tax can also be viewed from the perspective of behavioral economics. In this view, the deadweight cost created by the tax can play a role in a choice architecture as a nudge,[15] gently influencing people's decision to take an action or to refrain from doing an action. A nudge in a government policy can be utilized to gently push people's decision in a predictable way without any forceful element.[16] This is made possible because people determine their decision based on an incentive they may receive.[17] The behaviour of the general public can both be influenced by incentives and also by a designated nudge.[18] Hence, using tax as a nudge could play an important role in encouraging rational choices to be made by the community.

In law and economics, people's decision has challenges in its application, namely irrationality.[19] Rational choices are not decided by default. This happens because humans have a tendency to systematically 'move away' from rationality, or in other words to be 'biased'.[20] Thus, policymakers may help individuals who tend to be biased,by nudging them into making better decisions. From this perspective, the implementation of VAT on personal data transfers would perform the regulatory function of tax. In relation to the implementation of taxes on personal data transfers, this tax is expected to reduce the active behavior of electronic transaction operators in transferring personal data due to the disincentive of economic inefficiency.

Through the implementation of this tax, the author aims to show that when a PSE is obligated to calculate, deposit, and report taxes on personal data transfers,

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[15] Richard Thaler and Cass Sunstein found that "*A choice architect has the responsibility for organizing the context in which people make decisions*." See Thaler, Richard H., & Sunstein, Cass R., *Nudge: Improving Decisions About Health, Wealth, and Happiness*, (Yale University Press, New Haven: Yale University Press, 2008), 3.

[16] Thaler & Sunstein, 6.

[17] Thaler & Sunstein, 8.

[18] Thaler & Sunstein, 8.

[19] Posner, 54.

[20] Kahneman, Daniel, 2013, *Thinking, Fast & Slow*, (New York: Farrar, Strauss, & Giroux, 2013), 8.

the government can enable their regulatory function by creating an administrative burden for PSE from the additional taxation reporting obligation on personal data transfers. This is would theoretically discourage the occurrence of unsolicited personal data transfer by PSE as freely as possible and would benefit the website users by increasing the transaparency regarding personal data transfers.[21]

Based on the background outlined above, using a conceptual approach and a comparative approach, the author will examine two questions: (1) Does personal data fall within the scope of taxable goods under the Indonesian VAT Law?; and (2) Can VAT be applied on personal data without violating the provisions of International Trade Law and the upcoming International Tax Law?

B. Legal Analysis on the Proposed Implementation of VAT on Personal Data Transfer

The analysis of personal data protection within the tax framework involves discussions based on the categorization of objects, subjects, and the configuration of data protection in Indonesia. In this part, the author will refer to personal data as an object as defined in Article 1 number 1 of the Personal Data Protection ("**PDP Law**") and as a taxable goods under the Indonesian VAT Law. This classification aims to explore how taxes can play a role in personal data protection.

The state, in seeking tax objects, will look at economic activities in the form of (i) property, (ii) income, and (iii) consumption. When the processed personal data can provide value that is consumed by the data processor, then the processing of personal data can be viewed as an economic activity in the form of consumption.[22] Subsequently, taxes can also play a role in protecting personal data by establishing such consumption as a target for taxation. A tax object may taxed when a particular (i) condition, (ii) act, or (iii) specific event arise.[23] In this regard,

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[21] Hansen, Pelle Guldborg & Jespersen, Andreas Maaløe, "Nudge and the Manipulation of Choice: A framework for the Responsible Use of the Nudge Approach to Behaviour Change in Public Policy," *European Journal of Risk Regulation* 4, no. 1, (2013), 6.

[22] Case, Karl E., Fair, Ray C., & Oster, Sharon E., *Principles of Economics (13th Edition)*, (New York, Pearson Education Limited, 2020), 435.

[23] Soemitro, Rochmat, & Sugiharti, Dewi K., 2010, *Principles of Taxation 1 (2nd Edition)*, (Bandung: Refika Aditama, 2010), 95.

the author argues that any personal data processing activities can be included as an action that qualifies as tax object.

Personal data processing, according to Article 16 Paragraph (1) of the PDP Law, has six main categories: (i) acquisition, (ii) processing, (iii) storage, (iv) updating, (v) transfer, and (vi) deletion, in which this research will focus on the category (v) transfer activity. Thus, the author will analyze the role of tax in personal data protection when applied to personal data transfers.

Furthermore, for feasibility reasons to be discussed in the tax configuration section against international tax Law and international trade Law, the author chooses to focus on examining the role of VAT on personal data protection.

1. VAT Object Criteria

Activities and objects subject to VAT are outlined in Article 4 Paragraph (1) of Law Number 8 of 1983 on Value Added Tax and Sales Tax on Luxury Goods ("**VAT Law**"), as amended most recently by Law Number 6 of 2023 on the Establishment of Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation into Law. According to Article 4 Paragraph (1) of VAT Law, VAT is imposed on the delivery of taxable goods within the customs area by an entity.

Based on the categories of taxable goods or taxable services subject to VAT, and intangible taxable goods are included as objects subject to VAT under Article 4 Paragraph (1) point a of VAT Law. This is because these objects meet the criteria for the delivery of goods subject to VAT as "intangible goods delivered are taxable goods". This is in accordance with the explanation of Article 4 Paragraph (1) point a of VAT Law, that states 'taxable goods' meeting the requirements as 'intangible goods' can be considered as "intangible taxable goods".

Furthermore, in relation to personal data, personal data can be subject to VAT. There are two factors why personal data can be subject to VAT: (i) personal data is included as intangible goods within the realm of VAT Law, and (ii) personal data can included as intangible taxable goods.

To address the first factor, one can look at the scope of the definition of goods regulated by Government Regulation Number 18 of 2019 on Trade through Electronic System (*Perdagangan Melalui Sistem Elektronik*/"**PMSE Regulation").** Article 1 number 18 of PMSE Regulation states that "intangible goods" are included in the scope of "goods" in a trade through electronic system. Thus, an intangible good is an object that falls under the regulation of the PDP Law.

Based on the above definition of personal data, personal data can be classified as intangible goods because personal data falls into the category of digital goods. Article 1 number 19 of PMSE Regulation explains that (i) digital goods are intangible goods in the form of electronic information; and (ii) electronic data are digital goods. From these findings, it can be concluded that (i) personal data is data about individuals that can be identified through an electronic system, (ii) personal data is digital goods, (iii) digital goods are intangible goods in the form of electronic information, and (iv) ultimately, personal data falls within the scope of intangible goods in electronic system trading. Therefore, it can be concluded that the first factor is fulfilled.

The second factor, personal data falls into the category of Intangible Taxable Goods. The explanation of Article 4 Paragraph (1) point g of VAT Law provides information that one type of intangible taxable goods is the transmission of scientific, technical, industrial, or commercial information. Referring to Article 1 number 19 of PMSE Regulation, it is known that personal data is intangible goods in the form of electronic information. The legal consequence of this is that personal data can be classified as information transmission as intended by VAT Law, thus meeting the criteria for intangible taxable goods, as regulated by the explanation of Article 4 Paragraph (1) point g of VAT Law.

The provisions regarding the scope of intangible taxable goods that include the transmission of scientific, technical, industrial, or commercial information are also emphasized by Article 3 Paragraph (1) of the Regulation of the Minister of Finance of the Republic of Indonesia Number

60/PMK.03/2022 on Procedures for the Appointment of Collectors, Collection, Deposit, and Reporting of Value Added Tax on the Utilization of Intangible Taxable Goods and/or Taxable Services from Abroad (MoF Regulation 60/2022).

Article 2 Paragraph (1) of MoF Regulation60/2022 explains the scope of VAT on Trade through Electronic System (PPN PMSE) that is imposed on intangible Taxable Goods originating from outside the customs area and utilized within the Indonesian customs area. Additionally, the same paragraph also clarifies that such utilization is carried out through an electronic system. The consequence of this article is that personal data as digital goods can fall within the scope of PPN PMSE. This is in line with the provision of Article 2 Paragraph (1) of MoF Regulation 60/2022, that states:

> *"Value Added Tax is imposed on the utilization of intangible Taxable Goods and/or Taxable Services from outside the Customs Area within the Customs Area through Electronic System Trading."*

From the above explanation, it can be concluded that (i) personal data can be categorized as intangible Taxable Goods and (ii) personal data as intangible Taxable Goods legally falls within the scope of PPN PMSE. The consequence of this conclusion is that should PPN PMSE is to be imposed on personal data as Taxable Goods, currently it would only be possible to be imposed on personal data originating from outside the Indonesian customs jurisdiction.

2. Valuation Principles of Personal Data as an Intangible Taxable Goods

The imposition of VAT on the transfer of personal data requires a valuation of the data itself to serve as the basis for taxation. This can be achieved by determining principles to be implemented for calculating the value of personal data. The value of data collected by a company depends on the type of data gathered, whether obtained directly from the owner of the personal data or from a third party. The primary purpose of taxing personal

data is to provide transparency. Through this tax, data owners can obtain a record of how their personal data, collected from users of electronic system services, is utilized. Recording the pricing of personal data can be done by adhering to accounting principles, allowing data owners to receive a sort of financial report on the processing of their personal data.

In principle, the method of pricing each unit of data is free for the personal data processor to determine, as long as the data is not priced at zero.[24] One way to determine the basis for valuing the data is by calculating the cost of data acquisition. This cost of acquisition can then serve as the basis for imposing VAT on the data transfer.

From the author's research, the taxation of personal data can be reviewed from two stages of data value quantification. The first stage is through the establishment of a minimum value imposed on each kilobyte, megabyte, or terabyte of data transferred.[25] The second stage determines the "cost of data acquisition" that can serve as the basis for taxing personal data. In this way, the government can measure the volume of data transferred by electronic transaction operators and obtain information on the basis for taxing personal data transfers[26]. Quantifying the value of data from an accounting concept perspective can provide transparency to data owners regarding the value of their data and transparency related to data transfer activities. In its implementation, there are principles that need to be applied when designing a data value quantification algorithm, including:[27]

a. determining the frequency of recording the value of data;
b. procedures for recording data when grouped with other data point;
c. determining the subject of the data value;
d. procedures for tax authorities safe access;
e. procedures for data value information access; and

[24] Zetsche, Dirk A., 237.
[25] Zetsche, Dirk A., 238.
[26] Zetsche, Dirk A., 237.
[27] Zetsche, Dirk A., 239

f. determining the minimum value of payment to be made to the data owner.

The responsibility for monitoring data transaction activities subject to tax can be delegated to "data intermediaries". This can be done when there are issues of trust in the government, management problems, technology, and so on.[28] These data intermediaries conceptually have a role similar to that of Data Controllers or Processors as regulated in the PDP Law, but have the exclusive task of managing rights and access to protected data, ensuring data protection complies with applicable regulations, and ensuring that the technology used to protect data is the latest.[29]

One type of data intermediary proposed in the OECD report to the Group of 7 ("**G7**") is the "data space". This data space is a system or platform where data can be accessed by certain parties, is transparent to data owners, and also implements principles and privacy-enhancing technologies ("**PETs**"). The development of the data space platform is reflected in the European Commission's draft released in February 2022 titled "Proposal for a Regulation on harmonized rules on fair access to and use of data (Data Act)." One of the topics reviewed in this draft legislation is about data spaces, that are intended to be regulated by the following principles:

a. having a secure infrastructure that protects the privacy of collected, accessed, shared, processed, and utilized data;
b. having a clear, trustworthy, and practical data management mechanism or structure;

[28] Organisation for Economic Co-operation and Development (OECD B), "Cross-border Data Flows: Taking Stock of Key Policies and Initiatives of 12 October 2022", *https://www.oecd.org/publications/cross-border-data-flows-5031dd97-en.htm,* 14, (accessed on 8th May 2023).
[29] OECD B, 14.

c. complying with regulations and values related to personal data protection, consumer protection, and competition Law applicable in Europe;
d. data owners have the right to grant access to or share their personal or non-personal data;
e. data can be available in the data space with a certain compensation value or for free; and
f. open participation for individuals or groups.

Thus, the review of the data transfer mechanism above indicates that the management of data transfers is feasible. As the European Union countries have planned data space practices for future implementation, the option of regulating data transfers using data spaces can provide access for monitoring the data flow of transfers that occur. The existence of data spaces can assist in recording the pricing of data and the imposition of taxes on data.

3. Imposing Taxes on Personal Data from the Perspective of International Trade Law

International trade is centered around the World Trade Organization ("**WTO**"). This organization was established to create a free market characterized by non-discrimination, transparency, reciprocity, flexibility, and consensus-based decision-making.[30] The formation of the WTO was in response to the tendency of countries to engage in trade discrimination. Through this subsection, the author attempts to demonstrate that the imposition of VAT on data transfers does not violate international trade regulations. This is relevant because Indonesia is a member of the WTO, and thus bound by international agreements.

To address discriminatory practices in international trade, there are two main principles that act as the 'constitution' of international trade: the "Most Favored Nation ('**MFN**')" and "National Treatment ('**NT**')" principles. To

[30] Baldwin, Richard. "The World Trade Organization and the Future of Multilateralism," *Journal of Economic Perspectives* 30, no. 1, (2016), 97-98.

determine whether the application of VAT on data transfers constitutes discrimination, it needs to be compared against these MFN and NT principles.

The MFN principle aims to prevent horizontal trade discrimination. This prevention of horizontal discrimination seeks to eliminate policies that favor one country over another. In the legal framework of international trade, the MFN principle is adopted by General Agreement on Tariffs and Trade ("**GATT**") and General Agreement on Trade in Services ("**GATS**").

Article 1 of GATT asserts that there must not be any form of privilege or differential treatment in policies or procedures related to the export or import of goods granted to a select few countries. Such differential treatment may result in the form of varying amounts of duties or taxes imposed. In cases where horizontal discrimination against a particular country is found, the responsible country must promptly change its regulations to comply with the MFN principle as set out in Article 1 of GATT.

From the structure of the MFN principle in GATT, it can be seen that when Country A imports goods, it must apply the same policy to Country B, Country C, or even Country Z. When VAT on data transfers is considered within the context of the MFN principle, VAT on personal data transfers does not violate the MFN principle in international trade. This is because VAT on personal data transfers would be applied to all parties conducting data transactions, regardless of where the transaction parties originated. Thus, VAT on personal data would be possible as long as it does not discriminate against businesses from a particular country.

Moving on to the next discussion, the dimension of the NT principle. The NT principle, that seeks to avoid vertical discrimination between imported and domestic goods, is regulated in Article 3 of GATT. Article 3 Paragraph 1 of GATT lays the foundation that member countries of the GATT agreement are essentially prohibited from implementing taxes and other regulations that result in protectionist policies.

The provisions of Article 3 Paragraph 1 of GATT are further clarified by Article 3 Paragraph 2 of GATT, that explains imported goods originating

from GATT member countries entering the territory of another GATT member country must not be subject to domestic taxes or other charges exceeding those applied to similar domestic products.

The explanation of Article 3 Paragraph 2 of GATT clarifies that, in addition to similar or like products, imposing higher taxes on imported products that are direct competition or substitutes for domestic products is considered a violation of the NT principle. A VAT on personal data transfers applied to both from foreign and domestic businesses would fulfill the national treatment principle prerequisited by the WTO. Therefore a data transfer originating from abroad and domestically shall receive the same and equal tax treatment.

Certainly, the imposition of VAT on personal data transfers can change, depending on other variables that may occur (for example, a threshold that is too high for entities classified as foreign taxpayers can cause foreign products to be discriminated against). An example from the findings of this research is that personal data that can be subject to VAT are data transfers subject to VAT on Trade through Electronic System("**PPN PMSE**"). This means under current Indonesian law only data transfers whose personal data originates from outside the customs area are subject to VAT.

The limited scope of PPN PMSE could potentially violate the National Treatment (NT) principle, causing vertical discrimination against intangible Taxable Goods originating from abroad. Therefore, a holistic approach is needed that may facilitate the expansion of the scope of the PMSE that is currently limited to intangible taxable goods originating from outside the customs area, so as not to potentially violate the NT principle of international trade. Nevertheless, conditions where VAT on personal data can be applied without violating the pillars of the MFN and NT principles in international trade are possible to be met with certain regulatory adjustments.

4. Imposing Taxes on Personal Data from the Perspective of International Taxation

Several countries have attempted to unilaterally regulate the taxation of personal data. In their regulatory construction, these countries typically use the digital service tax method. Countries that have adopted this policy including Italy, France, and Spain.

Italy applies a digital services tax that covers three categories of activities subject to digital service tax. First, the placement of ads targeting users of the digital service ("**digital targeted advertising**"). Second, platforms for buying and selling services or goods between users. Third, the transmission of user data collected from user activities on the digital platform to other parties.[31]

Next, France imposes taxes on two categories of digital services. The first scope of activities subject to digital service tax in France is the provision of digital platform services that facilitate direct interaction between platform users, such as marketplace and networking platforms. Digital services used for financial services are excluded from taxation. Second, are advertising services on digital platforms targeting users of the digital service. In this case, ad placement services and user personal data transfer services are subject to digital service tax.[32]

Moreover, Spain has passed digital service tax rules that will apply temporarily until a multilateral agreement is reached, such as through the OECD regarding international tax allocation. The digital service tax imposed by Spain is an indirect tax, outside of VAT, on three digital activities subject to tax. *First,* are online ads targeting users based in Spain. *Second*, are digital services that facilitate transactions between users located in Spain. *Third,* is the transfer of data owned by users based in Spain.[33]

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[31] DLA Piper, "Announced Proposed and Implemented Key Features of Italy's DST", *https://www.dlapiper.com/en/insights/publications/2021/02/announced-proposed-and-implemented-key-features-of-italys-dst,* (accessed on 4th May 2023).

[32] Bird & Bird, "Digital Services Tax in France", *https://www.twobirds.com/insights/2019/global/digital-services-tax-in-france,* (accessed on 4th May 2023).

[33] PricewaterhouseCoopers, "Spanish Digital Services Tax and Financial Transactions Tax Laws Are Published", *https://www.pwc.com/gx/en/tax/newsletters/tax-controversy-dispute-resolution/assets/pwc-spanish-tax-Laws-are-published.pdf,* (accessed on fth May 2023).

The international community has taken steps to anticipate various international taxation challenges in this digital economy era by forming an initiative called the "OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting," that involves OECD and G20 member countries, including Indonesia. This initiative provides proposals to face these digital economy challenges through solutions of Pillar One and Pillar Two. Pillar One discusses the allocation of taxing rights to a country, while Pillar Two addresses the global minimum tax and its supporting policies such as the Global anti-Base Erosion (GloBe rule). This multilateral commitment was reaffirmed on October 8, 2021, when countries involved in the OECD/G20 Inclusive Framework agreed to repeal unilateral digital services tax regulations and similar relevant regulations to be replaced by a multilateral convention ("**Draft MLC**") that will implement Pillar One and Pillar Two policies.[34] Pillar One is planned to be implemented no earlier than December 31, 2023, and Pillar Two is also planned to be implemented by 2023.[35]

The implementation of the International Agreement related to Pillar One and Pillar Two will result in the phasing out of digital service taxes that have been unilaterally imposed by countries like Spain, Italy, and France. However, does this mean that taxes on personal data cannot be applied at all under the new international tax framework? To answer this, it is necessary to review the draft MLC on Pillar One.

Article 37 of the draft MLC related to Pillar One governs the removal of all current digital service tax regulations, as expressed in the following:[36]

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[34] Organisation for Economic Co-operation and Development (OECD C), "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*, 6, (accessed on 8th May 2023).

[35] OECD C, 8.

[36] Organisation for Economic Co-operation and Development (OECD D), "Public Consultation Document Pillar One – Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Similar Measures", *https://www.oecd.org/tax/beps/public-consultation-document-draft-mlc-provisions-on-dsts-and-other-relevant-similar-measures.pdf*, (accessed on 9th May 2023).

"A Party shall not apply any measure listed in Annex A (List of Existing Measures Subject to Removal) to any company as from the date on that this Convention enters into effect with respect to that Party."

The consequences for member countries that implements digital services tax scheme after the MLC related to Pillar One is implemented are, *first*, the country will not receive a share of the profit allocation that is subject to tax, and *second*, the country should not implement regulations related to digital service tax, as outlined by Article 38 Paragraph 1 of the draft MLC below:[37]

"Any Party for that a digital services tax or relevant similar measure, or a measure listed in Annex A (List of Existing Measures Subject to Removal), is in force and in effect during a Period:

a. shall not be allocated any profit under [the MLC provision allocating Amount A] with respect to that Period; and

b. shall not impose tax with respect to that Period under any domestic Law provision implementing the provisions of [the MLC provision allocating Amount A]. "

Furthermore, Article 38 Paragraph 2 of the draft MLC provides criteria for the definition of "digital service tax or similar relevant policies." The *first* parameter is that (a) the implementation of this tax is generally based on the location of the users of the electronic service. The *second* parameter is that (b) the tax is only applied to foreign taxpayers, owned directly or indirectly by foreign taxpayers, or has taxpayer criteria (example: threshold) that result in the majority of the parties subject to the tax being foreign taxpayers or foreign investments. Lastly, the *third* parameter is that (c) the application of the digital service tax is not treated as Income Tax or applied outside the scope of an international agreement intended to avoid double taxation related to Income Tax, in accordance with Article 38 Paragraph 2.

[37] OECD D, 4.

Moreover, countries that have implemented a type of tax that meets the criteria listed in Article 38 Paragraph 2 of the draft MLC on Pillar One and have not yet declared their intention to revoke such tax regulations are considered to have implemented a digital service tax or a relevant similar policy. This is in accordance with the substance of Article 38 Paragraph 4 below:

> *"A Party shall be considered to have a digital services tax or relevant similar measure in force and in effect if:*
> *a. it is determined by the Conference of the Parties to have enacted a measure described in paragraph 2; and*
> *b. the Conference of the Parties has not determined that the Party has withdrawn that measure or otherwise terminated its application with respect to all companies.*
> *The definition of 'digital services tax or relevant similar measure' in paragraph 2 and any determination under paragraph 4 shall apply solely for purposes of this Convention."*

Moving over, a crucial provision is provided by Article 38 Paragraph 3 of the MLC that limits the definition of "digital service tax or similar relevant policies." This article stresses the types of regulations that are excluded from the scope of digital service tax. *First*, regulations that are excluded in this definition are those that regulate the Permanent Establishment (PE) nexus previously based on the physical presence of the entity. *Second*, are regulations regarding Value Added Tax, Sales Tax, or other taxes imposed on consumption. *Lastly*, third, are taxes generally imposed on transactions based on "per unit" or "per transaction," as long as the tax is not ad valorem. Therefore, VAT on personal data would be excluded from the definition of "digital service tax". This is in line with the construction of Article 38 Paragraph 3 as follows:

> *"The term "digital services tax or relevant similar measure" shall not include:*
> *a. a rule that addresses artificial structuring to avoid traditional permanent establishment or similar domestic Law nexus requirements that are based on physical presence (including both*

direct physical presence and the physical presence and activity of an agent);

b. value added taxes, goods and services taxes, sales taxes, or other similar taxes on consumption; or

c. generally applicable taxes imposed with respect to transactions on a per-unit or per-transaction basis rather than on an ad valorem basis."

With the development of international taxation, it can be concluded that the existing digital service taxes will be phased out and then revoked. Of course, this will only occur when the multilateral agreements related to Pillar One and Pillar Two are enforced. The implication of the provisions in the agreement is that taxes on data transactions that fall under the construction of 'digital service tax'will be withdrawn.

Under Article 38 Paragraph 3 of the MLC, VAT on personal data would be excluded from the definition of 'digital service tax'. However, the current running PPN PMSE in Indonesia is only applicable on foreign intangible taxable goods, thus fulfilling the provision of Article 38 Paragraph 2 point b of the draft MLC on Pillar One. The exclusion on 'digital service tax' would be overruled by Article 38 Paragraph 2 point b. The implementation of PPN PMSE exclusive on foreign goods would also violate the National Treatment principle set out by the GATT.

Nevertheless, there is a way out so that VAT on personal data can be applied without conflicting with both the MLC and the GATT. VAT on personal data can be applied by extending the scope of PPN PMSE. In this fashion, the PPN PMSE shall on also be applied to data transfers conducted from and within the territory of Indonesia. This way, exercising the exclusion laid out by Article 38 Paragraph of the MLC to implement VAT on personal data would be possible without violating Article 38 Paragraph 2 point b of the draft Pillar One MLC and the GATT.

C. Conclusion

Based on the findings, it can be concluded that personal data can be classified as intangible taxable goods based on Article 4 Paragraph (1) point a of the VAT

Law. The configuration of personal data as intangible taxable goods is seen in the legal construction of VAT on Trade through Electronic System ("**PPN PMSE**"). This has been stated in Article 1 number 19 of Government Regulation Number 18 of 2019 on Trade Through Electronic Systems ("**PMSE Regulation").** Article 1 number 19 states that data is included in the scope of digital goods. Therefore, personal data is possible to be made an object of VAT and could be included in the scope of PPN PMSE.

The implementation of PPN PMSE on personal data will face challenges because the current scope of PPN PMSE in Indonesia is limited to intangible taxable goods originating from outside the customs area of Indonesia. This limited scope has the potential to violate, (i) the principle of national treatment regulated by Article 3 of the General Agreement on Tariffs and Trade ("**GATT**") and (ii) Article 38 Paragraph 2 of the draft multilateral convention on Pillar One. Therefore, it is necessary to adjust the applicable regulations, such as revising to expand the scope of PPN PMSE that is currently limited to intangible taxable goods originating from outside the customs area of Indonesia.

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