

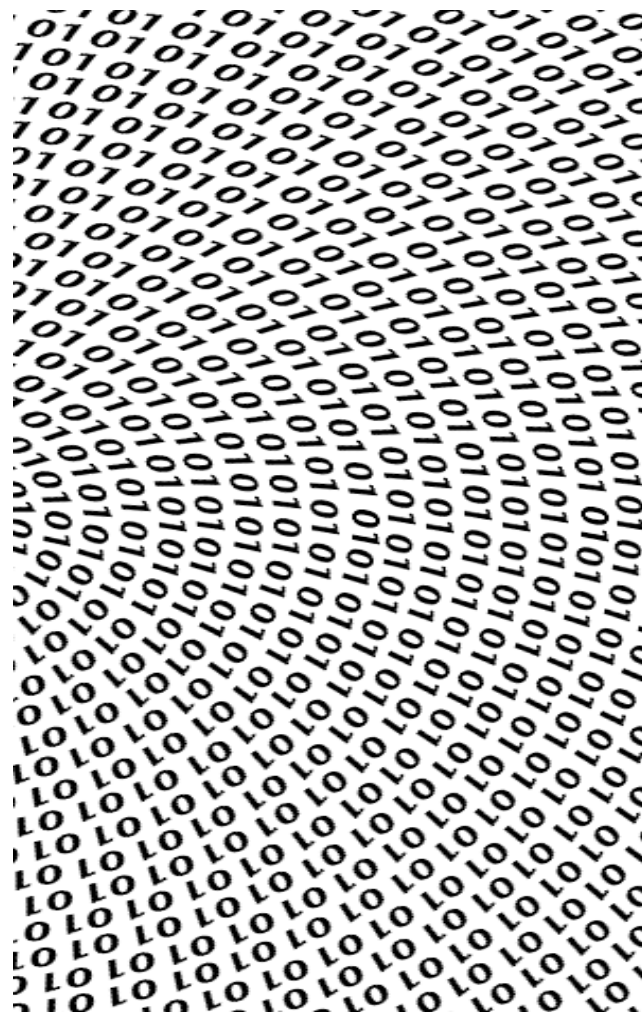
The Digital Economy and International Tax Law

– Main Challenges and Possible Solutions

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Agenda

- Defining the digital economy
- Main tax challenges
 - Lack of nexus
 - Treatment of IP and data
 - Income characterization
- Possible solutions
 - Recommendations
 - Country initiatives
- Preliminary assessment



What is the digital economy?

“The digital economy is the result of a transformative process brought by information and communication technology (ICT), which has made technologies cheaper, more powerful, and widely standardized, improving business processes and bolstering innovation across all sectors of the economy.”

OECD: Addressing the Tax Challenges of the Digital Economy, 2015, p. 11



Main Tax Challenges

- Overall concerns
 - Legal uncertainty for taxpayers and tax administrations
 - Risk of base erosion and profit shifting (BEPS)
- Lack of "nexus" for tax purposes
 - Jurisdiction to tax – residence and source
 - Place of effective management
 - Permanent establishment

“The tools available in international tax law have simply become outdated and are no longer fit for the purpose... And the increasing spread of the digital economy means that the problem is becoming increasingly pressing.”

M. de Wilde: "Tax Jurisdiction in a Digitalizing Economy; Why Online Profits Are So Hard to Pin Down", Intertax, 2015, p. 796-803.

Main Tax Challenges

- Treatment of IP and data
 - IP – Identification, valuation and (contractual) allocation
 - Extensive and sophisticated use of data
- Characterization of payments
 - Cloud computing
- Other challenges
 - The internet of things
 - 3D printing
 - The sharing economy
 - Use of digital currencies



- "Historical" background
 - 1998 – The Ottawa Ministerial Conference on Electronic Commerce
 - 2003 – Changes to the commentaries of the OECD Model Convention
 - 2014 – Report from the European Commission Expert Group on Taxation of the Digital Economy
 - 2015 – OECD/G20 BEPS Report on Action 1: Addressing the Tax Challenges of the Digital Economy

Outcome – BEPS Report on Action 1

1) Modify the list of exceptions to the PE definition

2) Modify the definition of PE

3) Revise transfer pricing guidelines

4) Design effective CFC rules

Possible Solutions

- A weak report with a disappointing outcome
 - A solution in the context of the existing international tax framework
 - More fundamental changes were considered but eventually abandoned
 - A new nexus concept in the form of a significant economic presence
 - A withholding tax on certain types of digital transactions
 - An equalization levy
- Could a destination based corporate tax be the answer?
- Can tax authorities catch up?
- Selected country initiatives
 - Italy: Special TP rule concerning online advertising and ancillary services
 - Hungary: Advertising tax
 - United Kingdom: Diverted profits tax
 - Australia: Multinational Anti-Avoidance Law (MAAL)
 - India: Equalization levy

Preliminary Assessment

- Tax challenges caused by the digital economy will also be part of the debate onwards, and probably increasingly so
- Interesting to see to which extent the OECD proposals will have an effect, if any
- True success is probably dependent on a coordinated approach
 - But currently we see a plethora of national initiatives...
- Perhaps/hopefully some of the more comprehensive solutions addressed in academia will be considered ...

Books and articles

Aleksandra Bal, Bulletin for International Taxation, 2014, p. 515-521

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Aleksandra Bal & Carlos Gutiérrez: Taxation of the Digital Economy, chapter 9 in International Tax Structures in the BEPS Era: An Analysis of Anti-Abuse Measures, IBFD, 2015

Arthur J. Cockfield, Bulletin for International Taxation, 2002, p. 606-619

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Maarten de Wilde, Intertax, 2015, p. 796-803

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Manoj Kumar Singh, Intertax, 2014, p. 325-333

Michael Deveraux & Rita de la Feria: Designing and implementing a destination based corporate tax, Oxford University Centre for Business Taxation, WP 14/07

Miranda Steward, Bulletin for International Taxation, 2015, p. 399-409

Oana Popa, European Taxation, 2016, p. 38-42

Paolo Centore & Maria Teresa Sutich, Intertax, 2014, p. 784-787

Peter Hongler & Pasquale Pistone: Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy, IBFD White Paper, 20 January 2015

Ramon Tomazela Santos, Bulletin for International Taxation, 2016, p. 399-405

Reuven Avi-Yonah: The Case for a Destination-Based Corporate Tax, Draft 22 July 2015 (SSRN)

Richard M. Bird, Bulletin for International Taxation, 2005, p. 130-140

Tatiana Falcao & Bob Michel, Intertax, 2014, p. 317-324

W.J.G Paardekoooper et al.: Intertax, 2016, p. 513-524

Yariv Brauner & Andrés Baez: Withholding Taxes in the Service of BEPS Action 1: Address the Tax Challenges of the Digital Economy, IBFD White Paper, 2 February 2015

Reports

European Commission: Commission Expert Group on Taxation of the Digital Economy, 2014

France Stratégie: Taxation and the digital economy – A survey of theoretical models, 2015

OECD: Taxation and Electronic Commerce – Implementing the Ottawa Taxation Framework Conditions, 2001

OECD: Attribution of Profits to a Permanent Establishment Involved in Electronic Commerce Transactions (discussion draft), 2001

OECD: Treaty Rules and E-Commerce – Taxing Business Profits in the New Economy, 2005

OECD: Action Plan on Base Erosion and Profit Shifting, 2013

OECD: Addressing the Tax Challenges of the Digital Economy, 2015

OECD: Preventing the Artificial Avoidance of Permanent Establishment Status, 2015

OECD: Aligning Transfer Pricing with Value Creation, 2015

Pierre Collin & Nicolas Colin: Report from the Task Force on Taxation of the Digital Economy, 2013

