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“The tools available in international tax law have simply become outdated and are no longer fit for the purpose… And the increasing spread of the digital economy means that the problem is becoming increasingly pressing.”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

• "Historical" background
  • 1998 – The Ottawa Ministerial Conference on Electronic Commerce
  • 2003 – Changes to the commentaries of the OECD Model Convention

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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 …
Literature

Books and articles


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

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


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Reports


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


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

OECD: Aligning Transfer Pricing with Value Creation, 2015
