



OECD/G20 Work on Tax Challenges Arising from Digitalisation

Update & next steps

University of Luxembourg
20 April 2018



The Task Force on the Digital Economy (TFDE)

Initial Mandate

(September 2013)



**Subsidiary
Body of the
CFA**

**Work
mandated by
the Action
Plan on BEPS
(Action 1)**

**BEPS Action
1 Report
delivered in
October 2015**



New Mandate

(January 2017)

**Subsidiary
Body of the
Inclusive
Framework
on BEPS (IF)**

**Follow-up
work
mandated by
BEPS Action
1 Report**

**Interim
Report
delivered in
March 2018**



IF & TFDE

113 jurisdictions working
on an equal footing





2015 Action 1 Report - Overview

**No ring-fencing of
the digital economy**

**No unique BEPS
issues**

**Key
Findings**

**No consensus and
importance to
continue working
together**

**Number of broader
tax challenges**
(nexus, data & characterisation)



TFDE work after 2015 – Timeline

October 2016 – January 2017

Preparation and approval of new Mandate



September-November 2017

Request for input & public consultation

April 2017

TFDE meeting



December 2017

TFDE meeting



March 2018

Approval and Delivery
of the Interim Report





The 2018 Interim Report



8 Chapters, in particular...

In-depth analysis of how digitalisation affects markets, business models and value creation

Stock-taking exercise on BEPS implementation and impact on BEPS issues

Monitoring of other tax measures adopted by countries potentially relevant to digitalisation

Discussion of systematic challenges and possible adaptations of the tax framework (long-term solutions)

Discussion of pros & cons of Interim measures, with a view to minimise the harm

Description of how digitalisation can help improve tax services and compliance (special feature)



DIGITALISATION, BUSINESS MODELS & VALUE CREATION



Outline

Infrastructure of the digital economy

The environment where digital businesses operate

The value creation process

Classification of different value creation processes for digital businesses

Case studies

Detailed analysis of the process of value creation

Common characteristics of value creation in digital businesses



Business Models and Value Creation

Complex reality

**Three key factors
prevalent in certain
highly digitalised
businesses (HDBs)**

**Not always exclusive
or specific to HDBs**

**Cross-jurisdictional
scale without mass**

- *Ability to remotely develop and interact with a global customer base*
- *Facilitates relocation of production processes & centralisation of functions*
- *HDBs often highly involved in economic life of a jurisdiction with little/no physical presence*

**Reliance on
intangible assets,
including IP**

- *Data available on growing importance of investment in intangibles*
- *Intangible assets crucial value driver of HDBs*

**Data, user
participation and
their synergies with
IP**

- *Data value cycle (e.g. collection, storage, analysis) becomes a key aspect of HDBs*
- *Users increasingly involved in value creation process (e.g. UGC) of some HDBs*



Divergent Views on User Participation

Whether and the extent to which they represent contribution to value creation by enterprise

A determinant of value creation

- *Amount of data collected, content contributed and network effects dependent on the level of user engagement, irrespective of the monetisation model (e.g., pricing, advertisement)*
- *User participation is a unique and important driver of value creation for some HDBs*

Income Tax Implications

A business input sourced from third parties

- *Contributed data, content and other information are the result of transactions between HDBs and users (e.g. barter transactions)*
- *User participation is NOT an activity to which profit should be attributed*
- *User data can be a valuable intangible asset of HDBs*



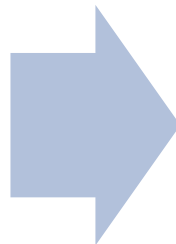
IMPLEMENTATION OF THE BEPS PACKAGE AND OTHER RELEVANT COUNTRY MEASURES



Implementation and Impact of the BEPS package

Relevant measures of the BEPS package

- **Amended PE definition** (Action 7)
- **Revised TP guidelines** (Action 8-10)
- **Strengthened CFC rules** (Action 3)
- **VAT collection** (Action 1)
- **Other BEPS measures** (Action 6, Action 5)



Impact assessment

- **Important impact on BEPS issues** (e.g., conversion from remote sales models to local reseller models, on-shoring of assets)
- **Limited impact on the broader direct tax challenges** (nexus, data and characterisation)



Other Relevant Country Measures

Alternative PE thresholds

- **Digital presence-type of PEs** (e.g. Israel, India, Slovakia)
- **Virtual Service PE** (e.g. Saudi Arabia)

Withholding Taxes

- **Broader royalty definitions** (e.g. Philippines, Malaysia, UK)
- **Technical service fees** (e.g. UN Model Tax Convention)
- **Online advertising** (e.g. Thailand)

Turnover Taxes

- **Sectoral taxes**, such as for advertisement (e.g. Hungary) or audio-visual content (e.g. France)
- **Levy on Digital Transactions** (Italy)
- **Equalisation Levy** (e.g. India)

Specific regimes for large MNEs

- **Diverted Profits Tax** (e.g. UK and Australia)
- **Base-Erosion and Anti-abuse Tax** (e.g. US)



ADAPTING THE INTERNATIONAL TAX SYSTEM TO THE DIGITALISATION OF THE ECONOMY



Background (I)



Action 1 Report (2015)

Identification of a number of
“broader direct tax challenges”

Nexus and physical
presence

Data and value
creation

Income
characterisation





Background (II)



Action 1 Report (2015)

No consensus on the precise scale and/or characteristics of these challenges, except for their systematic nature...

Paradigm used to determine where economic activities are located and value is created

Ability of the international standards to deliver appropriate results from a policy perspective

Allocation of taxing rights among countries





Key Concepts under Pressure

Nexus

Rules that determine jurisdiction to tax a non-resident enterprise

PE threshold (e.g. fixed place of business, dependent agent)

Historical & well-established concepts



Fundamental principles of the existing tax framework

Profit Allocation

Rules that determine the relevant share of the profits that will be subjected to taxation

Arm's length principle (e.g. TP rules, PE profit attribution)



Tax Implications of Digitalisation

Characteristics frequently observed in HDBs and their interaction with international tax rules – potential implications?

**Cross-jurisdictional
scale without mass**

***Impact on the distribution of
taxing rights***

*e.g., increasing share of profits
from cross-border activities
not taxed in market
jurisdiction*

**Reliance on
intangible assets**

***Difficult to determine how to
allocate income from
intangibles among different
parts of an MNE group***

*e.g., ownership/management
of important intangibles not
always clearly discernible, and
potentially easy to shift around
within an MNE group*

**Data and
user participation**

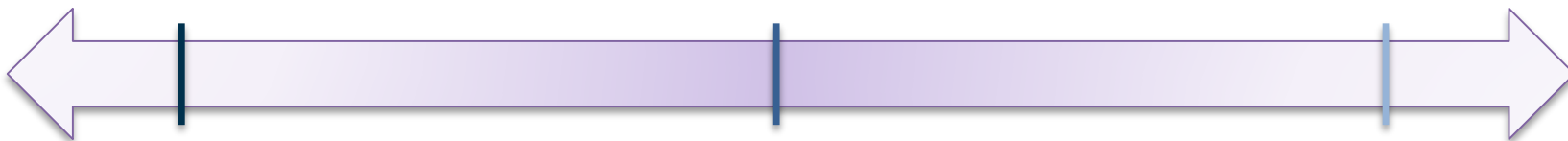
***Potential new
source/material contribution
to value creation not
captured by the current tax
framework***

*e.g., business that exploits data
and user-generated content
has little/no physical presence
in jurisdiction of users*



Divergent Perspectives

Broad spectrum of countries' views, that can generally be described as falling within three groups



- *Failure to take into consideration user-generated value in certain HDBs create misalignments between where profits are taxed and where value is created*
- *This does not undermine the principles of the existing international tax framework*
- *Only targeted changes needed*

First Group

- *Digitalisation and globalisation pose challenges to the effectiveness of some basic concepts underlying the existing international tax framework (e.g. transfer pricing, PE definition)*
- *These challenges are not exclusive or specific to highly digitalised business models*

Second Group

- *BEPS measures have largely addressed double non-taxation, and more time is required to assess their full impact*
- *Generally satisfied with the existing tax system and do not currently see the need for any further reform*

Third Group



Review of the Key Concepts

Commitment of the members of the IF to...

1

Undertake a coherent and concurrent review of the profit allocation and nexus rules

2

Work towards a consensus-based solution by 2020

(with an update to be provided in 2019)

Taking forward this commitment will require to...

Refine the analysis of value creation in HDBs

Test the feasibility of technical solutions

Clarify the parameters of such revision



INTERIM MEASURES



Background

Multinational
delivery

No consensus on the need for, or merit of, interim measures...

and
me...

Some countries support more immediate action (e.g. excise tax)

- *Untaxed value is being generated within their jurisdiction creating mismatches between taxable profits & value creation (e.g. HDBs reliant on user participation)*
- *Requires interim measure focused on certain HDBs pending global solution*
- *Potential risks of interim measure weighed against benefits that can be mitigated*



Other countries oppose such measure irrespective of its design

Disagree with conceptual basis

Diagnose risks and adverse consequences, inter alia:

- *Negative impact on investment, innovation and overall welfare*
- *Risk of economic incidence fully or partially passed on to consumers and businesses*
- *Risk of over-taxation*

... and no recommendation for the introduction of such measure

*Interim to permanent
No global solutions
and*



Design of Interim Measures

Countries that favour the introduction of interim measures have agreed guidance that needs to be taken into account in the design of such a measure:

***Avoid
multitude of
different
unilateral
measures***

***Limit
potential
adverse side-
effects of the
measure***

Minimising cost and complexity



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The „Genuine Link“ Requirement for Source Taxation in Public International Law



International Court of Justice



Tax and the Digital Economy

- Permanent Court of International Justice: Nottebohm case, 1927
 - Principle of Territoriality
 - Jurisdiction to Enforce – strictly territorial
 - Jurisdiction to Prescribe and to Adjudicate – less territorial
- International Court of Justice: Lotus case, 1955



The “Genuine Link” Requirement for Source Taxation

3

Taxation by the state on whose territory
the value is created

- Virtual Establishments/Place of Consumption/Destination Principle
- Fair relation to state-provided services, benefits and opportunities?
- General trend to expand the tax base in the country where the customers or users are located



The Future: Apportionment or Move towards Indirect Taxation?

- Apportionment?
- Location of Sales (US) or of Users (Commission proposal), but CCTB...
- Move towards Indirect Taxation?

Hits the wrong persons?



The „Genuine Link“ Requirement for Source Taxation

5

Thank you for your attention



EU and WTO Law Implications for Proposals to Tax 'Digital Business'

Prof. Dr. Werner Haslehner

ATOZ Chair for European and International Taxation

RUL

RESEARCH UNIT
IN LAW


UNIVERSITÉ DU
LUXEMBOURG

- Background
- EU Law Limits for Member States
- EU Law Limits for the EU
- WTO Law Limits
- Implications for Recent Proposals

- **Tax Policy challenges arising from digital business models**
 - Online trading in goods and services without physical presence undermines paradigm of ‘taxation where value is created’
 - Transfer pricing rules are not adapted to importance of user data and other intangible assets that are the main driver of value creation
 - Characterization of relationships and payments between digital economy actors
- **Tax Policy responses**
 - OECD/‘Inclusive Framework’: lack of consensus on action, further study needed
 - Selected countries: Extended withholding taxes, diverted profits taxes, equalisation levies on (digital services) turnover, extended PE rules
 - EU: Digital Services Tax; Digital PE

- **Competence**
 - Generally no problem as Member States remain fully competent to set their tax policies, subject only to: 1) compliance with internal market rules (freedoms, State aid) and 2) compliance with existing secondary law on taxation (VAT; excise taxes; PSD, IRD, ATAD)
- **Compliance with internal market rules**
 - Fundamental freedoms: No discrimination against foreign companies; no progressive tax on turnover? No double taxation?
 - State Aid: No positive discrimination of certain undertakings or sectors; can sector-specific taxes be justified?
- **Compliance with existing secondary law on taxation**
 - No overlap with excise taxes, no turnover taxes or border formalities (Article 1(3) Directive 2008/118/EC)
 - No overlap with EU VAT (Article 401 VAT Directive; Case C-475/03)
 - No withholding tax on inter-company dividends, interest, and royalties

- **Competence**
 - Article 113 TFEU: turnover taxes; Article 115 TFEU: direct taxes
 - Subsidiarity and Proportionality
- **Compliance with internal market rules**
 - Freedoms apply to EU as well; State aid rules do not
- **Compliance with public international law**
 - The status of (customary) public international law relative to EU law
 - Relationship of secondary law to international treaties: Article 351 TFEU by analogy?
- **Policy objectives**
 - Achieve the ‘Digital Single Market’, prevent internal market distortions
 - Strengthen growth and innovation in the EU
 - Support international consensus (?) on ‘taxation where value is created’
 - Combatting ‘harmful tax competition’?

- **Non-discrimination**

- Most-favoured nation rule (Article I GATT; Article II GATS)
- National treatment rule (Article III GATT; Article XVII(1) GATS)

- **Focus on indirect/excise taxes**

- Wide carve-out from national treatment for direct taxes (Article XIV(d) GATS)
- DTC carve-out from most-favoured nation treatment (Article XIV(e) GATS)
- What is an 'equalisation tax'?

- **Non-subsidy**

- Not an export subsidy (Article 3.1 and Annex I e) and f) ASCM)
 - No reduction in direct taxation (*FSC case*)
 - No exemption or refund beyond indirect taxes on domestic sales

Implications for Recent Proposals

	Digital PE / Significant Presence	Withholding taxes	Digital Services Tax / Equalisation Levy
Competence (MS)	OK ✓	Compliance with PSD/ IRD?	OK ✓
Competence (EU)	Relation to third countries? (treaty override)	Relation to third countries? (treaty override)	OK (Article 113) ✓
Fundamental Freedoms (for EU/MS)	OK ✓	No discrimination against EEA/third countries: Net basis	Must be non-discriminatory; Probable double taxation could be problematic
State aid (for MS)	Sector-specific? Size- thresholds?	Sector-specific? Size- thresholds?	Sector-/territory-specific? Size-thresholds?
Public int'l law (for EU)	Genuine link?	Genuine link?	Genuine link?
WTO (GATS)	OK ✓	OK ✓	Must be non-discriminatory
Policy concerns	Challenging attribution of income – limits to TP/AOA	Probable double-taxation due to lack of creditability	Contra international consensus, exacerbating competition

- **Thank you for listening!**
- **Questions and comments?**
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UNIVERSITÀ DEGLI STUDI DI BERGAMO

Constitutional Limits to the Taxation of Digital Economy

Prof. Dr. Gianluigi Bizioli

Tax and the Digital Economy
Université du Luxembourg, 20 April 2018

Justifications for Taxation [1]

At the very beginning of the modern State, the authority to tax is founded on the protection granted to subjects by the State

«To equal justice appertaineth also the equal imposition of taxes; the equality whereof dependeth not on the equality of riches, but on the equality of the debt that every man oweth to the Commonwealth for his defence»

T. Hobbes, *Leviathan*, London, 1651, Ch. XXX

Justifications for Taxation [2]

The “abilities” or “faculties” criterion has been introduced by A. Smith

«The subjects of every State ought to contribute towards the support of the Government as nearly as possible in proportion to their respective abilities, i.e. in proportion to the revenue which they respectively enjoy under the protection of the State»

Adam Smith's first canon on taxation, *Wealth of Nations*, London, 1776

Justifications for Taxation [3]

- Taxation as a compensation for the protection of life and ownership (benefit principle)
- Abilities or faculties shall be consider as a proxy of the enjoyment of public expenditure (ability to pay principle)

Justifications for Taxation [4]

- At the outset, the ability to pay principle was a proxy for the general advantages received by subjects from the State (Constituent Assembly of 1789; Griziotti (1949); Murphy and Nagel (2002))
- «a tax upon the doing of business, with the advantages which inhere in the peculiarities of corporate or joint stock organization of the character described» (US Supreme Court, *Flint v Stone Tracy Company*, 220 U.S. 107 (1911))

Justifications for Taxation [5]

- The transformation of the State (towards the Welfare State) has progressively faded the benefit dimension of the ability to pay (E.R.A. Seligman (1921), 336)
- The concept used by the Constitutional Courts (e.g., Germany, Italy and Spain) involves the economic participation of the subjects belonging to the polity without any reference to public expenditure

Justifications for Taxation [6]

- This double theoretical justification applies also to extraterritorial taxation
- Taxation of the non-resident in the Source State may either be justified
 - through (a limited) participation to the polity, or
 - as an “exchange” with the jurisdiction for the maintenance of good economic conditions for foreign investors

Justifications for Taxation [9]

- Implications:
 - taxation according to the actual economic value of the transaction (usually based on the market price or on the compensation)
 - prohibition of excessive taxation

Digital Taxation: Assessing the Proposals [1]

- Three main challenges (OECD, *Action 1: 2015 Final Report*, 100 ff.; *Interim Report 2018*, 166; *Explanatory Memorandum*, COM(2018) 147 final, 2):
 - nexus
 - data
 - characterisation

Digital Taxation: Assessing the Proposals [2]

«the taxation of a non-resident enterprise depends on rules that are strongly rooted in physical presence requirements to determine nexus and allocate profits. (...) value creation is becoming less dependent on the physical presence of people or property» (OECD, Interim Report 2018, 168-169; Explanatory Memorandum, COM(2018) 147 final, 2)

Digital Taxation: Assessing the Proposals [3]

Digital economy raises two different problems:

1. the justification for the taxation of non-residents who carry on economic activities without physical presence
2. if and how this activities may be measured for tax purposes

Digital Taxation: Assessing the Proposals [4]

Without any physical presence,

- taxation of activities carried on by non-residents cannot be justified according to participation to the polity (although, see *Action 1: 2015 Final Report*, 107)
- taxation of activities carried on by non-residents may be justified according to the (legal and economic) protection granted by the State
- different treatment of residents and non-residents

Digital Taxation: Assessing the Proposals [5]

Although the significant digital presence concept is accepted,

- is this a sufficient proxy to create value, and, if so,
- *how* this value can be measured

Digital Taxation: Assessing the Proposals [6]

Action 1: 2015 Final Report highlights that:

1. The existing rule on the attribution of profits cannot be applied (111-112)
2. Deemed net income by applying a ratio of presumed expenses to the non-resident's revenue departs from the international standards (112-113)
3. Deemed net income determination may clash with the ability to pay principle

Digital Taxation: Assessing the Proposals [7]

The “excise tax” mentioned in the *Action 1: 2015 Final Report* (115) and in the *Interim Report 2018* (182) is a kind of “surcharge” on the supply of certain e-services

Traditional indirect tax

Compliance with VAT/GST

Digital Taxation: Assessing the Proposals [8]

The DST taxes the revenues resulting from the provision of certain e-services (Article 3(1) COM(2018) 148 final)

1. Is the taxation of gross revenues compliant with the ability to pay principle?
2. How can be justified the discrimination among services provided through digital platforms and traditionally?

Digital Taxation: Assessing the Proposals [9]

The determination of profits attributable to or in respect of the significant digital presence shall be based on a functional analysis (Article 5, COM(2008) 147 final)

Practical issues

Thank you for your attention!

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Gunter Mayr

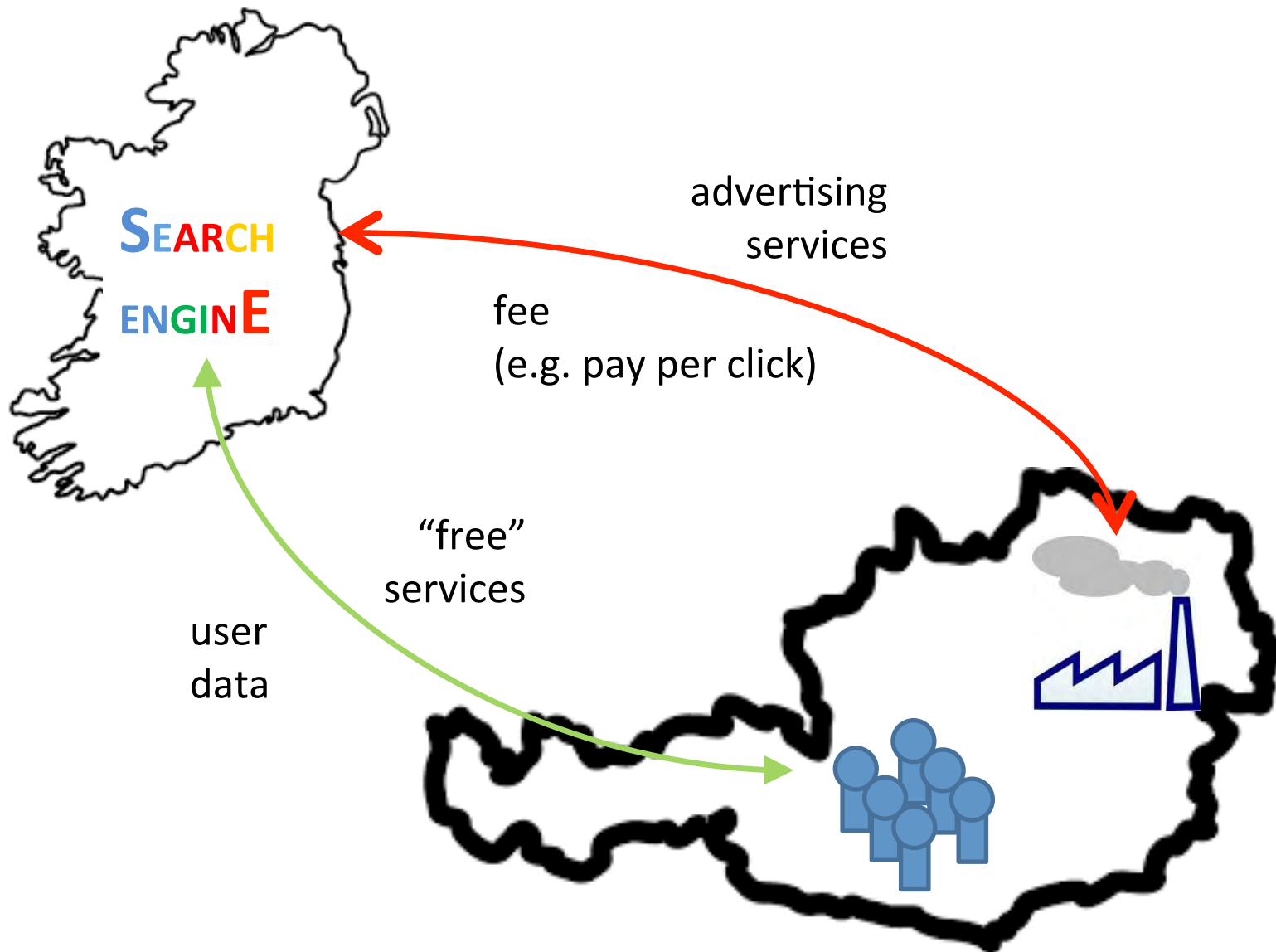
Taxation of the Digital Economy: The Austrian Perspective

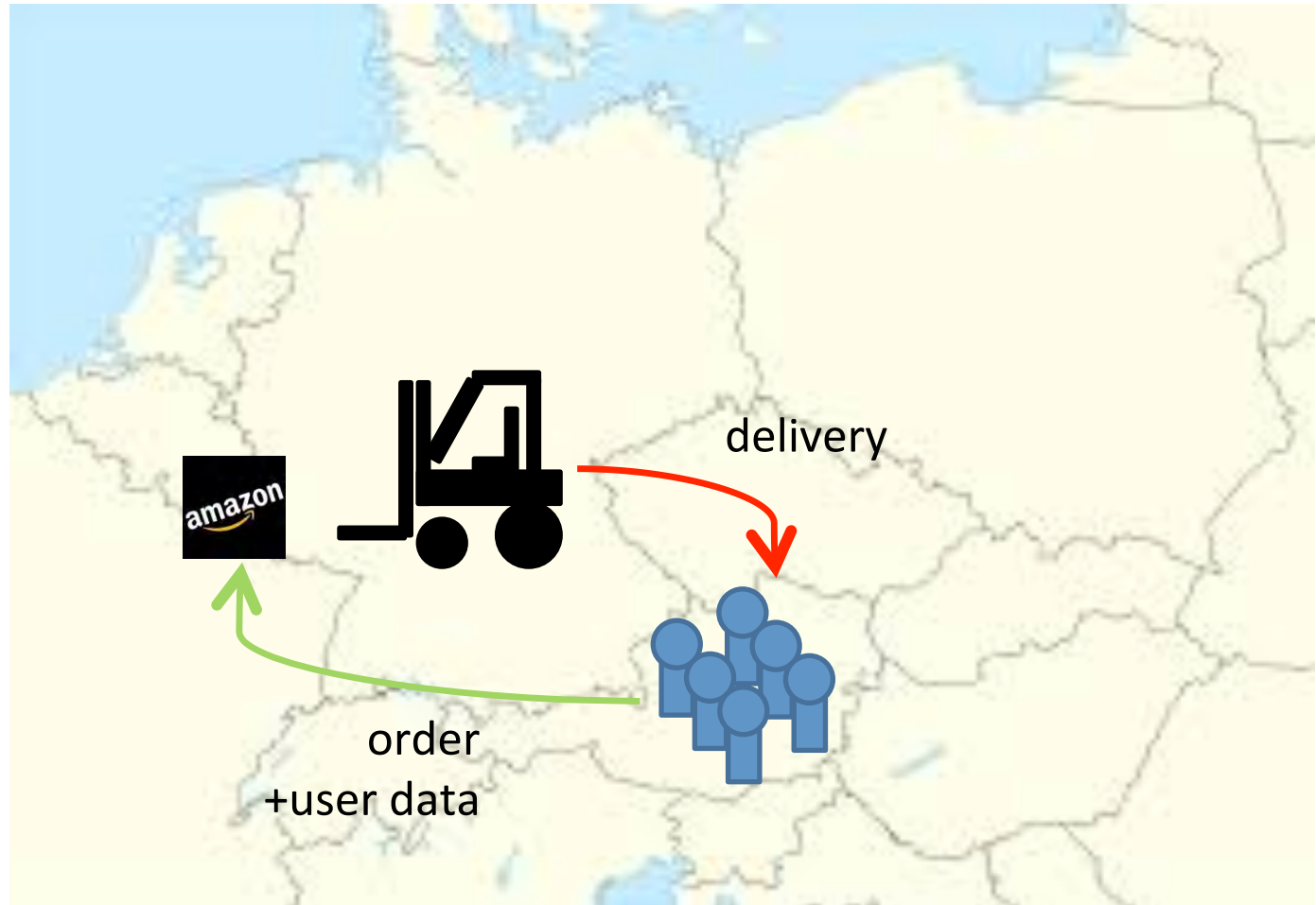
Taxation of Digital Economy

- Austrian perspective: DE very important
- Current definition of a PE
 - Refers to a physical presence
 - Not suitable for the digital economy
- Solutions:
 - Long-term: virtual PE?
 - Short-term: equalisation tax?
- But: 1 solution for all business models?

Different business models

- **BEPS Action 1:**
 - Online Advertising
 - Online Retailer
 - Cloud Computing
 - App Stores
 - Payment Services
 - Participative networked platforms
 - High frequency trading
- **Examples**





A pragmatic starting point

- Which business models differ sharply from those in the traditional economy?
- 3 Categories
 - Next picture:
 - Source: G. Kofler, G. Mayr & C. Schlager, *Taxation of the Digital Economy: A Pragmatic Approach to Short-Term Measures*, ET 2018, 123.

“Traditional”: Further development of the traditional economy

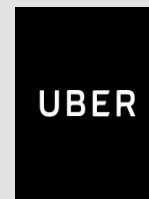
The mail-order business and Pay TV have not undergone any fundamental changes due to digitalization, but have been developed further



NETFLIX

“Hybrid”: Multi-sided platforms

Sharing economy and other platforms that rely heavily on user data combine traditional and new elements



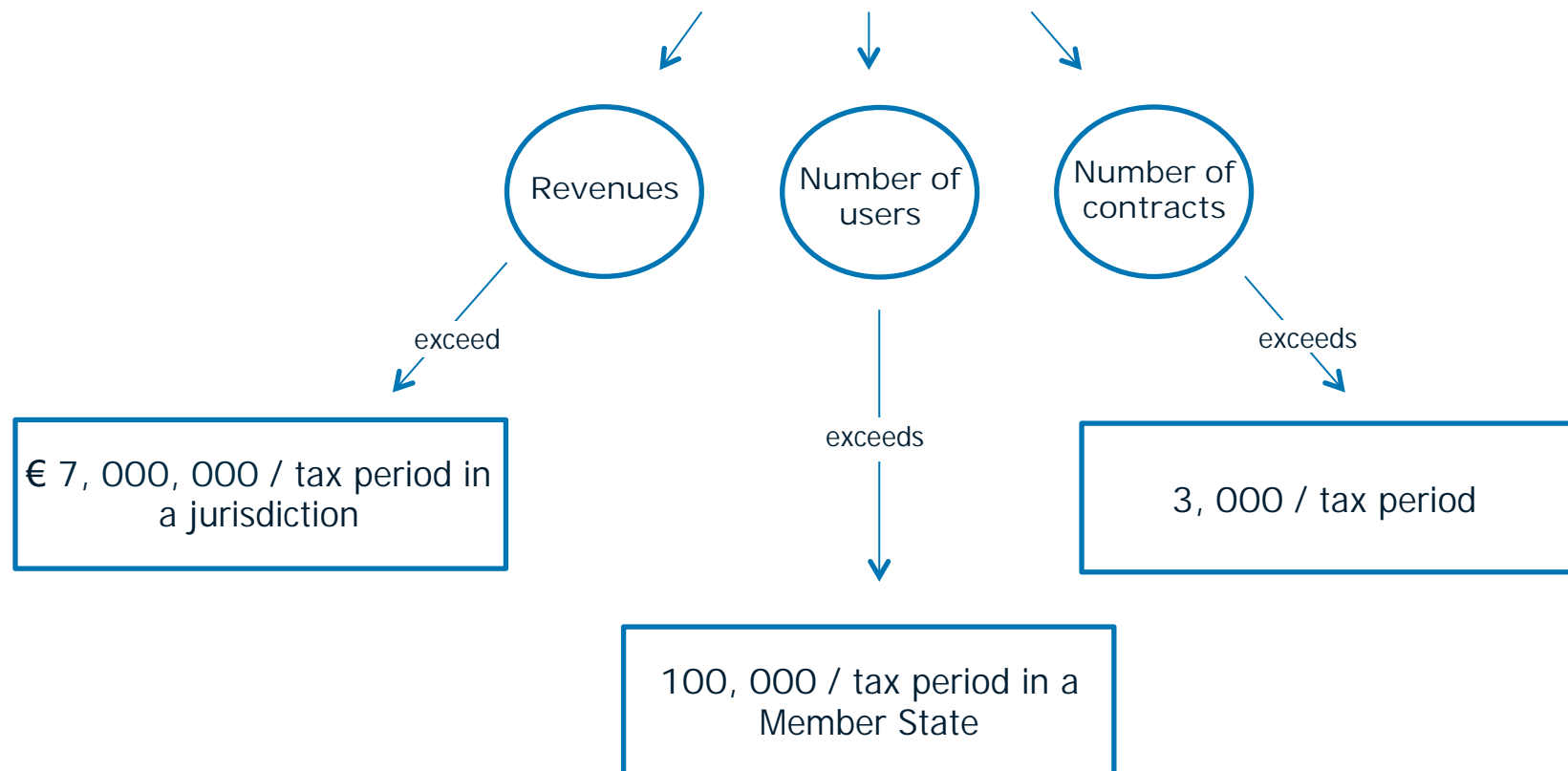
“New”: Exploitation of personal data

Companies whose business model is based on the collection and exploitation of data are new indeed

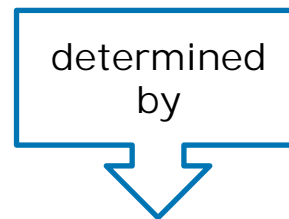


- On 21 March 2018 Digital Taxation Package
 - 2 proposals:
 - SDP-Directive
 - Significant Digital Presence
 - Long-term solution
 - DST-Directive
 - Digital Services Tax

- Significant digital presence
 - supply of digital services through a digital interface



- Profit attribution to Member States



Functional analysis



Economically significant activities:

Shall be taken into account

- Economically significant activities:
 - Focus on: DEMPE
 - Development, enhancement, maintenance, protection and the exploitation of intangible assets
- Taxpayers shall use the
 - profit split method
 - Splitting factors may include
 - Expenses for research, development + marketing
 - Number of users + data collected per MS

- Conclusion:
 - Virtual PE:
 - best solution
 - But: change the tax treaties with 3. countries?
 - realistic?
 - Vague about functional analysis + profit split
 - a lot of disputes in practice
 - At the moment:
 - DST more realistic

Reforming “Nexus”: Fitting the
Existing International Tax
Framework around the Digital
Economy:

Withholding Taxes

Andrés Báez Moreno

Universidad Carlos III de Madrid

Starting point

- WTH...an abandoned path.
- A reconsideration?
 - “Our proposal” and other WTH alternatives
 - “Our proposal” and other alternatives (Digital-PE and Equalization Levies).

Our proposal:

A standalone gross-basis final WTH tax on cross-border services in B2B contexts

- Why a final WHT?
 - Not a primary collection mechanism to enforce a new Digital PE
- Why just on services?
 - Not on goods.
- Why on all B2B services?
 - Not “digital” services
- Why just on cross-border services?
 - Not “domestic” services
- Why just on B2B services?
 - Not B2C services

“Our” WTH and other alternatives (I)

- Design and implementation issues
 - Thresholds.
 - Definition/Continuity/Abuse/CERTAINTY?
 - Attribution of Profits.
 - Data as key value driver for profit attribution.
 - Scope.
 - Digital/non-Digital; B2B/B2C; Domestic/Cross-Border
 - Method of Taxation (Gross/Net).
 - Global solutions?/“Targeted Therapy”?
 - Compliance and enforcement.
 - Controlling thresholds and income...(M)OOS?/Self-enforcing WTH on B2B

“Our” WTH and other alternatives (II)

- Legal consistency issues.
 - Double Taxation Conventions
 - Digital PE...all treaties to be revised
 - WTH: *Fees for technical services*
 - Equalization Levies: what is a tax on income?
 - WTO-Law (referred to Prof. Haslehner)
 - EU-Law (referred to Prof. Haslehner)

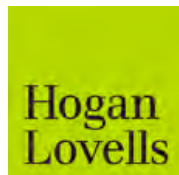
“Our WTH and other alternatives”

Issue to be compared	DIGITAL PE	WITHHOLDING TAX	EQUALIZATION LEVY
Thresholds	X	V	X
Attribution	X	V	V
Scope			
Digital/Non-Digital	X	V	X
B2B/B2C	V	X	X
Cross-border/domestic	V	V	X
Method of Taxation Gross/net	V	X	X
Compliance	X	V	X
Double Taxation Conventions	X	X	X
WTO Law	V	V	X
EU-Law	V	X	X

DIVERTED PROFITS TAX AND OTHER EQUALIZATION TAXES

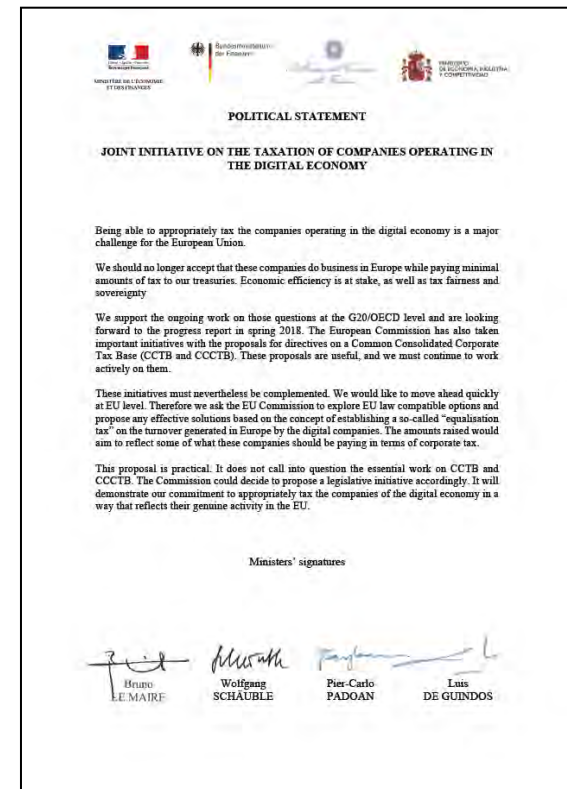


Georg Kofler
Rupert Shiers



DIGITAL ECONOMY | DEVELOPMENTS

- OECD BEPS Action 1 (October 2015) and Interim Report (March 2018)
- UN Committee of Experts, *The digitalized economy: selected issues of potential relevance to developing countries*, E/C.18/2017/6 (8 August 2017) and *Tax consequences of the digitalized economy*, E/C.18/2017/CRP.23 (10 October 2017)
- European Union
 - Political Statement – Joint Initiative on the Taxation of Companies Operating in the Digital Economy” (9 September 2017)
 - Informal ECOFIN meeting in Tallinn on 16 September 2017 and Council conclusions on “Responding to the challenges of taxation of profits of the digital economy”, Doc. 15175/17 FISC 320 ECOFIN 1064 (30 November 2017)
 - Commission’s Communication “A Fair and Efficient Tax System in the European Union for the Digital Single Market”, COM(2017)547 final (21 September 2017), and concrete proposals in March 2018
- Unilateral Action (e.g., DPT, MAAL, Indian equalisation levy, Italian “web tax” etc)



DIGITAL ECONOMY | *DEVELOPMENTS*

■ *Fair Taxation of the Digital Economy (21 March 2018): Short- and Long-Term Solutions*

Commission's Communication "Time to establish a modern, fair and efficient taxation standard for the digital economy" (COM(2018)146 and Annex)

Long-Term Solution: Significant Digital Presence

Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 and Annexes

Commission Recommendation of 21.3.2018 relating to the corporate taxation of a significant digital presence, C(2018)1650

Short-Term Solution: Digital Services Tax

Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018)148

Impact Assessment SWD(2018)81 and SWD(2018)82

Hogan
Lovells



The UK experience Diverted Profits Tax etc

UK Diverted Profits Tax (DPT)


- Introduced with effect from 1 April 2015
- Only one real change to rules on nexus
- PE concept extended to cover "avoided PE"
- Other conceptual changes
 - deemed royalty payments to which UK WHT can apply
 - stronger TP recharacterisation rule than OECD permits
- All DTA protections disapplied - permitted in UK law
- HMRC publicised view on EU law:
 - fundamental freedoms don't apply
 - as all relevant cases are ones of abuse
 - or possibly other justifications apply
 - (and made much less important by Brexit)

DPT - the scope of "avoided Permanent Establishment"

Section 86, Finance Act 2015

- A non-UK person carries on a trading business
- Another person carries on activity in the UK in connection
- Reasonable to assume that either's activity is (in whole or part) designed to ensure that no UK permanent establishment
- Arrangements in place in connection with sales for which at least one main purpose is to reduce UK corporation tax

BUT

- DPT on deemed PE is charged on UK activities
 - And fundamentally: OECD guidelines still apply
- 

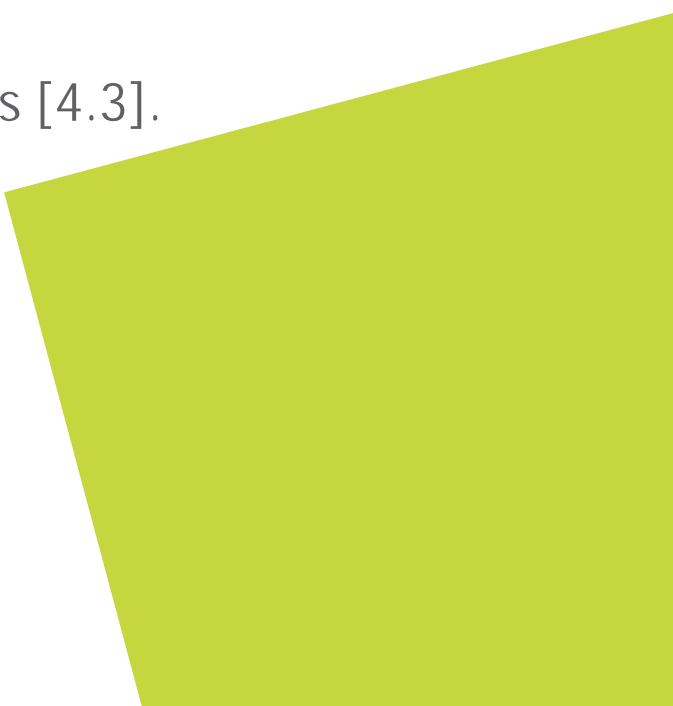
DPT - the practical experience

- First serious investigations are now coming to a close
- Changes to nexus have not been critical
- In practice the key changes have been non-technical:
 - increased tax rate if no swift settlement achieved
 - change to who "holds the money"
 - perceived reputational issues
- In many cases DPT may be only on deemed royalty payments

Questions

- Is the issue more behavioural than technical?
- Is a point that the UK economy is not typical?
- Does DPT go far enough?
- Could it even be applied in other Member States?

UK proposals for new digital tax

- Published 13 March 2018
 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/689240/corporate_tax_and_the_digital_economy_update_web.pdf.
 - "The government's position is that active user participation creates value for certain digital businesses, and that jurisdictions in which users are located should be entitled to tax a proportion of those businesses' profits." [3.7]
 - Advocates international tax reform to allow this [4.3].
 - Short term : interim measure [4.6], [4.7]?
 - Prefers to coordinate with eg Commission but willing to act unilaterally if needed [4.11]
 - Note: NOT a final position and no hard date for consultation responses
- 

EQUALISATION TAX | *BACKGROUND*

- “Equalisation tax on turnover of digitalised companies” – The “amounts raised would aim to reflect some of what these companies should be paying in terms of corporate tax”.
- Discussion in Chapter 6 of OECD, Tax Challenges Arising from Digitalisation –Interim Report 2018 (2018)
- EU Proposal for a “DST” → Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018)148
- Broader economic questions, e.g., impact on investment, innovation and growth



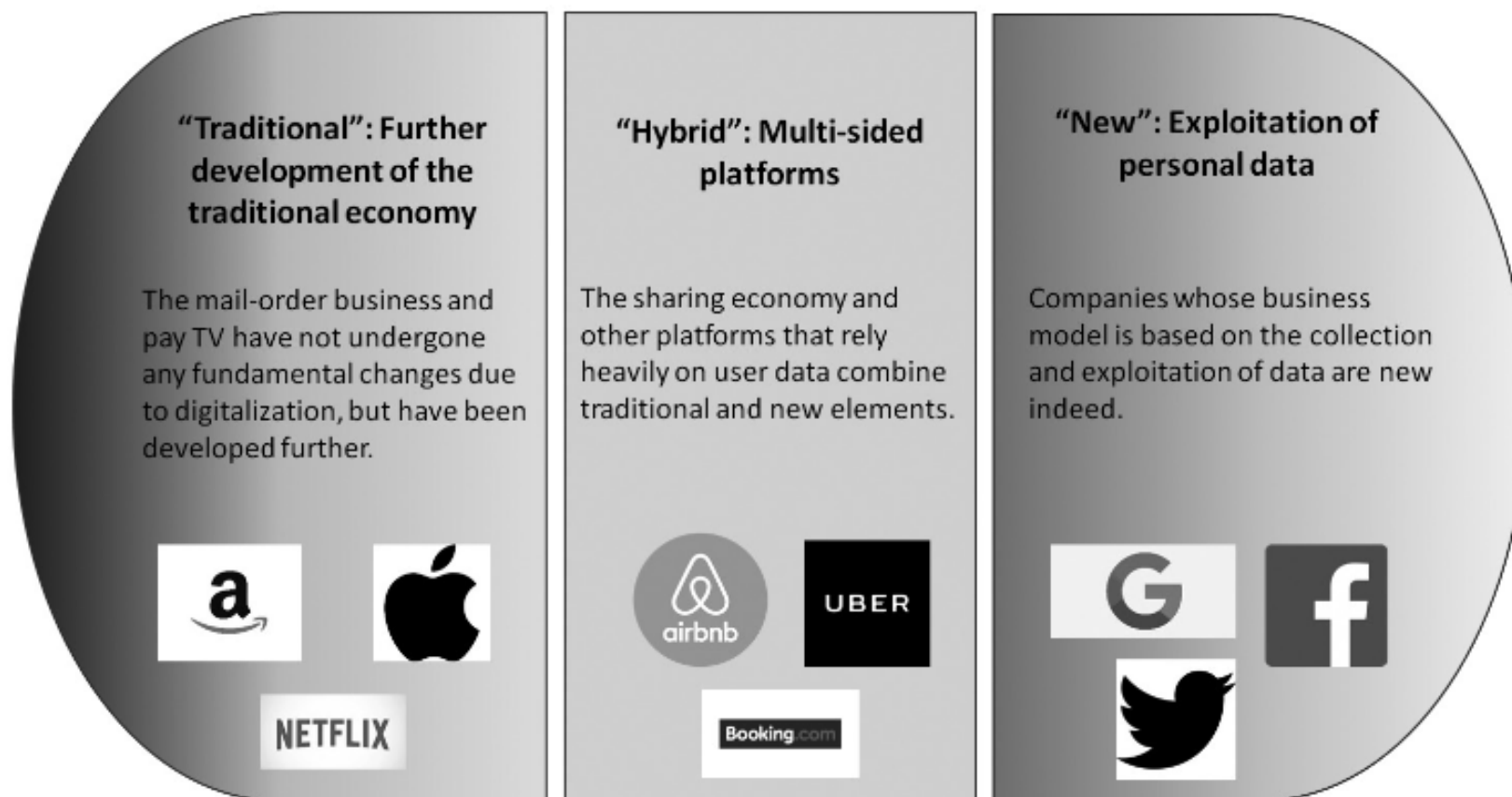
EQUALISATION TAX | *ISSUES*

Issue	Problems	EU Proposal
Type of tax	Tax treaties? WTO? EU law?	Indirect tax (Article 113 TFEU)
Nexus	Source? Residence? Market?	Location of users (Articles 5, 6 DST) = place of taxation
Subjective Scope	Potential economic incidence of taxation on consumers and businesses	“Entities” (Articles 2, 4 DST) = service provider
Material Scope	Targeted to improve compliance and administration and to minimise collateral impact International double taxation	Three categories of services (Article 3 DST): <ul style="list-style-type: none"> ▪ Advertising on digital interface ▪ Multi-sided digital interface ▪ Transmission of user data
Territorial Scope	Possibility of over-taxation Compliance with international obligations	DST includes both non-resident and domestic transactions and companies
Threshold	Impact on start-ups, business creation, and small businesses more generally	Worldwide revenues > € 750 million and taxable EU revenues > € 50 million (Article 4 DST)

EQUALISATION TAX | *ISSUES*

Issue	Problems	EU Proposal
Base	Overtaxation as compared with profit taxation, relevance of business model and level of market, etc	Gross revenues, net of VAT and other similar taxes
Rate		3% (Article 8 DST)
Temporal Scope	Possible difficulties in implementing a tax as an interim measure	1 January 2020, no sunset clause!
Collection	Withholding? Assessment?	Identification, annual DST return – Complex procedural arrangements (Articles 9-19 DST) and administrative cooperation (Articles 20-23 DST)

EQUALISATION TAX | *ISSUES*



- Source: G. Kofler, C. Schlager & G. Mayr, *Taxation of the Digital Economy: A Pragmatic Approach to Short-Term Measures*, ET 2018, 123.



QUESTIONS?













TAX TREATMENT OF DIGITAL CURRENCIES

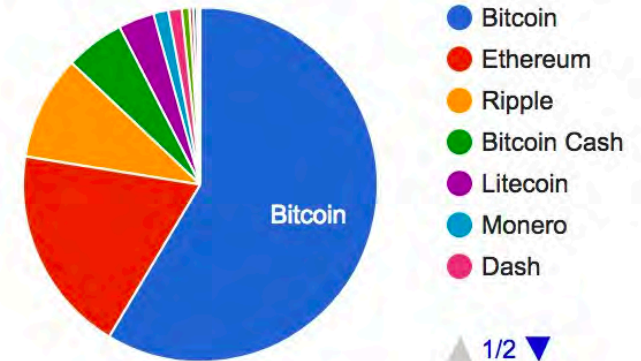


Michael Tumpel

WHAT ARE DIGITAL CURRENCIES?

#	Coin	Market Cap	Price
1	 Bitcoin BTC	\$116,457,644,842	\$6,866.38 ▼
2	 Ethereum ETH	\$37,620,628,484	\$381.45 ▼
3	 Ripple XRP	\$18,877,694,217	\$0.4829 ▼
4	 Bitcoin Cash BCH	\$10,739,862,832	\$629.53 ▼
5	 Litecoin LTC	\$6,525,230,714	\$116.60 ▲
6	 EOS EOS	\$4,545,935,894	\$5.89 ▼
7	 Cardano ADA	\$3,816,198,601	\$0.1472 ▼
8	 Stellar XLM	\$3,693,673,227	\$0.1991 ▲
9	 NEO NEO	\$3,016,992,419	\$46.42 ▲
10	 IOTA MIOTA	\$2,677,445,501	\$0.9633 ▼

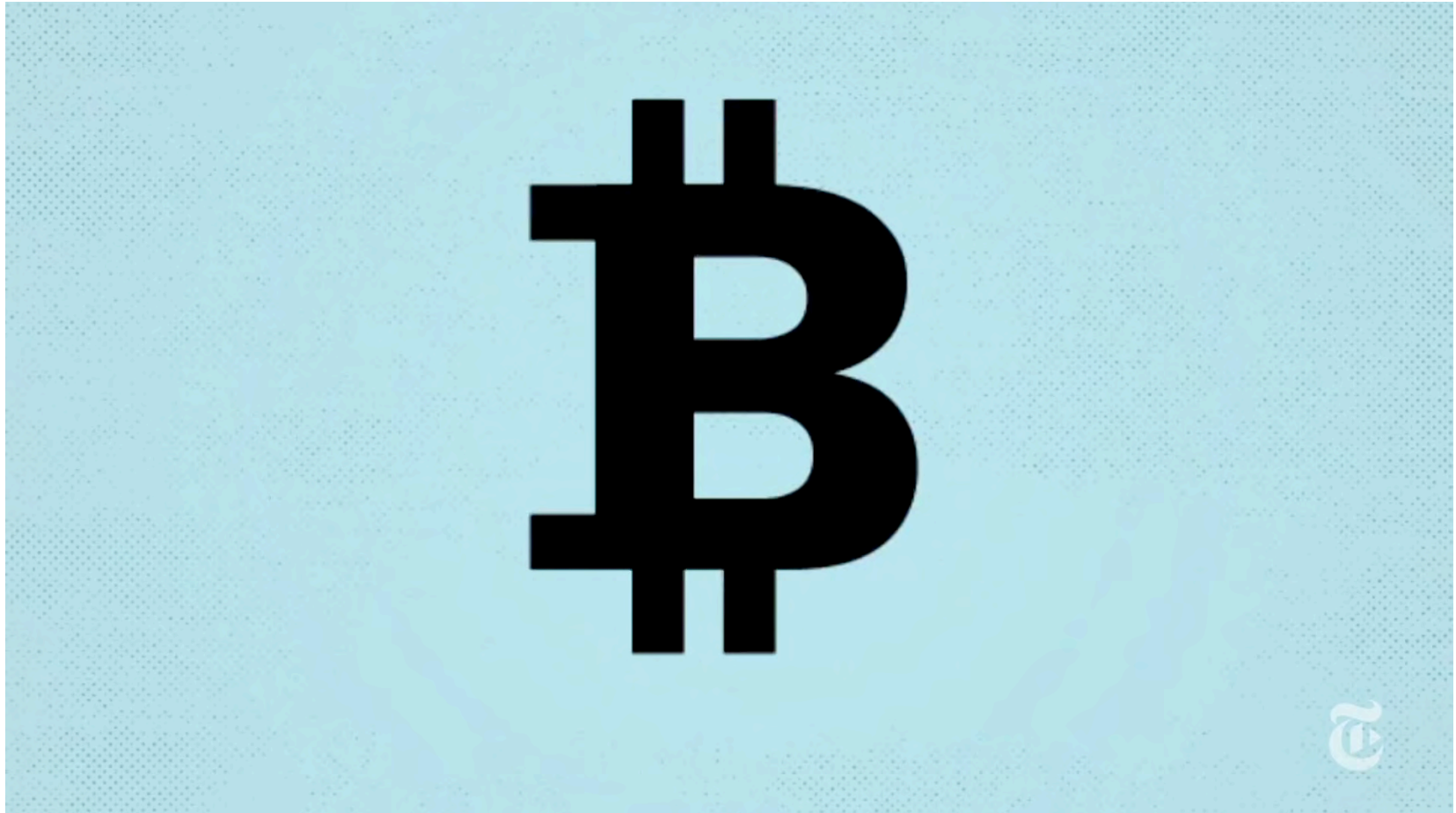
Market Capitalization, \$USD



WHY IS THERE SO MUCH BITCOIN HYPE?



HOW CRYPTOCURRENCY WORKS



QUESTIONS RELATED TO TAX TREATMENT OF DIGITAL CURRENCIES

- Transfer of digital currencies
- Exchange of digital currencies
- Exchange platforms and wallet apps for digital currencies
- Holding assets in digital currencies
- Verification of transactions of digital currencies
- Mining of digital currencies
- Other applications of block chain technology
 - ☐ (Initial Coin Offerings)
 - ☐ (Smart contracts)
 - ☐ (Supply chain management)
 - ☐ ...

HEDQVIST (C-264/14)

■ Transfer of digital currencies

- ☐ „According to the findings of the referring court, bitcoins also constitute a **pure means of payment**“ (AG Kokott – par 17)
- ☐ Transfer of legal tender and other pure means of payment such as voucher with a face value and bitcoin is **not a taxable transaction** (AG Kokott – par 18)

HEDQVIST (C-264/14)

■ Exchange of digital currencies

- Buying and selling of bitcoins at a price which includes a mark-up constitutes **the supply of services for consideration** (ECJ – par 31 with reference to *First National Bank of Chicago*, C-172/96, EU:C:1998:354, par 25)
- **Exemption** of Article 135(1)(e) of the VAT Directive covers the supply of services of the exchange of traditional currencies for units of the ‘bitcoin’ virtual currency and vice versa, performed in return for payment of a sum equal to the difference between, on the one hand, the price paid by the operator to purchase the currency and, on the other hand, the price at which he sells that currency to his clients (ECJ – par 53)

■ Exchange platforms and wallet apps for digital currencies

EDM, C-77/01

■ Holding of digital currencies

- ☐ Simple acquisition and the mere sale of shares and other negotiable securities is **not an economic activity** (ECJ - par 58)
- ☐ Neither the **scale** of such sales, nor the employment in connection with such sales of consultancy undertakings, can constitute criteria for distinguishing between the activities of a private investor, which fall outside the scope of the directive (ECJ *EDM, C-77/01*, par 61)
- ☐ Drawing revenue on a **continuing basis from activities which go beyond the compass of the simple acquisition and sale of securities**, such as transactions carried out in the course of a business trading in securities falls within the scope of the VAT Directive (ECJ *EDM, C-77/01*, par 59)

EDM, C-77/01

■ Holding of digital currencies

- ☐ Buying and selling of digital currencies as a private investor is not an economic activity?
- ☐ Exchange of digital currencies or incidental transactions by taxpayers fall within the scope of VAT Directive but are exempt under Article 135(1)(e) of the VAT Directive

VERIFICATION OF TRANSACTIONS OF DIGITAL CURRENCIES

■ Facts

- ☐ Miners render verification services in exchange for transaction fees
- ☐ Transaction fees are spent by bitcoin holders to incentivize miners to include the transaction in a block
- ☐ Successful miners can claim transaction fees and mined bitcoins
- ☐ Unsuccessful miners will receive nothing for their activity until the next success

VERIFICATION OF TRANSACTIONS OF DIGITAL CURRENCIES

■ Supply of services for consideration?

- ☐ Legal relationship between the supplier of service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the supplier constituting the value actually given in return for the service supplied to the recipient (ECJ *Hedqvist*, par 27)
- ☐ A supply is effected 'for consideration' within the meaning of Article 2(1)(a) of VAT Directive 2006/112 if a direct link exists between supplies and the consideration received (ECJ *Hedqvist*, par 27)

VERIFICATION OF TRANSACTIONS OF DIGITAL CURRENCIES

■ Exempt transaction?

☐ Article 135(1)(e) of the VAT Directive

- No exchange of virtual currency between the parties other than the transaction fee itself
- The service provided does not involve the money itself but the verification of the transaction

☐ Article 135(1)(d) of the VAT Directive

- Exemption of transactions involving, inter alia, payments and transfers
- Fulfilling the specific, essential functions of a service described in that provision (ECJ *Hedqvist*, par 39)
- Services provided must have the effect of transferring funds and entail changes of a legal and financial character (ECJ *Nordea*, par 24)
- Distinguished from a mere physical or technical supply, such as making a data-handling system (ECJ *Nordea*, par 24)

MINING OF DIGITAL CURRENCIES

- Ancillary service to the verification by including a transaction in the block?
- Separate service of keeping the ledger of all transactions within the network of the digital currency?
 - A legal relationship between the provider of the service and the **recipient** pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration given in return for the service supplied to the recipient? (ECJ *Hedqvist*, par 27)
 - Recipient is the community of current and future participants of the network

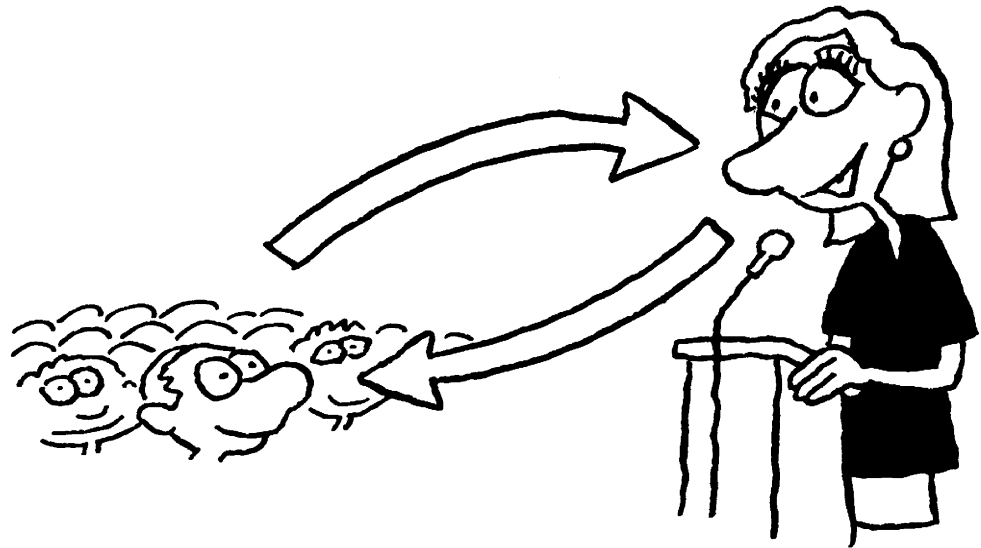
INCOME TAX QUESTIONS

- Capital gains and losses from buying and selling digital currencies
- Business income from exchange of digital currencies
- Business income from mining or income from gambling?

THANK YOU!



QUESTIONS?





INSTITUTE FOR
EUROPEAN
STUDIES

Prof. Dr. Marie Lamensch

The VAT treatment of digital services

Tax and the Digital Economy

University of Luxembourg, 20 April 2018

The challenge to levy VAT on digital services

Intangibles...

...physical borders and distances have become irrelevant

- Enforcement issues (effectiveness, efficiency, neutrality)
- Compliance issues (efficiency, simplicity, proportionality, neutrality)

The EU VAT treatment of digital services

Concept of “electronically supplied services”:

Article 7(1) of the Implementing Regulation 282/2011: “*‘Electronically supplied services’ as referred to in Directive 2006/112/EC shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology*”.

Focus on:

1. **Place of supply and collection:** Now and in the future (recently adopted “e-commerce package”)
2. **Rates:** Now and *possibly* in the future (EC proposal on rates)

1. Place of supply and collection

B2B supplies: *The current rules*

- Destination based taxation (Article 44 VAT Directive)
- Reverse charge
- Deeming provision (any taxable person who “*takes part*” in the supply of electronically supplied services is deemed to be acting in his own name albeit on behalf of the initial provider of these services)

1. Place of supply and collection

B2B supplies: *Difficulties?*

1) Decision to zero-rate (in view of RC) based on customer status and location.

* Customer status: treat at private customer in absence of verifiable VAT number allowing to ascertain status.

- Not a suitable option because no right to deduct for the customer (no go).
- Explanatory notes: possible rectifications by suppliers – costly and burdensome.

1. Place of supply and collection

- VIES only available source for real time verifications of EU VAT numbers.
 - However: not all numbers uploaded in VIES, what if name is different? What if no matching address? What if VIES system temporarily not available? What in case of abuse of VAT number?
 - + Explanatory notes: *“even when a customer communicates a VAT number that has been successfully verified and there is no information suggesting that the customer is not a taxable person, the supplier may still, in case of doubt, decide that the communication of the VAT number is not sufficient”* – Legal certainty? Feasibility?
- Tax certificate for non-EU suppliers.
 - Obviously not appropriate for digital supplies

1. Place of supply and collection

* Customer location: self-identification + verification by: “*normal commercial security measures such as those relating to identity or payment checks.*”

- VAT numbers (same limitations as above), billing address is irrelevant, payment details may not be available and in any case come too late.

!! **Multiple location customers**: same rules apply as for traditional transactions (meaning having to determine whether supply is made to a fixed establishment). Verifications involve taking into consideration nature of the supply and qualification of customer as an entity able to receive and use the service for its own needs and having the infrastructure in terms of human and technical resources to do so

... Not suitable for digital suppliers.

1. Place of supply and collection

2) Deeming provision

Can be rebutted when the initial service provider is explicitly indicated as the supplier by the taxable person taking part in the supply and this is reflected in the contractual arrangements with the customer, either because the initial supplier is identified on the invoice issued by each person taking part in the B2B supply, or in the customer's bill or receipt in the case of a B2C supply.

! Cannot be rebutted when authorising payment or delivery or setting the terms and conditions of the supply.

- Explanatory notes with charts. Sometimes go quite far in interpretation. For example: catches situations where the platform “provides customer support” in relation to the service supplied, “exerts influence” over the presentation and format of a marketplace or “owns customers data”. Not clear from the text of the Regulation!

1. Place of supply and collection

B2B supplies: *e-commerce package?*

- Not addressed in e-commerce package
- Difficulties are here to stay

1. Place of supply and collection

B2C supplies: *The current rules?*

- Destination based taxation (Article 58 of the VAT Directive as an exception to Article 45)
- Mini one stop shop (“Union” and “Non-Union” schemes)
- Deeming provision (same as for B2B)

1. Place of supply and collection

B2C supplies: *Difficulties?*

1) Enforcement: 12.900 EU suppliers v. 1.100 non-EU suppliers

- Why? Compliance costs and no enforcement jurisdiction on non-EU suppliers
- EC: *“the current system is not neutral as EU businesses are at a clear disadvantage to non-EU businesses which can legitimately and through high levels of non-compliance make VAT-free supplies into the EU. Given that VAT rates can be as high as 27%, there is a substantial distortion in favour of non-EU business if VAT is not applied (...)”*.

1. Place of supply and collection

2) Compliance (Customer location)

- Step 1: self identification + verifications
 - What kind of verifications?
 - In case of multiple location customers: : *'place that best ensures taxation at the place of actual consumption'*.

Implementing Regulation: the place of residence comes first, unless there is evidence that the service is used at the permanent address... Not relevant for digital suppliers.

1. Place of supply and collection

- Step 2: When it proves: *“extremely difficult, if not practically impossible, for the supplier to know where the customer is actually established, has his permanent address or usually resides”*, suppliers can gather 2 pieces of non-contradictory evidence to determine location (including for example an IP address, a billing address, a credit card number or any other element that would allow determining the residence of the customer).
 - Which are relevant? IP address, bank details, billing address?
 - Real time verification
 - EC: *“The concerns raised during the consultation process by businesses and business associations, including small and medium enterprises, mainly relate to the 2015 place of supply rules and application of the MOSS for the services concerned”*.

1. Place of supply and collection

3) Deeming provision

Same as for B2C

1. Place of supply and collection

B2C supplies: *e-commerce package?*

As of 2019

- A first threshold: option to charge VAT at origin if turnover related to cross-border TBE is below EUR 10.000 – For EU suppliers only.
- A second threshold: only one piece of evidence must be collected to determine customer location if domestic and cross-border TBE turnover is below EUR 100.000 – For EU suppliers only.
- Non-EU suppliers with an EU VAT number: may use the non-Union scheme.
- Home country rules for invoicing (but record keeping for 10 years).

1. Place of supply and collection

As of 2021

- Deadline for submitting VAT returns extended (from 20th day to last day of the month following the end of the tax period).
- Correction to previous VAT returns:
 - Can be made in a subsequent return instead of the original return to be corrected (up to 3 years back).
 - With reference to the MSC, tax period and VAT amount.

1. Place of supply and collection

- Still problematic: Enforcement (in particular non-EU businesses)
- New issues:
 - How to police the EUR 10.000 threshold and what impact of possible diversity of rates? (+ does not apply to non-EU, discrimination?)
 - Relaxed customer identification obligations for EU suppliers only
 - Discriminatory?
 - Satisfactory for tax admin?

2. Rates

- Current rule: Article 98(2) of the VAT Directive provides that electronically supplied services cannot be subject to reduced rates.
- CJEU EC v. France & Luxembourg: VAT Directive as currently drafted does not allow for the application of reduced rates to e-books and the principle of fiscal neutrality cannot overrule the text of the VAT Directive.
- CJEU RPO: Electronic and tangible books are comparable situation but different treatment is justified on account of legal certainty and simplicity.

2. Rates

1. 2016 Commission proposal on possibility to apply reduced rates to electronic publication – not adopted.
2. 2018 Commission proposal to grant more flexibility on rates in context of definitive regime proposal – discussions ongoing
 - Key element: a negative list rather than a positive list for applying reduced rates
 - Risk: great complexity for suppliers (in particular because categories of supplies would not be harmonized).

3. What conclusions can we draw?

1. Tax assessment and collection:

- Enforcement remains a major issue.
- Compliance can be burdensome or unfeasible (and difficult to monitor).

What can we do?

Multi-disc. research (law, economics, IT) to identify the potential of new tech.

To do what?

Improve current (vendor collection) model or

Develop new models (third party or customer collection)

Lamensch & Saraswat (2017): “From clicks to compliance: A data conduit to collect VAT”, International VAT Monitor, Vol. 28, issue 5.

3. What conclusions can we draw?

In my opinion:

- Lack of *enforcement jurisdiction* is a fundamental and inherent weakness of a vendor collection model.
- Reliance on intermediaries in the transaction chain a dangerous “fix” because: Risks of double or non taxation; Legal uncertainty; Complexity; Platforms will adjust.
- The only constant element in an e-commerce transaction is that there will always be a supplier at the beginning and a customer at the end of the chain. If the supplier is not reliable/cannot be forced to comply, the alternative solution is to turn to the customer
 - **Customer collection models** usually sidestepped because:
 - Too many taxpayers
 - No incentive to pay
 - Too complex for customers to declare and pay

3. What conclusions can we draw?

However:

- Technology would enable us to address these issues.
- Major advantage is that the taxpayer is within jurisdictional reach (Stop trying to chase offshore businesses and/or platforms, focus on *your* customers!)
- The relevant data can be captured and the collection can be automated!

How to better collect taxes on offshore taxpayers
also relevant in context of destination based corporate taxation proposals...

3. What conclusions can we draw?

2. Rates:

- Current situation is clear
- Major compliance issues expected if new proposal on rates is adopted

Thank you for your attention

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Taxing the Sharing Economy

Ass. Professor Katerina Pantazatou
(Aikaterini.pantazatou@uni.lu)

Luxembourg, 20 April 2018

RUL | RESEARCH UNIT
IN LAW


UNIVERSITÉ DU
LUXEMBOURG

Sharing (Collaborative / Gig) Economy: What is it?

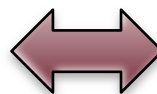
- Collaborative platform model, whereby digital platforms connect spare capacity and demand and enable individuals to share “access” to assets rather than own them outright. Platforms charge a fixed or variable fee on each transaction.
- Online multi-sided platforms often facilitate transactions between individual sellers of goods and services to individual consumers, peer-to-peer (P2P) transactions, *which occur outside of traditional business structures* (e.g., the case of marketplaces).
- Examples: Airbnb, Blablacar, Uber, Lyft.

Sharing Economy: Triangular relationship

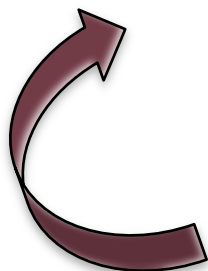
■ Peer to peer

Services' provider/Taxpayer?

- VAT? [qualification? Prof. activity?]
- Direct taxes? [definition? Activity? Remuneration? Transparency & enforcement?]
- Where?



(Taxes included in the 'final bill'?)



Platforms/ 'Match-makers'

- What kind of taxes? [revenue, profit, VAT, special taxes?]
- Where?
- Who collects?

Issues

- Does the current legal framework suffice to deal with sharing economy challenges?
 - Lack of visibility → no reporting, poor monitoring and collection of taxes.
 - Many grounds of differentiation; No 'one –size – fits – all' approach possible.
 - No possibility of sectoral uniform rules. Different platforms/services/ remuneration/bartering.
 - Competitive advantages vis-à-vis 'traditional' businesses? [Physical vs. Digital presence - *state aids* issues? Distorted competition?]

- Different (tax) rules.
 - *Who* should pay taxes? *Where*? Under *what conditions*? What kind of taxes?
 - Definition of the taxpayer [also a matter for *labour law*?]
 - Definition of the tax base.

Interaction with other 'areas' of (EU) law (I)

■ Labour law

- eg. Uber driver: independent contractor/ worker/ employee to an Uber driver?
 - Performs 'economic activity' *independently*? Possibility of escaping taxation under the EU VAT rules?
 - 'Status of the platform': eg. Uber = *transportation services' provider* or digital platform? (C-434/15)
 - UK employment tribunal: Taxation of Uber drivers element in the definition of their working status.
-
- Different states provide for different (tax) incentives depending on the type of labour contract at issue. Sharing economy features (and uncertainties) of the tax system could lead to revenue losses if there are large shifts in working patterns and taxable status.

Interaction with other ‘areas’ of (EU) law (II)

■ State aids/ Distortion of competition?

- Effective lower taxation?
 - Through enacted tax relief measures (eg. UK).
 - Through the introduction of special tax regimes for activities facilitated through the use of platforms (eg. Italy).
 - Through allowing for non-payment of (certain) taxes or other contributions (eg. No payment of social security contributions nor claiming any license fees).
 - Lack of/ Poor enforcement – Tax evasion. Difficulty in ensuring that services’ providers will declare their income. Can it be proved?
- Competitive advantages [against whom?]: Selectivity? Identification of the reference system?
 - Uber vs. taxis, Airbnb vs. hotels?

Where do (digital/sharing) platforms pay taxes?

Reality vs. Normativity

- A matter of *(lack of) coordination*.
- Possibilities: In the 'market' state [where *value is created*]/ profit shifting/ as assets' based companies?
- Options:
 - *Virtual PE*
 - Withholding tax on digital service payments
 - Equalization tax
 - Diverted profits tax
 - Other taxes (online advertising tax, data collection tax, etc.)

VAT – related issues

- Supply of goods and services provided by platforms and through the platforms by their users are, in principle, *VAT taxable transactions*.
 - multi-layered transactions in the context of the sharing economy that can be subject to VAT:

Uber (platform/intermediary) ➡ Uber driver (services' provider) ➡ Uber users (end users)

VAT taxable
(consideration
paid for the
use?)

VAT taxable

(consideration?)

VAT: 'Taxable person'/ Economic activity

- VAT Taxable person(s)? [Are platform users taxable persons for the purposes of the Directive?]
 - Any person or body 'who, *independently*, carries out in any place any **economic activity**, whatever the purpose or results'.
 - Independent activity: Is the activity carried out for *the purpose of obtaining income on a continuing basis*?
 - Economic activity: Nature of the property; Suitability for economic exploitation and/or private purposes?
 - 'Marketization' & advertising = elements of economic activity/exploitation (CJEU).
 - Continuity: 'Member States may regard as a taxable person anyone who carries out, on an *occasional basis*, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) [...] (Art. 12 VAT Dir.).'
 - Commission: the supplies of goods and services made through sharing economy platforms, such as driving customers to requested destinations or renting out immovable property, *may* qualify as an economic activity in the sense of the VAT Directive irrespective of whether such supplies are delivered with clear continuity or on a more occasional basis.

VAT: 'Taxable person' / Income

- 'Purpose of obtaining **income**' - Definition of income
 - Variations on remuneration or 'income' the service providers receive depending on the *platform itself* or the *provider*.
 - 'Income' = bartering or 'recovering costs' [eg. Blabla car] or amounts comparable to business/work activities.
 - Different definitions of income => same activity may constitute an economic activity for VAT purposes in one M/S and not in another one where the remuneration at issue does not qualify as income.
 - Different thresholds M/S apply; what constitutes a 'professional activity' vis-à-vis an 'occasional' intervention of private individuals.
 - Exemption of 'small businesses' / 'small taxable persons' from VAT registration? Thresholds?

Compliance and enforcement through information exchange

- Facilitation of tax evasion due to lack of visibility of the business activity.
 - Existing legal framework *on information exchange*: sharing economy participants in intra- or inter-Member State situations: no reporting persons caught by the EU *tax Directives*.
 - In the EU: Data protection rules (GDPR)
 - Tax compliance and enforcement difficulties associated with identifying the taxpayers and taxable income as well as *with under-reporting* on behalf of the taxpayers.
 - Attempts to incentivize the services' providers to include their income from the sharing economy when filing their tax returns through *simplified procedures* or *automated 'pre-filled' tax declarations* available to the services' providers directly through the platforms.
 - Data exchange through new technologies (Mexico).

Compliance through the modernization of the legal framework

- Exhaustive – to the extent possible- **definitions**: who is a *taxable person* and what constitutes *income* for tax purposes in the context of the sharing economy.
 - Employment status?
 - Eg. income from short-term rentals ('Airbnb type') income from immovable property/ income from business activity? Qualifiers?

Enforcement through the collection of the taxes due by the platforms

- Facilitation and incentivization of the platforms to *collect and remit to the TA* the taxes due (notably VAT and tourist taxes).
- Applicable in restricted cases: Locally (local tax authorities) and specific taxes (eg. Tourist tax and occupancy tax) [Lisbon, Amsterdam, Paris].
- Collection of VAT. Eg: the Airbnb website provides that Airbnb collects VAT in all Member States *by reference to the services provided through the platform*.
 - However, exclusion of the VAT the *hosts* (would) have to pay concerning the services they have provided to the end users (reliance on the ‘goodwill’ of the hosts).
 - Incentives build on the facilitation of the hosts to pay VAT, or by forcing the hosts to register with a special register (eg. Greece).
 - However, problem with monitoring the frequency and the duration of the services.

The way forward: EU

- Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence (& Commission Recommendation of 21.3.2018 relating to the corporate taxation of a significant digital presence)
 - Note: 'Digital services shall *not* include the services listed in Annex III or the sale of goods or other services which is facilitated by using the internet or an electronic network.'
 - Are sharing economy platforms caught by the [proposed] Directive?
 - If interpreted contextually yes [see also the Commission's press release]
 - Wording of the proposal unclear.
- Proposal for a Council Directive on the common system of a *digital services tax* on revenues resulting from the provision of certain digital services.
 - In particular, taxable revenues should be those resulting from the provision of the following services: (ii) the making available of multi-sided digital interfaces which allow users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users (sometimes referred to as "intermediation" services);
 - If no revenues are obtained from the supply of such services, there should be no DST liability.

The way forward: The world

- BEPS: allocation of taxing rights by reference to 'value creation'.
- OECD interim report (March 2018):
 - Improving the *effective taxation* of activities facilitated by online platforms through
 - improving taxpayer education and self-reporting &
 - obtaining *tax data about transactions* facilitated through platforms
 - Collaborative approach: What kind of information? (≈ info required under CRS), consent of the provider? Spontaneous, automatic exchange?
 - Possible multilateral agreements for data exchange.
 - ≠ EU: GDPR
 - Tax compliance
 - Enhancing the effectiveness of tax compliance through new technologies (data recording technology and data protection rules?)
 - Improving taxpayer services, making it easier for them to report.
 - Reducing tax compliance burdens through automated compliance processes (prerequisite: acquisition of data)

Effective Taxation vs Effective Data Protection



Viktoria Wöhrer
20 April 2018



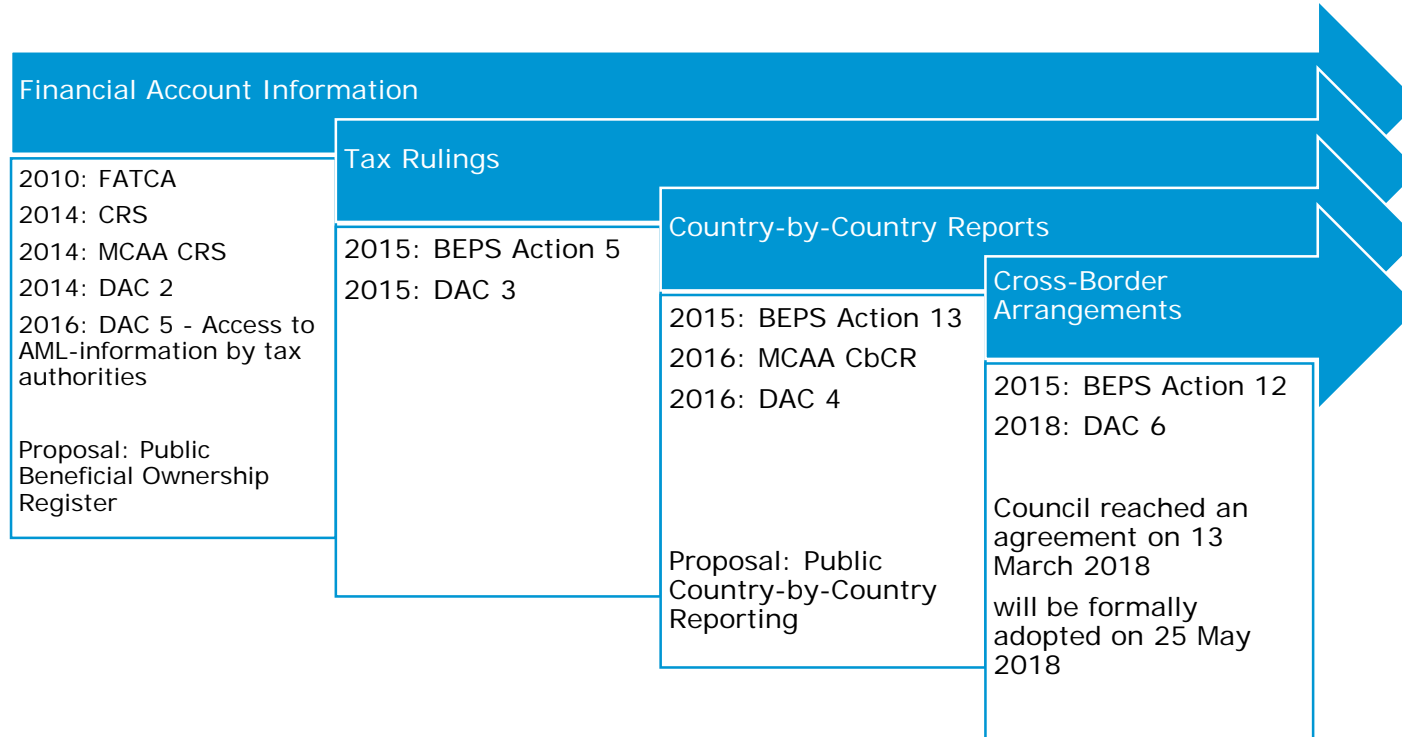
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Recent years have seen a **large increase in the amount of third party data available to tax authorities** coupled with lower storage costs and advances in analytics techniques. These data include transaction and income data, behavioural data generated from taxpayers' interactions with the tax administration, operational data on ownership, identity and location, and open source data such as social media and advertising.

OECD, Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS

Ensuring Effective Taxation: Increasing Data Collection and Automatic Exchange



Effective Taxation vs Effective Data Protection

Scope

- Is data processing for tax purposes covered by data protection guarantees?

Requirements

- Legal basis
- Legitimate purpose
- **Proportionality assessment**

Procedural Rights

- **Right to be informed**
- Right to access
- Right to rectification and erasure

Data protection in the European Union

- Data Protection as a part of Right to Private Life
 - **Art. 8 European Convention on Human Rights** (ECHR) also encompasses data protection
- **Charter of Fundamental Rights** (2000)
 - Art. 7 CFR right to private life AND
 - Art. 8 CFR right to the protection of personal data
- Art. 16 TFEU
 - legal basis for implementation of data protection rules
- **Data Protection Directive** - DPD (1995 until 2018)
 - To ensure free flow of personal data
 - To protect fundamental rights
- **General Data Protection Regulation** - GDPR (2016, from 2018 onwards)
 - shall further harmonise data protection in the EU

Scope of Data Protection Guarantees

- Art. 8 ECHR
 - “Everyone has the right to respect for his private and family life, his home and his correspondence.”
 - ‘**private life**’ covers professional or business activities
 - tax information is personal data protected under Art. 8 ECHR (*F. S. v. Germany, Satakunnan Markkinapörssi Oy and Satamedia Oy*)
- DPD and the GDPR
 - **Personal data: any information** relating to an identified or identifiable natural person
 - data about the income of a person constitutes personal data (*Satakunnan Markkinapörssi and Satamedia*)
- Art. 8 CFR
 - “Personal data” may concern activities of a professional nature (*Schecke*)
 - data does not need to be sensitive; not necessary that persons concerned have been inconvenienced (*Digital Right Ireland*)

Scope of Data Protection Guarantees

- DPD & GDPR: **only natural persons**
- Art. 8 CFR
 - “**Everyone** has the right to the protection of **personal data** concerning him or her.”
 - *Schecke*: **legal persons** are protected “*only insofar as the **official title** of the legal person **identifies** one or more **natural persons***” (confirmed in *WebMindLicenses*)
 - *Schecke*: Reference to the case law of the ECtHR
- Art. 8 ECHR:
 - unclear whether the right to private life covers legal persons
 - *Othymia Investments BV*: ECtHR was “*prepared to accept that there has been interference with the applicant company’s rights under Article 8*” but dismissed the complaint at a later stage

- Data processing for tax purposes
 - Third parties have to report information to tax authorities
 - Cross-border Exchange of Information
 - Use of information by tax authorities
 - Storage of information by tax authorities
- Case Law of the ECtHR:
 - collection of **personal data required for tax assessment** by state authorities interferes with Art. 8 ECHR (*X v. Belgium*)
 - **exchange of** lawfully collected **data between tax authorities** of two different countries interferes with Art. 8 ECHR (*F.S. v. Germany*)




Scope of Data Protection

- **processing** of personal data: any operation which is performed upon personal data
 - DPD & GDPR: inter alia "**collection**, recording, organisation, structuring, **storage**, adaptation or alteration, retrieval, consultation, **use**, **disclosure by transmission**, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction"
 - DPD: where the 'controller' is in the EU
 - GDPR: where the 'controller' or the 'processor' is in the EU
- Case Law of the CJEU: Broad scope of **processing**
 - communication of personal data to a public authority (*Österreichischer Rundfunk*)
 - collection and retention of data (*Digital Rights Ireland*)
 - transfer of information from one public authority to another public authority (*Smaranda Bara*)
 - disclosure of information to the public (*Schecke*)
 - publication of already public information (*Satakunnan Markkinapörssi and Satamedia*, *Google Spain*)

Requirements stemming from data protection

- Art. 8 (2) ECHR:
 - “shall be no interference [...] except such as is **in accordance with the law** and is **necessary** in a democratic society in the interests of national security, public safety or the **economic wellbeing of the country**, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
- Art. 8 (2) CFR:
 - “data **must be processed fairly for specified purposes** and on the basis of the consent of the person concerned or some other **legitimate basis** laid down by **law**.”
- Data quality principles (Art. 6 DPD / Art. 5 GDPR)
 - Lawfulness & fairness / Purpose limitation / Data minimization / Accuracy / Storage limitation
- legitimacy of processing personal data (Art. 7 DPD / Art. 6 GDPR)
 - Data processing necessary for the performance of a **task carried out in the public interest** – legal basis required

Requirements stemming from data protection

- Legal basis: 
 - should clarify what data are to be used, shared and exchanged, for what purposes, who has access to what information, how IT security is ensured and what additional safeguards are applicable
- Legitimate purpose: 
 - fighting against cross-border tax evasion and tax fraud
 - effective administration and enforcement of tax laws in cross-border situations
- Proportionality 
 - personal data must be *"adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed"*
 - Is a less intrusive alternative measure available?

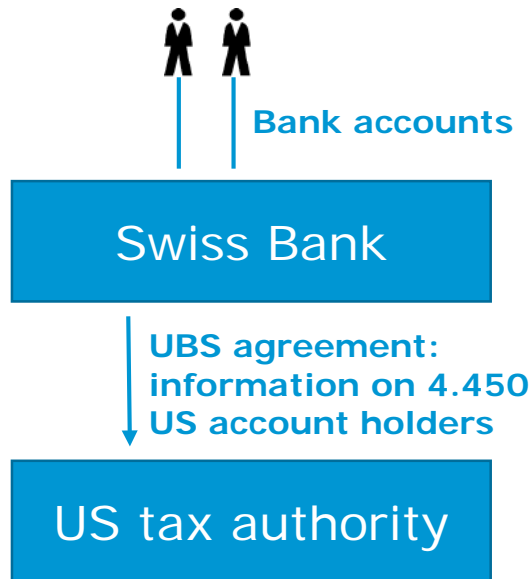
Requirements stemming from data protection: Proportionality

- *Digital Rights*: **massive collection** of traffic and location data covering everyone using electronic communications services is **disproportional**
- *Schrems*: Safe Harbour Agreement permitted public authorities to store personal data "***without any differentiation, limitation or exception being made in the light of the objective pursued***" → not limited to what is **strictly necessary**
- *Schecke*: **no automatic priority** can be conferred on the objective of transparency over the right to protection of personal data even if important economic interests are at stake
- *Worten & Heinz Huber*: data processing could be necessary if it contributes to the **more effective application** of the legislation
- CJEU: collection of passenger name record data of all air passengers is proportional – air passengers are subject to border control measures and security checks (Opinion 1/15)
- ECtHR: Even if only a small fraction of suspicions reported under AML legislation were forwarded to the prosecuting authorities, data processing is proportional → **deterrent effect** (*Michaud*)

Requirements stemming from data protection: Proportionality

- *Peter Puškár (2017):* where a list of natural persons purporting to act as company directors is created for the purpose of collecting tax and combating tax fraud it is for „*the national court to ascertain [...] whether there is no other less restrictive means in order to achieve those objectives*“
- *Commission v Germany (2018):* obligation for travel agents to state their profit margin on the invoice has the purpose of providing for a balanced allocation of VAT revenues between the EU Member States - this purpose cannot be reached by a less intrusive alternative measure

ECtHR: *G.S.B. v. Switzerland*



- Interference with Art. 8 ECHR
- Legal basis: UBS agreement
- Legitimate purpose: economic wellbeing
 - banking sector important in Switzerland; Switzerland was interested in solving the conflict with the US
- Proportionality:
 - Necessity to solve conflict with the US
 - only bank account details, no private details which would have deserved enhanced protection
 - account holders benefited from a number of procedural safeguards

- **Right to be informed** (Arts. 10 and 11 DPD / Arts. 13 and 14 GDPR)
 - about the purpose of processing, the identity of the data controller, the possible recipients of the data
 - Individuals should know and understand if personal data are being collected, by whom, and for what purpose
 - *Smaranda Bara*: data subject needs to be informed separately where the law is not clear enough
- **Right of Access** to the data
 - Art. 8 (2) CFR: *Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
 - Art. 12 DPD/Art. 15 GDPR: right to obtain information about the data processing from the controller without constraint at reasonable intervals and without excessive delay or expense
 - all data on the particular taxpayer stored by the tax administration
 - also to information on the disclosure, e.g. to whom and which tax data has been provided to third parties (*Rijkeboer*)

- **Right to Rectification and Erasure**
 - where the data processing is not in line with data protection safeguards
- Art. 13 DPD/Art. 23 GDPR: **procedural rights** & data quality principles **can be restricted**
 - in order to safeguard an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and **taxation** matters
 - Only if provided by appropriate legislative measures
 - not sufficient that a domestic law merely requires data processing and does not explicitly address the rights of the data subject
 - Art. 23 GDPR: specific legislation is required for restriction

- Challenge: Balancing effective taxation and effective data protection
- Data protection is mainly relevant for natural persons
- Data protection safeguards have to be taken into account
 - Quantity of personal data collected
 - Bulk exchange of information
 - Restriction of procedural rights
 - Retention period
 - Domestic law of EU member states needs to provide clear guidance
- So far in the area of taxation: ECJ and ECtHR have applied a rather lenient approach to data protection

Thank you for your attention



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Digitalisation and the Future of National Tax Systems

Selected Aspects

Prof. Dr. Joachim Englisch



Overview

1. Tax policy implications of increasing automation through robots equipped with AI-systems
2. The potential of blockchain for tax compliance & efficient tax controls



Intelligent robots





Why could there be a need to act?

- Already in the next 10-15 years, the proliferation of robots with AI will lead to a dramatic transition of the workforce
 - Long-term effects disputed; but at least temporarily, massive disruption of the labour market widely expected
- Likely to result in double fiscal challenge
 - Shrinking revenues from taxing labour
 - Costs for re-training, unemployment benefits etc. will rise
- Moreover, layoffs and an (even) greater capital share in national income could exacerbate income / wealth inequality
 - Potential for social unrest / instable democracies



Should robots, or their use, be taxed?

- Prominent proponents, e.g. Gates 2017
 - Others, e.g. Musk / Hawking, urged for income redistribution
- Some scholarly writings have picked up the idea, justifying and specifying it
 - Most notably, Oberson 2017 & Abbott/Bogenschneider 2018
- I will try to show that the case for taxing robots is weak
 - However, certain tax policy implications should be addressed



Robots as taxpayers? – Income Tax

- Proposal: Tax robots based on deemed / „imputed“ wage

BUT

- Eventual concession of legal personhood in civil law in itself is not a compelling reasons for granting taxpayer status
 - Arguably a necessary condition, but certainly not sufficient
- Eventual financial capacity of robots \neq ability to pay
 - Only if robots would not only pay but actually bear the tax
- (Still) not needed as „prepayment“ of income tax ultimately to be paid by the owner / user of the robot
 - And even if that were to change: would justify CIT, not PIT/SSCs



Robots as taxpayers? – Payroll tax / SSCs

- To the extent that SSCs are based on the benefit principle, taxation of robots cannot be justified
- To the extent that they are based on considerations of ability-to-pay: see above
- Regarding the employer share in payroll taxes see below (relates to taxing the use of robots)



Robots as taxable persons? – VAT

- Argument: autonomy in rendering services / supplying goods
 - BUT: again, only a necessary, not a sufficient condition for taxable person status in (EU) VAT law
 - Tax collector concept: legal & financial autonomy required, too
- (Only) once (some) robots enjoy such autonomy, they should indeed be considered as taxable persons
 - Provided they and tax procedure will be “smart” enough to also handle tax compliance & payment automatically



Additional taxes for owners / users of robots?

- Proposals: compensatory wage and payroll taxes based on imputed / deemed wages equivalent to human employee pay

BUT:

- No justification to tax “imputed income” as such
 - Robots employed by businesses generate *real* (market) income
 - Intelligent home appliances: Inconsistent to tax only this kind of imputed income; general objections apply for robots, too
- Will not restore neutrality of taxation (different: A/B 2018)
 - True: wage tax & payroll tax need to be paid only for humans
 - Legalistic objection: These taxes are supposedly borne entirely or at least partially by the employee, not the employer



Additional taxes for owners / users of robots?

- Neutrality (cont'd)
 - Objections based on real economic incidence: Empirical studies survey indicates that workers bear 65% - 90% of taxes (long run)
 - Tax shifting is esp. pronounced with low-skilled workers
 - Altogether speculative, esp. since robot manufacturers might also be able to shift some of their direct tax burden
- Not needed to offset benefits of accelerated depreciation
 - Claimed by A/B 2018 (contrasting with wage cost deduction)
 - But contradicts textbook economic insights
 - Conceded by A/B, who rely on highly questionable assumptions to justify their deviation



Additional taxes for owners / users of robots?

- Corrective / Pigouvian tax (Gates 2017)?
 - To address negative externalities of rapid automation
 - Refined / targeted approaches suggested by A/B 2018
 - But: difficult trade-off / significant complexity
- Neither tax policy objective attainable due to tax competition
 - Different mobility / supply elasticities of capital and labour
 - In this regard, robots resemble capital investments, not workers
 - Comprehensive int'l coordination is illusory in the near future; efforts should focus on comprehensive capital income taxation
 - Could be different only for corrective tax targeted on use of robots in certain (esp. B2C) “on the spot“-services

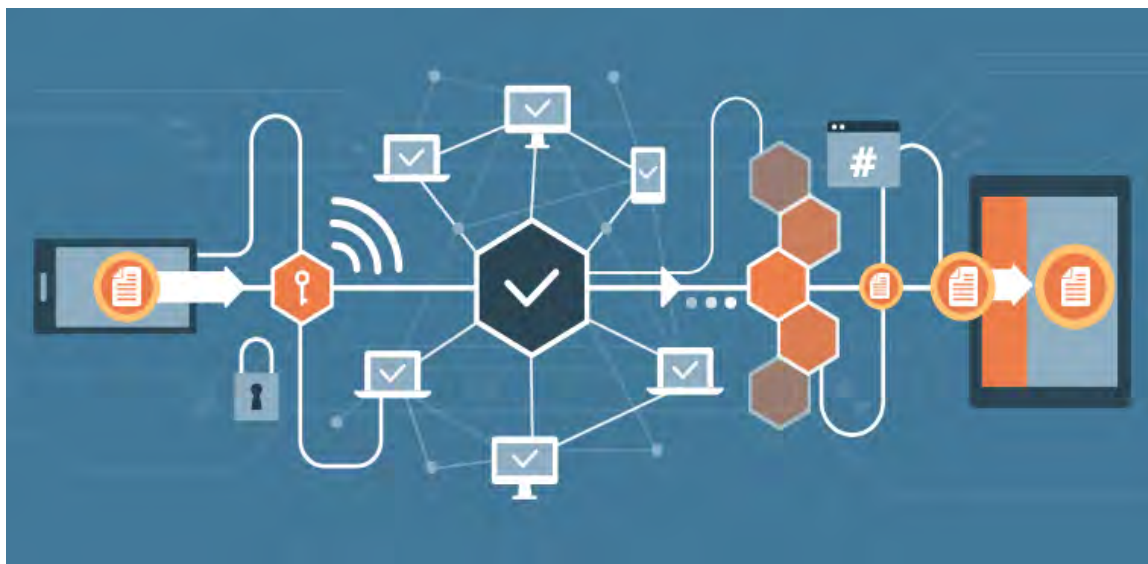


Other implications of increasing automation

- Taxable nexus
 - Fixed physical presence of intelligent robot should constitute PE
- Profit allocation
 - ALP: activities of intelligent robots = “relevant people functions”
 - FA: intelligent robots should be taken into consideration (only) in the payroll factor based on deemed wage
- Economic substance requirements in GAARs/SAARs
 - Should take into account the presence of intelligent robots
- Int’l coordination efforts to ensure certain minimum level of taxation of the return on capital investments should intensify



Blockchain / DLT in tax





What is it? ... in a nutshell

- DLT: Electronic data storage system
 - Multiple stores (“ledgers”) with identical data records
 - Maintained and controlled by server network (“nodes”)
 - Decentralised consensus mechanism for entering new data
 - “Digital fingerprint”/cryptography: all new entries are “hashed”
 - Permissioned or permissionless; public or private
 - Blockchain: DLT where every new data entry (a “block”) is added and linked (hashed) to preexisting one
- Main features
 - Greater data security (no single point of attack), esp. blockchain
 - Trust in data integrity & immutability without central authority
 - Transparency in “real time” and at (relatively) low cost



“Basic” uses in tax: transparency & integrity

- Customs documentation
 - Already some successful pilots
- E-record-keeping requirements for tax auditing purposes
 - E.g., TP documentation, or chronological business documents
- Overcoming information silos within the tax administration
 - E.g. between VAT & customs departments (new platform rules)

Usually permissioned, and always private systems



Transformational potential in tax

- Real-time features linked with AI (“smart contracts”)
 - Payroll tax payments at the time of wage payments
 - Automated RETT or other transfer tax payments
 - Taxation on daily / immediate basis instead of periodical tax liability clearing (e.g. tax accounting; split payment in VAT)
 - Immediate clearance of B2B cross-border supplies (VAT)
 - Reviving traditional TP methods instead of profit split
 - Real time tracking of IP use / micro royalty payments
 - Virtual currency for tax purposes: “VAT coins” (Ainsworth)
 - Self-policing features of cross-border B2B VAT at low cost
- ... etc.



Challenges

- Developing the AI needed for advanced applications
- Protection of personal data / privacy
 - Restricting access / storage in compliance with GDPR
 - Protecting multiple (!) points of attack: cryptography
- Cost/benefit analysis
 - Private systems are less costly
- Cost allocation
 - Public or private sector?
 - VAT: Allocation among different MS



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