Editors:
Pasquale Pistone and Dennis Weber

Taxing the Digital Economy

The EU Proposals and Other Insights

IBFD

Taxing the Digital Economy

Why this book?
As the OECD puts it, the digital economy is increasingly becoming the economy itself. Since this new economy comes with challenges for tax policymakers, the OECD published the consultation document "Addressing the tax challenges of the digitalisation of the economy", which outlines different policy options to address these challenges. In June 2018, the Amsterdam Centre for Tax Law and IBFD hosted a two-day conference, where speakers from all over the world shared their views on these various options for taxing the digital economy.

This book contains the papers written in connection with this conference. It summarizes the insights from the conference and discusses recent policy developments on the taxation of the digital economy. Different aspects of the taxation of the digital economy, from value creation to significant digital presence to the digital services tax, are addressed by renowned academics and distinguished scholars.

In offering insight into all the different aspects of the taxation of the digital economy, this book aims to provide an overview of the (consequences of) various tax policy options to address the digital economy. In particular, it is hoped that it contributes to the discussion on resolving the tax challenges arising from the digitalization of the economy.

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Foreword

The first industrial revolution began in the early 18th century and laid the foundations of the economy as we know it today. It brought significant social changes and resulted in an increase in population and the phenomenon of urbanization. In the late 19th century, the second industrial revolution started when the first mass production started and assembly lines were introduced. This revolution changed the foundations laid by the first revolution and reshaped our economy. Now, a third (some say fourth) revolution is under way with the digitalization of the economy and, as the OECD puts it, the digital economy is increasingly becoming the economy itself.

The rapid technological progress that has characterized the digital economy has led to a number of challenges for tax policymakers in the near future. The OECD identified these challenges and developed measures to prevent extensive base erosion and profit shifting (BEPS) in their BEPS Action Plan. The European Commission, inspired by the BEPS Action Plan, proposed two Council Directives on 21 March 2018: (i) the taxation of profits based on a corporation's significant digital presence; and (2) a common system for a digital services tax. Both proposals ultimately aim at the attribution of taxing rights to the jurisdiction where users are located. In the beginning of 2019, the OECD published the public consultation document "Addressing the tax challenges of the digitalization of the economy". The consultation document outlines different policy options addressing the tax challenges posed by the increasing digitalization of the economy.

To discuss the challenges of the digital economy and the proposed measures, the Amsterdam Centre for Tax Law and IBFD jointly hosted a conference titled "Taxing the digital economy: the way ahead" on 28 and 29 June 2018 in Amsterdam, the Netherlands. During this conference, speakers from all over the world shared their views on the various options for taxing the digital economy. Renowned academics and distinguished scholars discussed the ideas from the OECD/G20 and the published proposals of the European Union during the conference.

This book summarizes the insights from the conference and discusses recent policy developments on the taxation of the digital economy. Additionally, the book contains a compilation of papers that were written following the panels and discussions that took place during the conference.

On behalf of the Amsterdam Centre for Tax Law and IBFD, we extend our thanks and appreciation to the speakers for their contribution to the discussions and to Juan Manuel Vázquez for reviewing the proofs.

Pasquale Pistone and Dennis Weber
Amsterdam, March 2019

Chapter 4

Taxation of the Digital Economy: A New Dawn for Multilateralism and Mutual Recognition

Mattia Calabrese

4.1. Introduction

The digital economy has changed the way in which enterprises are operating through a radical reshaping of value chains and markets. This phenomenon is directly connected with the question of whether the digital economy has also had an impact on how value is created, leading to a misalignment between taxation and value creation. The purpose of this chapter is to show that the principle currently used to tax business profits, i.e. where the value is created, is actually connected to only one of the several managerial theories explaining value creation. However, if other approaches are considered, they should at least be contextualized, e.g. in light of the so-called service-dominant (S-D) theories of value creation that are receiving more and more consensus in the managerial literature. Finally, the chapter will show how the S-D logic of value creation might be used to reshape the international tax framework following a pattern of multilateralism and mutual recognition.

4.2. The crisis of the territoriality principle on taxation of business profits in the digital era

The current framework of international taxation is pinned on a duality in the attribution of taxing rights: on one side, there is the residence state, entitled to tax the worldwide income generated by companies on the basis of the presence in its territory of the place of effective management (POEM) or because the company has been incorporated under its law; on the other side, there is the source state, which can levy taxes only on the income generated in its territory. With this background, the territoriality principle can be seen as the principle of imposing taxes only within the territorial jurisdiction of a sovereign state. In this sense, the sovereignty of a state can be measured by its ability to possess and effectuate tax jurisdiction over all income arising within its territory without external limitations.[1] The residence state, in particular, considers the worldwide income of the enterprise to have a strong attachment with its territory because of the fulfilment of predetermined criteria like incorporation or POEM, allowing it to exercise its sovereignty on the entire amount of this income; by contrast, the source state limits its sovereignty to only the income generated in its territory.

As regards business profits, in the literature it has been stated that source state taxation is justified only by an economic attachment between the generation of income and the territory of the state, which means that the income not only should have a geographic connection seeking to assert source jurisdiction, but that attachment must also be economic, namely the income must be produced in that territory.[2] According to Kemmeren, that type of production can only be the result of human activities because only individuals can create income, whereas things in themselves cannot. Therefore, the intellectual element is the key component in the production of income because only through the actions of an individual may value be added to something.[3]

In the OECD Model, this interaction between residence and source states is clearly described in article 7, which asserts that the profits of an enterprise can be taxed only in the residence state, unless the enterprise has a permanent establishment (PE) in the other contracting state. In addition, the latter is allowed to tax only so much of the profits attributable to the PE located in its territory as if the PE were "a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise".[4]

Nonetheless, the wording of article 7 is not sufficient for finding a connection through which the profits generated between different parts of the same economic operator can be apportioned. The OECD, in line with the origin theory, has developed widely accepted standards that adopt a supply-centric theory of value creation. The origin theory qualifies enterprises as the only entities capable of generating value and, within the enterprise, the main

1. A. Becker, *The Principle of Territoriality and Corporate Income Taxation - Part 1*, 70 Bull. Intl. Taxn. 4, p. 190 (2016), Journal Articles & Papers IBFD.
2. Id., at pp. 194-195.
3. E.C.C.M. Kemmeren, *Source of Income in Globalizing Economies: Overview of the Issues and a Plea for an Origin-Bases Approach*, 60 Bull. Intl. Taxn. 11, p. 434 (2006), Journal Articles & Papers IBFD.
4. *OECD Model Tax Convention on Income and on Capital* art. 7 (21 Nov. 2017), Treaties & Models IBFD [hereinafter *OECD Model* (2017).

source of value creation can be identified in the functions that people working for the enterprise perform, especially those related to risk management, which can be deemed to comprise three elements:

> (i) the capability to make decisions to take on, lay off, or decline a risk-bearing opportunity, together with the actual performance of that decision-making function, (ii) the capability to make decisions on whether and how to respond to the risks associated with the opportunity, together with the actual performance of that decision-making function, and (iii) the capability to mitigate risk, that is the capability to take measures that affect risk outcomes, together with the actual performance of such risk mitigation.[5]

What is more, in order to benchmark the PE against other independent enterprises, the OECD developed the Authorised OECD Approach (AOA), which splits the analysis into two parts:

> first, a functional and factual analysis, conducted in accordance with the guidance found in the Guidelines, must be performed in order to hypothesise appropriately the PE and the remainder of the enterprise (or a segment or segments thereof) as if they were associated enterprises, each undertaking functions, owning and/or using assets, assuming risks, and entering into dealings with each other and transactions with other related and unrelated enterprises. Under the first step, the functional and factual analysis must identify the economically significant activities and responsibilities undertaken by the PE. This analysis should, to the extent relevant, consider the PE's activities and responsibilities in the context of the activities and responsibilities undertaken by the enterprise as a whole, particularly those parts of the enterprise that engage in dealings with the PE. Under the second step, the remuneration of any dealings between the hypothesised enterprises is determined by applying by analogy the Article 9 transfer pricing tools (as articulated in the Guidelines for separate enterprises) by reference to the functions performed, assets used and risk assumed by the hypothesised enterprises. The result of these two steps will be to allow the calculation of the profits (or losses) of the PE from all its activities, including transactions with other unrelated enterprises, transactions with related enterprises (with direct application of the Guidelines) and dealings with other parts of the enterprise (under step 2 of the authorised OECD approach).[6]

However, with the rise of the digital economy, companies are not obliged anymore to keep a physical connection with the destination state to ensure the sale of their products in the market of that state. Therefore, the digital economy has created a discrepancy where even though a company is

5. *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* para. 1.61 (10 July 2017), Primary Sources IBFD.
6. OECD, *2010 Report on The Attribution of Profits to Permanent Establishments* para. 10 (OECD 2010), Primary Sources IBFD.

interacting with users or customers located in a state, that company has no functions, assets or risks geolocated therein. As a result, no taxable profits can be attributed to that state under the current international tax framework. Moreover, due to the so-called scale without mass,[7] this discrepancy is creating a sense of unfairness in the public, which perceives a "tax gap",[8] resulting in strong political tensions.

The main obstacle to moving forward is, apparently, the current versions of tax treaties following the OECD Model, which limit source taxation only to cases in which a PE is deemed to exist. Article 5 of the OECD Model defines a PE as a fixed place of business through which the activities of the enterprise are wholly or partly carried on.[9] Hence, the lack of physical presence in the territory of the state hampers the introduction of any possible fiscal measure capturing the profits realized by foreign enterprises. For this reason, the PE definition seems to be more of a cage[10] than a threshold for ensuring neutrality and fairness.[11]

Since the definition of a PE has been perceived as a thorny obstacle to eliminate, some scholars,[12] the European Commission[13] and the OECD[14] have presented brand new definitions of a digital PE. All these definitions focus on the value generated by factors of production external to the sphere of the enterprise, seen as an aggregation of functions, assets and risks, entailing a shift from a supply-centric view to a reconceptualization of value creation that takes into account also demand factors.[15]

7. OECD/G20, *Tax Challenges Arising from Digitalisation – Interim Report 2018* p. 24 (OECD 2018), Primary Sources IBFD [hereinafter *Interim Report 2018*].
8. A. Turina, *Which 'Source Taxation' for the Digital Economy?*, 46 Intertax 6/7, p. 498 (2018).
9. Art. 5 *OECD Model* (2017).
10. Y. Brauner & P. Pistone, *Some Comments on the Attribution of Profits to the Digital Permanent Establishment*, 72 Bull. Intl. Taxn. 4a/Special Issue (2018), Journal Articles & Papers IBFD.
11. B.J. Arnold, *Threshold Requirements for Taxing Business Profits Under Tax Treaties*, 57 Bull. Intl. Taxn. 10, p. 482 (2003), Journal Articles & Papers IBFD.
12. P. Hongler & P. Pistone, *Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy*, Working Paper, p. 3 (20 Jan. 2015), Journal Articles & Papers IBFD.
13. Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final of 21 March 2018, Primary Sources IBFD.
14. OECD/G20, *Addressing the Tax Challenges of the Digital Economy* pp. 107-111 (OECD 2014), Primary Sources IBFD; OECD/G20, *Interim Report 2018*, *supra* n. 7, at pp. 133-139.
15. Hongler & Pistone, *supra* n. 12, at pp. 17-24.

4.3. Reconsidering value creation: The OECD approach

In the Interim Report "Tax Challenges Arising from Digitalisation", the OECD focused on analysing new theories of value creation that could be used to make a proper evaluation of the tax measures to be introduced to "realign" taxation and value creation in the digital era. The starting point was that the process of value creation has substantially changed, especially for digitalized businesses having in common the following characteristics:

- cross-jurisdictional scale without mass, meaning that digitalized enterprises can be involved in the economic life of a country without having any physical presence in its territory;
- reliance on intangible assets, including IP, as they are essential to support digital platforms, websites and many other functions that are central to the business model; and
- data, user participation and their synergies with IP, as most of the social networks could not exist without data, network effects and user-generated content.[16]

Companies with such characteristics are competing in the so-called digital market, which also has peculiar features in comparison to the other ones, namely

- direct network effects, where the utility from the consumption of a specific good or service is dependent on the number of other end-users consuming the same good or service;
- indirect network effects that arise in a multisided contest in which a specific group of end-users benefit from interacting with another group of end-users via the digital platform;
- economies of scale due to the prevalence of fixed costs over variable ones;
- switching costs and lock-in effects caused by the dependence on an operating system, which may render difficult switching to another one; and
- complementarity of the goods sold in different markets.

The result of these peculiarities is that, in each digital market, only or almost only a single firm can exist, and it would be strong enough to influence market prices.[17] What is more, transactions with end-users can be concluded in a very short amount of time, decreasing the time required to develop new products, share ideas, create new markets, and identify, engage and develop

16. OECD/G20, *Interim Report 2018*, *supra* n. 7, at pp. 24-25.
17. Id., at pp. 26-28.

new customer bases.[18] Then, the possibility of having cross-jurisdictional networks through the use of the Internet has improved the way in which multisided markets work and has contributed to creating "barter transactions" where valuable services are exchanged for other inputs, such as data.[19]

Under this backdrop, the OECD tries to test the old theories of value creation. In particular, a criticism of Porter's value chain analysis has been made, stating that it does not consider the information flow as an asset capable of generating a competitive advantage; the theory was originally designed to be applied to domestic firms and not to MNEs; the theory is not applicable to services due to the lack of inputs being transformed into outputs.[20] For this reason, two further theories of value creation are presented: the value network and the value shop.

The value network sees the network as a critical determinant of value creation, generated from the actions of linking the organization with and facilitating exchange between users.[21] Companies trying to build a value network will focus, inter alia, on attracting and selecting users; establishing, maintaining and terminating links between users; and maintaining and running a physical and information infrastructure.[22]

On the other hand, the value shop operates in single-sided markets and is characterized by the usage of an intensive technology applied to solve customers' problems.[23] A value shop is comprised of five primary activities, namely:

– problem finding and acquisition, where the problems to be solved are recorded, reviewed and formulated;
– problem solving, in which different alternatives are found and evaluated;
– choice, comprising all the activities connected with the identification of the best solution;
– execution, where the solution is communicated, organized and implemented; and
– control and evaluation, which measures to what extent the initial problem has been solved.[24]

18. Id., at p. 28.
19. Id., at pp. 28-29.
20. Id., at p. 35.
21. Id., at p. 38.
22. Id., at p. 39.
23. Id., at p. 40.
24. Id., at p. 41.

Finally, the OECD clarifies that, even though in all the sections describing value creation a reference has been made to business models, it would be better to use the term “business lines”, as most of the time companies take advantage of the complementarity between different business initiatives and, hence, can make use of different business lines at the same time. For instance, Amazon’s retail business is consistent with the value network, whereas Amazon’s web services are in line with the value shop.[25]

However, the states comprising the Inclusive Framework have different opinions on whether data and user participation can contribute to value creation. Some members consider the role of user participation to be an important value driver, especially for its capacity to generate network effects; still others consider the exchange between the services provided by the companies and the data disclosed by the users as a mere transaction, incapable of entailing the attribution of taxing rights to the states where the users are located. Nonetheless, in the latter case, some countries view user participation and data as potentially giving rise to valuable intangibles, entailing further analysis in the process of value creation.[26] In the author’s opinion, the different positions taken by the states are the reflection of a never-ending diatribe in the managerial literature that, as the next sections outline, could be either the trigger of a tax war in the allocation of taxing rights, implying serious risks of double taxation, or, as the author wishes, the dawn of a new way of conceiving international taxation based on multilateralism and mutual recognition.

4.4. A new perspective on value creation: Value co-creation

The origin principle starts from the assumption that the generation of profits by companies can only be the result of functions performed by people working for the company. This perspective, considering the changes in the value chains presented by the OECD, may lead one to wonder what the impact on the concept of value creation might be. In other words, are the changes in how the value chain is structured affecting how value is generated by companies?

In the author’s opinion, the answer is no. The fact that companies are structuring their business in different ways does not rule out the possibility of

25. Id., at p. 42.
26. Id., at pp. 25-26.

carrying out an analysis based on where the functions performed by people on behalf of the company are located. For instance, the crucial role of users in the profitability of the social network does not affect the validity of an assumption that the success of the digital platform depends on the functions performed by people for the company. In fact, without developing and marketing a product capable of appealing to users and creating a strong attachment, it would not be possible to reach a huge success in the market so as to assume a monopolistic position. Following this reasoning, value can still be deemed to be generated where the functions are performed.

In addition, even considering old-fashioned business models, companies could not have been successful on the market and could not have generated any profit without having clients ready to purchase the product offered at the price asked by the company. According to this view, the necessity for the company to develop a product that is "welcomed" within a market has always been the main objective for the generation of value/profits.

This concept can be explained even better using a metaphor related to the survival of human beings. It is a fact that human beings need food to survive and grow strong. In ancient times, humans used to eat vegetables growing in the wild without external intervention and hunt animals to gather the food they needed to satisfy their needs. Today, people are using technologically advanced cultivation methods to provide all the vegetables they need and are breeding animals to ensure a sufficient amount of meat for society. In other words, the evolution of the activities performed to get food does not affect the necessity of eating for humans to survive. The same reasoning might be applied to companies and the digital economy: the technological improvements achieved through digitalization and new business models represent only new tools that can be used to get to the final purpose that companies pursue to exist: value creation.

As a result, the first outcome of this chapter is that value creation and the structuring of the value chain are two concepts that should be kept separate: value creation should be understood as the capability of a company to use factors of production generating outputs that have higher returns than the costs borne by the company in the process of realizing those outputs; by contrast, the structuring of the value chain is just a tool, created by managerial decisions willing to exploit the possibilities offered by the current technologies to maximize the value generated in terms of positive differentials between revenue and costs. Consequently, the Report presented by the OECD only outlines the current tools used by companies to get to value creation, but does not explain why, in the modern age, the place where the functions are performed is no longer capable of capturing the value generated. In other words, the OECD does not explain why transfer pricing is not capable of aligning taxation and value creation in the digital era.

However, it is necessary to underline that the framework used to explain the generation of value and justify the possibility for a state to levy taxes on the profits generated in its territory is not aligned with an influential managerial doctrine that is trying to explain value creation on the basis of the so-called S-D logic as opposed to the goods-dominant (G-D) logic. In particular, the G-D logic, as can be easily understood from the previous assertions, is based on the value-in-exchange meaning of value where value is created (manufactured) by the firm and distributed in the market through the exchange of goods and money. From this perspective, the roles of "producers" and "consumers" should be kept separate, and value creation should be understood as a series of activities performed by the firm.[27] On the contrary, S-D logic is linked to the value-in-use meaning of value where the roles of producers and consumers are not distinct, meaning that value is always co-created, jointly and reciprocally, in interactions among providers and beneficiaries through the integration of resources and application of competences, where the final outcome is to get a job done.[28] When value is perceived as value in use for the customer, the focus is no longer predominantly on a customized bundle of products or services exchanged for a price. Instead, value creation becomes an ongoing process that emphasizes the customer's experiences, logic and ability to extract value from products and other resources used.[29]

An example presented by Vargo et al. to explain this theory refers to the sale of an automobile in which a manufacturing company uses different raw materials, such as metal, plastic, rubber, etc., to generate the final product. According to the G-D logic, the firm's production process creates value for customers though the manufacturing and delivery of the automobile. In this sense, value is created by the firm in the form of a good, and this valuable good is exchanged in the marketplace for money. Alternatively, pursuant to the S-D logic, the automobile is only an input into the value creation that occurs as customers use it and integrates it with other resources (e.g. the ability to drive). If the customer did not know how to drive, the automobile

27. S.L. Vargo, P.P. Maglio & M.A. Akaka, *On value and value co-creation: A service systems and service logic perspective*, 26 European Management Journal, p. 146 (2008).
28. L.A. Bettencourt, R.F. Lusch & S.L. Vargo, *A Service Lens on Value Creation: Marketing's Role in Achieving Strategic Advantage*, 57 California Management Review 1, pp. 51 (2014).
29. C. Grönroos & P. Voima, *Critical service logic: making sense of value creation and co-creation*, 41 J. of the Acad. Mark. Sci., p. 135 (2013).

would not have had any value. Consequently, it is only when customers satisfy their own needs through the use of the automobile that value is created, and this concept is at the basis of the so-called value co-creation where customers and firms are involved in a reciprocal and mutually beneficial relationship.[30]

What is more, this theory can be logically extended not only to customers, but also to all the other actors interacting with the company. In fact, a company can be successful only if it is involved in a network of successful relationships with all its stakeholders, especially shareholders, banks, employees, suppliers, public authorities, and so on. Would it be possible to imagine the existence of a company without shareholders? Clearly it would not, because without people trusting in the success of a specific investment, that investment would never be made. This implies that, in an S-D logic, the company is exchanging resources with its shareholders not only in terms of capital for dividends, but also competences, acknowledgment of a higher social position, etc. Without the creation of a satisfactory balance between the parties, no value could be created. Would it be possible to imagine the existence of a company without banks? Probably not, because without the support of specific services provided by financial institutions, the management of inflows and outflows of money would be impossible. Again, in the S-D logic, there must be an exchange of resources leading to a satisfactory result for both parties in order for the company to operate in the market. Would it be possible to imagine the existence of a company without employees? No, because the company would be reduced to just an empty box, incapable of generating any value. Again, the company must ensure the creation of good relationships and exchange of resources to exist and be successful for several years. Would it be possible to imagine the existence of a company without all the authorizations required and, possibly, a relationship of trust with the public authorities? Even if criminal entities could carry out activities, their long-term survival would be impossible since, sooner or later, the state would take countermeasures to stop or hamper the entity from performing whatever activity.

Against this backdrop, it is clear that there might be potential conflicts of interest between companies and their stakeholders: for instance, when companies have to pay interest to a bank, dividends to shareholders or salaries to employees, they are subtracting financial resources from reinvestments in their activities. However, at the same time, companies cannot survive without the cooperation of those stakeholders. In the end, all the relationships

30. Id., at. pp. 146-147.

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