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Allocation of the Right to Tax Income from Digital Intermediary Platforms

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Background and outline

Background

- NJCL 2018-call for papers
- Shine light on legal issues concerning platforms
- Already outdated?

Aim

- Analyse the posibilities for user-jurisdictions to tax remuneration received by foreign platform enterprises
- Discuss whether a non-cash taxable barter transaction takes place

Outline

- International tax law and the digital challenge
- Platforms and international tax principles
- Policy challenges and options

Allocation of the Right to Tax Income from Digital Intermediary Platforms – Challenges and Possibilities for Taxation in the Jurisdiction of the User

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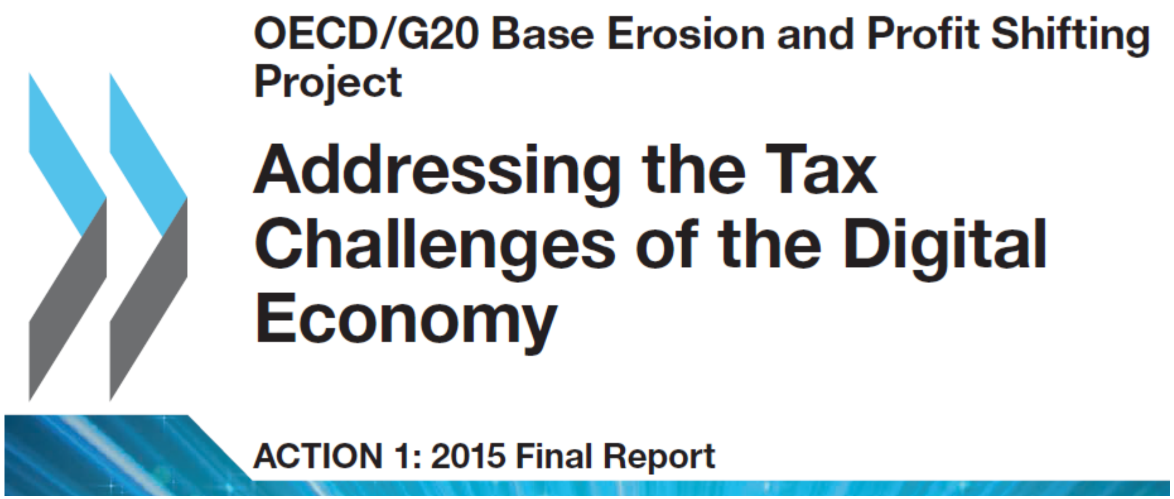
The digital challenge

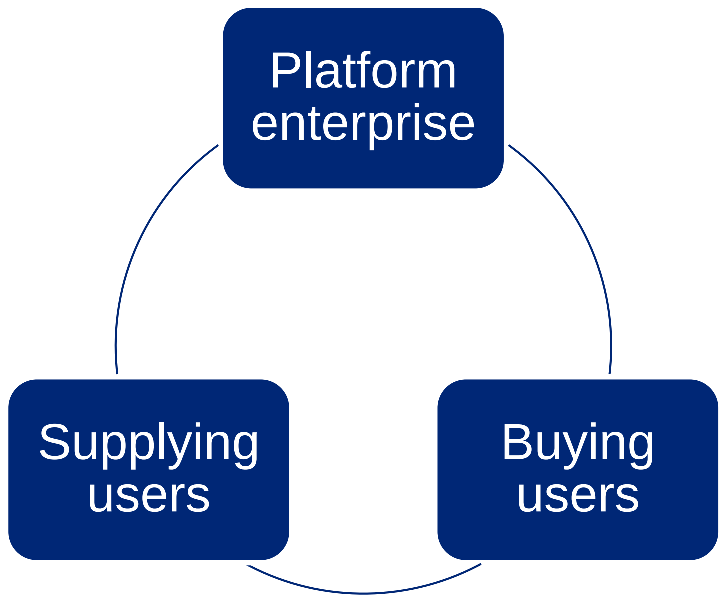
BEPS 1 (2015)

- Digitalization exacerbates the risk of BEPS
  - Key features: mobility, reliance of data, network effects and the spread of multisided business models
- The current framework is not sufficiently equipped to address modern digital business practices, where physical presence in the market jurisdiction is no longer necessary
- Policy options considered, but not (yet) adopted
  - Work continues towards reaching agreement in 2020



Platforms & int. tax principles

- The internet and mobile devices have expanded the possibility of sharing goods and services
- Some corporations have been able to turn the collaborative model ínto (profitable), global businesses



- The platform bussines model relies on a three-party relationsship, and the platform takes a fee for its services
  - Matching supplying users and buying users through mediation technology, organising and facilitating the exchange, ensuring transaction quality etc.

Platforms & int. tax principles

- Publicly available information: Some platform enterprises have enjoyed low effective taxation of their worldwide income. Q1: How?
  - By using rather complex corporate structures involving entities in low tax jurisdictions (e.g. to hold valuable intangible asset and facilitate earnings stripping)
  - By actively avoiding creating a taxable presence (nexus) in user-jurisdictions (e.g. using one ”well located” subsidiary to handle all user-payments worldwide)
  - If local subsidiaries are used – by ensuring that they only provide low-risk support services → Modest remuneration

Could the cash payment be considered royalty income (instead of business income) that could be taxed at source? Probably not:

- Payments in consideration for know-how and copyrights concerning software shall only in rare cases be classified as royalties.
- Such payments are generally for the provision of services using underlying copyrights or know-how and *not for the right to use* or be *imparted* in the copyright or know-how.

See para. 11-11.6 and 12-17.4 of the commentaries to Article 12 of the OECD (2017) and the OECD TAG Report (2001)

Platforms & int. tax principles

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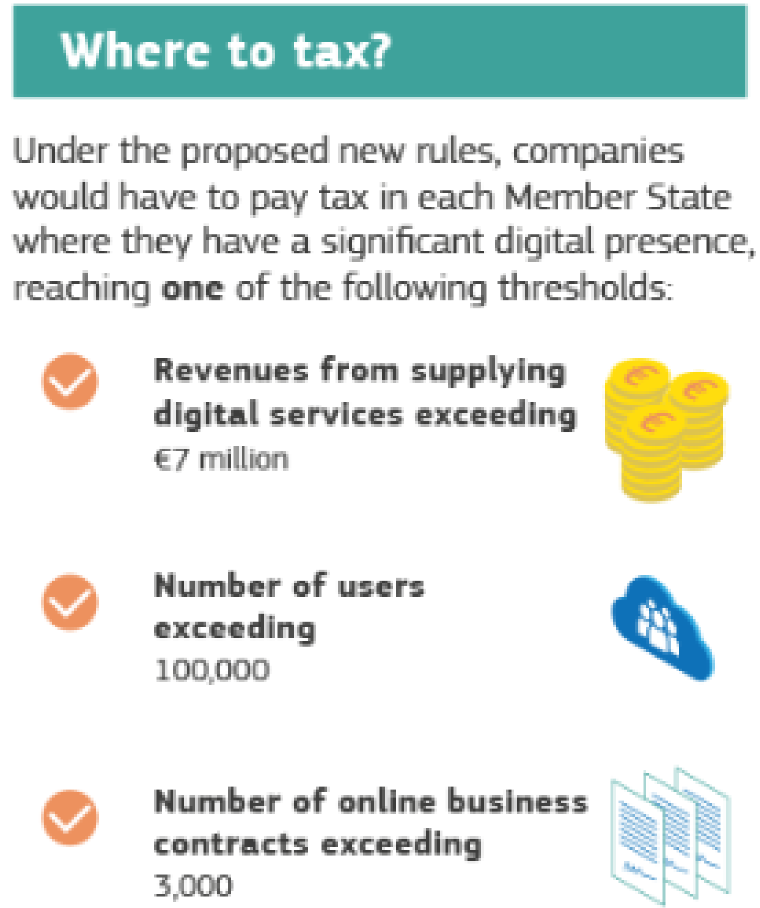
- No income tax systems focus exclusively on cash compensation
- Q2: Does the interaction between users and the platform enterprise (in addition to the cash transaction) also consist of a taxable non-cash barter transaction?
- Danish law as an example
  - Main rule: All income is taxable whether in money or in kind (SL § 4)
  - Exception 1: Disposal of private property (SL § 5)
  - Exception 2: Customary non-commercial services between family, friends and the like caused by ordinary helpfullnes, generosity or social involvement (Skatteministeriet 2002, Rapport om vennetjenester og sort arbejde)
- The exchange between the users and the platform enterprise
  - The platform enterprise supplies access to an intermediary platform (App)
  - The users continouly supply personal data and reviews
  - It is a commercial transaction between unrelated parties
- Allegedly, there may be legal basis for taxing the barter transaction, BUT…

Policy challenges & options

The Commission's Digital Tax Package (2018)

- Proposal for a Digital Services Tax, COM(2018) 148 final – ☠
- Proposal for rules on Significant Digital Presence, COM(2018) 147 final – ?
  - Depends on the future success of the OECD – 3 alternative proposals:
    1) User Participation Proposal
    2) Marketing Intangibles Proposal
    3) Significant Economic Presence Proposal



Source: Commission's Digital Tax Package (2018)

Policy challenges & options

Assessment of the SDP proposal

- Addresses a political and legislative need
- A uniform approach preferable to mulitiple unilateral approaches
- Interpretive uncertainties
- Are the thresholds appropiate?
- Risk of ring fencing
- How to allocate income to the SDP?
- Limited scope and effect if non-EU treaty partners do not agree to re-negotiate tax treaties

Conclusion

- The SDP proposal has some merit – also with respect to taxing platform enterprises – but needs further work

Source: Commission's Digital Tax Package (2018)