Tributação de atividades digitais e a criação de valor: o caso da publicidade on-line

Maio 2018
Agenda

— Estrutura de planejamento tributário típica das empresas de publicidade on-line
— OECD 2018 Interim Report
— EU Proposal
Estrutura de planejamento tributário típica das empresas de publicidade
Estrutura de planejamento tributário típica das empresas de publicidade on-line
“Put at its simplest, the basic issue is that digitalization makes it increasingly possible for businesses to reach markets in jurisdictions in which they may have relatively little physical presence. This means that under existing international tax rules, which allocate taxing rights on business profits on the basis of physical presence, it is possible for a company that is resident in one state (Residence State) to generate significant revenues in another state (Source State) without paying a significant amount of corporation tax in Source State.”

The OECD and EU appear to take related, but different views on how to approach this:

- **OECD**: The Report focuses on taxing where **value is created**, and on understanding the impact that digitalization may have had on business models and value creation. Due to lack of consensus among the member countries, it does not reach any recommendations on whether or to what extent changes to international tax rules for dividing profits between source and residence countries may be required. Instead, it calls for further work to examine the existing international tax rules on nexus (e.g. should a digitalized business be deemed to have a taxable presence in a county where it does not have a traditional physical presence) and on how to allocate profit on the basis of that nexus.”

“EU Commission: It appears that the EC considers the issue to be more a political one over taxing rights and the balance between source and residence taxation — as witnessed by the fact that the EC talks about digital companies “paying their fair share of tax”. The draft directives released by the EC would allocate additional taxing rights to countries in which users of digital services are located, rather than the country of residence of the enterprise providing those services.”

Contexto da discussão
OECD 2018 Interim Report

— Two main challenges:

- **Nexus**, i.e. determining which State has taxing rights over services provided digitally and a commercial presence is only virtual; and

- **Value creation**, i.e. allocating profits to such a virtual presence, where value is created through intangible assets, data and knowledge.
Traditional Value Creation

— Manufacturer in Country A produces goods and sell them to Distributor in Country B (or transfers them if Distributor is its own PE).

— Distributor holds the stock, carries out marketing and sells to local customers in Country B.

— Manufacturer generates value in Country A and is taxed there on the profit it makes.

— Distributor generates value in Country B and is taxed on there on the profit it makes.
Publisher in Country A develops all the software systems and manages the entire business.

- Independent writer in Country D sells an article to Publisher.
- Publisher uploads all its content to a cloud-based platform with servers in Countries B and C.
- Publisher sells advertising space to Advertiser based in Country E which enables Advertiser to customize adverts to Publisher’s subscribers in Country F.
- Subscribers in Country F pay a subscription to Publisher in Country A in order to access content on their platform.
- Publisher generates value in Country A from developing the platform and running the business and is taxed on all the profits it earns there.
- Writer is taxed in Country D on the fee he or she earns.
Publisher generates value from using the data of Customers in Country F to sell advertising space to Advertiser in Country E. But is the value created in Country F where the data is collected, in Country E from which a tax deductible payment is made or in Country A where the software and business model are developed? Which country has the taxing rights on this portion of value creation?

Is Publisher generating value in Country F simply by receiving the subscription fees? Does this change if Publisher is able to use the Customers’ data to actively sell more digital content or if Customers actively engage in suggesting what sort of articles Publisher should produce? Which country should be able to tax (part of) the subscription fees?

Publisher’s business relies on the servers in Countries B and C but these require no local personnel of Publisher to maintain them. Is Publisher generating value in Countries B and C and can they tax the profits of Publisher?
Value?

“Where is value created?”

Underlying principle for transfer pricing is that profits should be taxed where value is created. However, in a digitalized world, it is not always clear:
— What the value is,
— How to measure it,
— or where it is created

“How to capture activities which are increasingly based on intangible assets and data?”

Development
Enhancement
Maintenance
Protection
Exploitation

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— 37. While there is general agreement that data and user participation are common characteristics of digitalised businesses, there are differences of opinion on whether and the extent to which data and user participation represent a contribution to value creation by the enterprise. For some members of the Inclusive Framework, the role of user participation is seen as a unique and important driver of value creation in digitalized businesses. These countries point to the participation and sustained engagement of users which allows digital businesses to collect large amounts of data through the intensive monitoring of users’ active contributions and behaviour. These countries also point to the contribution of content by users, which can be central to a digital business’ offering and central to attracting other users and generating network effects.

109. A social network company uses data in two main ways: to enhance the user experience and to help advertisers to better target customers in order to increase advertising sales.

158. For some members of the Inclusive Framework on BEPS, the role of user participation represents a unique and important driver of value creation in digitalized businesses. This includes the collection of user data, both passively (such as on user preferences or behaviour) and actively (such as solicitation of user-generated content like reviews and posts). User data is then analysed by the business and may be employed to sell advertising targeted to the users or to customise the business’s products and services to make them more valuable.

159. In contrast, other countries view data collection from users, user participation, and the provision of user generated content as transactions between the users (as providers of data/content) and the digitalised business, with the digitalised business providing financial or non-financial compensation to the users in exchange for such data/content. (...) These countries do not agree that the action by the digitalised business to source data from users is an activity to which profit should be attributed to the digitalised business solely because the data acquired may be valuable. In this sense, the user’s supply of data would not be different from other business inputs sourced from an independent third party in the business’ supply chain (for example, data storage, broadband access, electricity).

OECD 2018 Interim Report

DE tax concerns
- Nexus – exploitation without traditional nexus
- Data – how to attribute value
- Characterization – digital revenues

User value creation
- No consensus
- Concerns include user data, use of infrastructure, and base erosion

Long-term solution
- No consensus
- Nexus – jurisdiction to tax nonresidents
- Profit allocation – how to allocate profits to jurisdictions

Interim measures
- No consensus
- No recommendations
- Framework agreed as to design of interim measures

Organisation for Economic Co-operation and Development

OECD 2018 Interim Report

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European Commission's view

“the current international tax rules need to be reformed so that value created from new business models that have emerged as a consequence of advances in information technology is effectively captured.” (2014 Report of the Commission Expert Group on Taxation of the Digital Economy)

— In 2015, the European Parliament called on the European Commission to bring forward a legislative proposal in order to:

- adjust the permanent establishment definition so as to address the digital enterprises which have a significant digital presence in the source jurisdiction; and

- incorporate a definition of minimum economic substance so as to verify if the non-resident enterprise is "adding value" to the economy of the source jurisdiction.
Value Creation – EU

— The EU Commission’s Fact Sheet states that the current tax rules do not “effectively tax profits generated largely from consumer data.”

— The EC proposals may seem to have overcome the issue of how to value the data to a certain extent by deeming activities related to data and users carried out through the digital interface to be economically significant activities carried out through the Significant Digital Presence relevant to the attribution of assets and risks. It is true that this analysis would then be followed by an attribution of profit to the Significant Digital Presence based on current transfer principles and so does consider value creation. But this is done by deeming functions to be carried out through the Significant Digital Presence.
Value Creation – EU

— The EU Commission proposals: Article 5 of the draft directive states that the profits attributable to the Significant Digital Presence are the profits it would have earned if it had been a separate and independent enterprise. Such profits are found by carrying out a functional analysis.

— In determining the economic ownership of assets and risks it is necessary to take account of the economically significant activities performed through the digital interface. Activities “related to data or users” are deemed to be “economically significant activities of the significant digital presence which attribute risks and the economic ownership of assets to such presence.”

— The issue of how much profit to attribute to the Significant Digital Presence remains a challenge. The EC proposals attribute to the Significant Digital Presence the economic ownership of the portion of the intangible assets of the MNE used in the performance of economically significant activities in the Source State.
Value Creation – EU

— A key open question is how to determine what that portion of the MNE’s intangible assets actually is. Once the intangible assets attributable to Source State have been determined, the next step will be determining how this should be factored into a profit split.

— The proposals suggest that the development, enhancement, maintenance, protection and exploitation (DEMPE) functions associated with the intangible assets used in the performance of the economically significant activities by the digital presence could be attributed to Source State and the expenses incurred for these activities relative to other expenses attributable to the head office and/or any other significant digital presences could be used as a possible splitting factor.
March 21 EC Proposal

DE tax concerns
- Competition distortion between DE and traditional businesses
- DE intangibles are hard to value and distort concepts of jurisdiction to tax

User Value Creation
- Active engagement and user data
- Free use of legal and commercial infrastructure

European Commission

Long-term solution
- Digital PE
- Wide scope of activities
- EU directive and amend treaties

Interim Measures
- Digital Services Tax (DTS)
- Source revenues based on user location
- De minimis thresholds
Proposals by the European Commission of March 21, 2018
Proposal of March 21, 2018 – unanimity required

Comprehensive solution: Stand-alone directive on digital PE + non-binding recommendation for double tax treaty situations

Targeted (interim) solution: Directive on DST
3% tax on gross revenues from user value creation
Annual worldwide (group) revenues > EUR 750 mil. and digital (group) revenues in the EU > EUR 50 mil
Taxation of the Digital Economy

Digital Services Tax: Scope

Transmission of Data
- Websites publishers
- Apps developers
- Advertisers

Intermediation Services
- Platform services that bring consumers and suppliers together (housing, taxi services etc.)

Outside of scope?
- Supply of digital content
- E-commerce (not including intermediary services)
- Multiplayer online games, payment services
- Traditional newspapers

Supply of Advertising
Taxation of the Digital Economy

Digital Services Tax in Brief

- Directive on a digital services tax on revenues:
  - Address mismatches between taxation of profits and value creation (high involvement of users)
  - Tax on gross revenues from user value creation (i.e., processing user participation):
    - Valorization of user data via ad space or sale
    - Making available digital platforms to users
  - 3% single tax rate
  - Businesses that have annual worldwide (group) revenues > EUR 750M and digital (group) revenues in the EU > EUR 50M
  - Tax due where users are located
    - Allocation key depending on the digital services
    - One-stop-shop simplification system
- No difference between purely domestically operating companies of international operating companies. So not only the U.S. tech companies are affected.
- Does the taxpayer have to pay the tax also when it is making a loss or paying a “normal” effective tax rate?
- Is the DST deductible as an expense or creditable as a foreign tax credit?
EU Digital Permanent Establishment in Brief

**Scope**

Stand-alone directive on the taxation of digital activities.

Taxpayers incorporated or established in the EU and outside of the EU but with no relevant double tax treaty, AND with a **significant digital presence** in the EU.

— **Outside of scope**: Situations where a double tax treaty with the relevant MS applies.

**Significant Digital Presence**

Taxable nexus in addition to the existing PE concept.

— Digital businesses relying on a large user base, user engagement and user’s contribution
  - Revenues from digital services in a MS > EUR 7 million, or
  - Number of users in a MS > 100,000, or
  - Number of online contracts with in a MS > 3,000

— Digital service = service delivered over the internet or an electronic network, the nature of which renders its supply essentially automated and involving minimal human intervention.

**Profit Allocation**

Profit allocation relying on the current OECD framework applicable to PE

— OECD arm’s-length principle based on significant people functions relevant to the attribution of risk and to the economic ownership of assets, AND

— Tailored framework for economically significant functions, e.g.:
  - Activities undertaken through a digital platform related to data and users
  - DEMPE functions, even if not linked to people functions in the same MS
  - Profit split method (e.g. R&D costs, marketing expenses, # users, data collected, etc.)
Obrigado!

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