Is Digital Different? Economic Nexus and Other Efforts to Respond to the Changing International Tax Landscape

Lilian V. Faulhaber
Professor of Law
Georgetown University Law Center
Digital measures listed by the TFDE

• Measures changing the PE definition
  – Israel’s significant economic presence test
  – Slovak Republic inclusion of digital platforms
  – India’s significant economic presence test
  – Virtual service PE (considered in UN MTC)
Digital measures listed by the TFDE (cont.)

• Measures that changed what types of payments could be subject to W/H/T
  – Expanded definition of royalties subject to withholding
  – Withholding on fees for technical services, income from online advertising, etc.
  – Technical services included in UN MTC
Digital measures listed by the TFDE (cont.)

• Turnover taxes or equalization levies
  – France’s tax on online and physical distribution of AV equipment
  – India’s equalization levy
  – Italy’s levy on digital transactions
Digital measures listed by the TFDE (cont.)

- Measures targeting large MNEs
  - Australia’s DPT
  - UK’s DPT
  - Italy’s enhanced procedure for cooperation and collaboration
  - U.S. BEAT
Are there other digital measures?

• Recent tax measures that target:
  – Ability to scale up without physical presence
  – Importance of IP and intangible assets
  – Role of data and user participation
Other digital measures not identified by the TFDE

- EU’s proposed digital service tax
- EU’s proposed digital presence test for a virtual PE
- UK’s proposed digital service tax
- U.S. GILTI
- UK’s proposed user contribution measure
- U.S.’s proposed market jurisdiction measure
- France and Germany’s proposed GLOBE
Differences and similarities

• Design differences and apparent difference in targets

• All focus on:
  – Physical presence requirement
  – Residence/source divide

• All part of a larger trend challenging existing international tax system:
  – Wayfair
  – State aid investigations
So are these just revenue grabs?

• Yes – they are a new form of competition
  – See Faulhaber, *The Trouble with Tax Competition*
  – These are a more aggressive form of competition just focused on revenue

• No – they are challenging a tax system that was already favoring certain jurisdictions
Next steps

• International solutions would be ideal – but impossible if countries blocking any solutions (see previous TFDE reports)
• Article will list pros and cons of digital measures so jurisdictions can choose which best protects competitive goal
• Particularly relevant in wake of BEPS 2.0 announcement