

**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