

## **The digital economy and international taxation: a literature review in a post-crisis context**

### **L'économie numérique et la fiscalité internationale : une revue de littérature dans un contexte post-crise**

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**Abstract :**

Today's new paradigm has shown that the digital economy is no more one of the economy's areas but is shifting and becoming a vehicle for change of all the economy's sectors eroding residence countries' tax bases or creating double taxation on foreign digital companies. The digitization of the economy through the internet, cloud computing, big data, fintech and other new technologies that allow the use, the collection and the analysis of data as well as information sharing are driving numerous states to adopt new tax rules that would ensure that digital companies contribute equally to public finances. The new tax rules aim at changing how profits are allocated in a way which better reflects how digital companies generate value remotely, depending on where the customers are based, for instance. This article intends to help understand the importance of an international taxation consensus regarding the way of creating an international framework for fair tax principles. Also, this review tries to highlight the meaningful contributions to a thorny subject such as taxation debate. Especially on how legislative proposals were implemented and how solutions were embraced to address tax challenges related to the digital economy.

**Keywords:** significant digital presence, value creation, BEPS project, OECD, tax base erosion

**Résumé :**

Aujourd'hui l'économie numérique n'est pas un secteur de l'économie. Elle est un vecteur de transformation de tous les secteurs de l'économie, dans lesquels elle provoque de puissants déplacements de marges des entreprises traditionnelles vers les entreprises opérant des services digitalisés. La progression des nouvelles technologies de l'information et de la communication, les effets de réseau et la prolifération des nouveaux modèles économiques basés sur la collecte des données, pourraient limiter les manœuvres de l'action publique dans la définition de la structure de son cadre fiscal. La fiscalité reste l'une des matières les plus anciennes de développement d'une forme de mondialisation juridique, bien qu'elle soit un prédicat de souveraineté. Dans cet article, nous cherchons à comprendre l'importance d'un consensus mondial sur une réforme du droit fiscal international face aux défis d'une économie de plus en plus liée à l'immatériel. Nous nous interrogeons également sur les problématiques abordées liées aux défis fiscaux de l'économie numérique.

**Mots-clés :** présence numérique significative, création de valeur, projet BEPS, OCDE, érosion de la base d'imposition,

## Introduction

The global pandemic has not only weakened economies but also opened an era of a “New Economy”, today in a dominant position: the digital economy. It is increasingly common to see the emergence of economic activities combining digital technology, machines and robots in countries where the company has no tax domicile, that is to say no physical presence. New business models are developing characteristics specific to the digital economy which expose States to a structural problem endangering public finances. By the non-customization of subsidiaries, the mobility of activities, the specific exploitation of data, the abundance of activities sitting on network effects or by structured economic models around multi-faces markets, national tax systems are find unfit to take the "just parts" of tax and oscillate between the risk of non-double taxation and that the double taxation. International tax law is undermined before a structural problem. The dazzling of the development of new economic models have led to the obsolescence of national tax systems, do not allow traditional companies to evolve in just conditions of competition in the face of digital companies imposed at levels of close taxes zero in countries where they nevertheless hold a significant market share. . The debate on the inadequacy of the current tax system in the face of the digital economy is all the more alarming since it is legitimate to study sustainable solutions and to counter the shortfall propelled by the dynamics of information technologies and communication. Also, the digital economy is transversal and therefore impacts all sectors of activity. She is also behind several innovative sectors and makes the development of other sectors dependent on her. This expands problems related to the transfer of profits to low -tax jurisdictions and those linked to the erosion of the tax base. In addition, all the characteristics of the digital economy have raised the debate having first targeted its archetypes: the GAFA (Google, Amazon, Facebook, Apple) and their avatars. But they are not the only ones concerned. The reflection process first made it possible to redefine the notion of permanent establishment implemented in 1899 for the first time, and focused on the difficulties of capturing added value through traditional taxation. Furthermore, the taxation of intangible and therefore digital profits presents a greater risk for developing countries than for developed countries. Its consequences are multiple, ranging from the development of tax optimization strategies to tax evasion. Faced with new tax challenges linked mainly to the erosion of the tax base, and according to several documented reports, we see a real desire on the part of the European and international community to adapt the tax system to

the digital economy. The OECD and the EU have realized the need to act and have proposed solutions to meet the need for tax justice inherent in a stable tax system.

Compared to the existing literature, this does not claim to be exhaustive and aims to highlight the importance of the subject in a context of internationalization. Few studies have focused on the impact of the digital economy on taxation. Most simply described the link between the two variables. On the other hand, an abundant literature has been devoted to the analysis of the pillars of the OECD, the Inclusive Framework and the solutions proposed by the stakeholders. Some authors have been interested in the reasons for discrepancies and the difficulties of adapting tax law international, and the emergence of a new business model in which the intangible is considered the major value creation lever in a context of globalization (Section 1). Much work has been devoted to adapting the various taxes. Some have defended the idea of the need to redefine the concept of “permanent establishment” and to broaden it to digital presence beyond the sole “physical” criteria of the activity (section 2).

Finally, it is no author who does not evoke the dilemma imposed by solutions seeking both to avoid double taxation and non-taxation and to propose simple and harmonized rules (section 3)

### **1. Digital economic models: new situation**

The findings relating to the erosion of tax bases are certainly not specific to the digital economy and the overhaul of the taxation of multinationals is now a priority in the OECD negotiations. Digital companies have characteristics that make them new models that escape traditional economic models both in terms of the value creation chain and their growth on national and international markets. Some authors present it with specificities identifiable by the non-localization of activities and their mobility, the exploitation of particular data, the importance of network effects, as well as the central role of platforms.

The uniqueness of these new models incredibly challenges national tax systems which have proven ineffective in capturing value. These particularities lead to deviations that do not allow these two models to evolve in conditions of fair concordance with the rules of the game on the international scene. In purely fiscal terms, these specificities disrupt the value creation chains, thereby reducing the effectiveness of traditional taxation. From the 1920s, the League of Nations (SDN) began a program of reflection on international taxation in order to combat (hypotheses of double taxation ), linked to situations in which two States could claim the right

to tax income generated on their floors. Traditionally, international tax law regarding the taxation of profits is based on the rules following the model of bilateral tax convention between States which provides that the taxation of profits is carried out in the State of the headquarters (the State of source). of the company rather than in the place where it carries out its activity. For example, the ease with which Google managed to escape the taxation of its income in France allows us to affirm that the definition of permanent establishment retained until now by the OECD, and which is based on the degree of physical presence of a company in a territory, either directly or through entities affiliated with them, is no longer adapted to new economic models in constant evolution. For the past ten years, nearly 140 countries have been thinking about how to adapt their tax rules to economic exchanges increasingly linked to digitalization. The digital economy evolves in ecosystems encompassing related markets and often leads to the acquisition of dominant positions. The economic models of digital companies are radically different from traditional models due to their nature, their structuring as well as the modes of value creation that are completely disconnected from traditional economic models. Disintermediation modifies their production chains. The domination of intermediary business models allows companies whose profits are not taxed locally to capture an increasing share of the margin to the detriment of other players in the value chain; - downward pressure on prices is exerted by these intermediary companies through their data collection activities from users of their applications. The literature is abundant on the subject of business models, but in the digital economy, there are eight basic business models relying largely on ICT innovations: the advertising model (e.g.: Google), the marketplace model where the source of revenue comes from the taxation of a transaction between supplier and buyer (e.g.: eBay), the subscription model where the system is based on a periodic payment. (Ex.: Internet service providers), the e-commerce model where it is a direct virtual transaction between a seller and a customer (Ex.: Dell), the affiliation model where revenues are generated by sales commissions via links where users are attracted from site to site (eg: Amazon), the on-demand service model, where the invoice depends on the use of a product (eg: platform of online application), the freemium model which offers a free basic service to customers and a paid part with more features, the infomediary model where the source of income comes from the exchange of information between users and products or services (e.g.: Facebook). The digital business model is thus a model that takes into account technology as an input, to transform it into economic value for the customer. (Chesbrough and Rosenbloom, 2002). This explains the difficulty of capturing

the value created and applying tax rules developed on the basis of the territoriality of the tax. For example, the commission charged by platforms in the hotel sector can reach 30% of the reservation price. However, this commission is linked to a value created which is not captured. In the digital economic model, value capture occurs through the use of new technologies or by the creation of new entities exploiting the new technology in new markets and the place of establishment is automatically decoupled from the place of consumption.

Faced with the domination of intermediary business models which ultimately allows companies to capture a significant share of the margin to the detriment of other actors in the value chain, those responsible for public action are struggling to adapt their strategies both at the national and internationally when defining the structure of their tax system. In addition, and beyond a simple shortfall in tax revenue, the downward pressure on prices exerted by these companies which benefit from technological progress, thanks to their data collection activities from the users of their applications, contributes to causing a retraction of the taxable amount. According to the mission, the common point among all large companies in the digital economy is the intensity of the exploitation of data resulting from the regular and systematic monitoring of the activity of their users. The collection of this data is made possible by the emergence of “free work” that users provide either without their knowledge or through their voluntary contribution. It is on the basis of this diagnosis that the mission proposes to create new tax bases based on data.

Finally, the current problem goes beyond the primary postulates in terms of principles of tax fairness and redistribution objectives defended by the theory of optimal taxation. Until now, this theory consisted of describing the optimal configuration of a system and analyzing the efficiency-equity trade-off that a government had to face. From now on, it is no longer a question only of responding to the problem of choices of tax scales and arbitration between redistribution and economic efficiency. It is a continuum of reflection which takes into account a new variable: digital.

In addition to the numerous works of stakeholders and international organizations in this area, some authors approach the question from a pragmatic point of view. R. Murphy proposes to oblige multinationals to publish essential information such as: "A complete network of subsidiaries and their countries of establishment, the number of employees, declared profits and taxes paid by each subsidiary. This system is simple and convincing so much that it has been incorporated into certain legislation. The BEPS project is one of them (Zachariasen, 2016).

Others also study the question from a philosophical point of view, through the prism of a new relationship between the tax administration and the taxpayer based on an e-tax contract which would have the advantage of going beyond the institutionalized State to take into consideration the use of technology in the globalization of the intangible. The contractual method questions the future of the connected State in a now globalized space. It must serve as the basis for the New Economy, subject to the principles of convenience and equality. Failing this path, destabilizing elements could harm the tax competitiveness of many countries and their well-being. (Neau-Leduc, 2010). The scarcity of public funds is a reality linked to that of new technologies and which calls into question taxation as an element of solidarity and the social contract.

## **2. Tax connection and significant physical presence**

The cornerstone of the rules governing the allocation of the right of taxation between two States is the concept of « permanent establishment », defined in the OECD tax conventions, as ; « a fixed place of business through which a company carries out all or part of its activity ». Taxation of corporate profits made at the national level is based on the presence of a permanent establishment. International conventions in fact retain the notion of permanent establishment as a criterion for the territorial attachment of profits. For more than half a century, this concept of permanent establishment has fulfilled its objective and allowed a more or less “harmonious” distribution. of interstate corporate tax.

In essence, a company resident in a source State (State A) is only subject to tax on profits in that State, including on deliveries of goods or services that it makes in a State. of residence (State B) unless it has a physical presence, through a permanent establishment, in State B through which the goods are sold or services rendered. This criterion based on physical presence is, however, not adapted to the digital economy. One of its characteristics is the ability to generate profits in a given country by creating value from the data it collects on users without the company being physically present there. In the absence of a strong physical guarantee, it therefore becomes increasingly uncertain to allocate to a particular State the right to impose this or that stage of value creation. Using this inadequacy of current tax rules to economic developments, certain multinational groups actually bear very low or even zero, tax burdens in the country where they nevertheless make very significant profits. The structure of companies and the process of creating value have evolved considerably. These specific production



conditions favor the relocation of production factors and the strong decentralization of activities at the global level.

Current economic models allow different support activities to situate themselves in a jurisdiction different from that of the consumer. A physical presence of the company in consumer jurisdiction is often no longer necessary. This complicates the determination of the economic substance of a company, a central element to impose, (OECD, 2018a). The value chains using the dynamics of new information and communication technologies distance the place to capture the value of the creation territory. By remotely capturing the added value created, digital services amplify the erosion of the tax bases and reduce the tax base of the rest of the economy. For example, in the hotel sector, the commission taken by a reservation site located at large distance can reach 30 % of the price (Charrié and Janin 2015). We can also think about the insertion of intermediaries in the value chain. Intermediaries are strategically placed in the chain such that they manage to capture part of the margin. The use of intermediaries in the chain is not new but the digital economy seems to facilitate this strategy (Colin & Collin, 2013). Indeed, most companies in the sector have seen their value chains completely modified, mainly because of the dematerialization of the economy. According to a study by Amit and Zott (2001), the creation of value in e-business goes further than the value created according to the classic model of Michael Porter. In the Collin and Colin report from 2013, the observation is reiterated: “productivity gains generated by the digital economy do not translate into additional tax revenue for developed countries. According to the European Commission, digital companies are taxed at an effective tax rate of only 9.5%, compared to 23.2% for traditional business models. The main reason is based on the notion of permanent establishment. On the one hand, it is certainly difficult to draw a strict separation between digital services and the rest of the economy since they are not reduced to the dimensions of a single sector. Digitalization, which gives pride of place to intangible assets such as algorithms, software and artificial intelligence, as well as to the exploitation of data, tends to weaken physical functions by confining them to activities whose added value represents an increasingly slim share in value creation. However, intangible assets, know-how, and the ability to use data are mobile assets that can be located in countries that are not major markets. Such a situation can lead to taxation that is not linked to the creation of value, to double taxation or, on the contrary, to double non-taxation. These disconnections between physical presence and value creation have been at the origin of a demand for the relevance of historically inherited tax



instruments. The flaws in the tax system were further accentuated by the absence of a reconciliation of the power to tax the digital activities of a State with an obsolete territorial attachment. These flaws are easily exploitable by the digital economy than by the traditional economy. Certain activities have even undergone transformations so that they reduce the taxable profits of companies or avoid the use of permanent establishments, which prevents states from being able to tax them. For example, we can take the case of a company which declares its profits abroad but which monopolizes the value created or the margin on a market. In international tax law, the notion of territoriality remains a key notion for determining the taxation of cross-border activities in the sense that it determines the legal competence of the sovereign entity and that it distributes the power of taxation between two States. The territorial function therefore serves to connect and create a link between a sovereign State and a taxpayer. The creation of value in the digital economy is a central point in the problem of taxation of multinationals. It is about linking tax to the creation of value and closing the loopholes which, in the international tax configuration, facilitate tax evasion. The tax must be levied where the value was created. A report published by the OECD 2018 highlights some important points for digital taxation, notably the role of the market in creating value, but does not draw conclusions in terms of reform.

The concept of stable establishment being exceeded, the "significant economic presence" becomes more relevant to allocate part of the taxable base in the country of the market. The European Commission has drawn up two legislative proposals: the first aims to reform the rules relating to the taxation of companies so that the profits are taxed where companies have a significant interaction with users. The second will argue in favor of a provisional tax on the main digital activities. Under these rules, companies will have to pay tax in each Member State where they have a significant economic presence. Furthermore, the discussions of the main players were structured around two pillars: pillar 1 intends to address the problem by reattributing profits to the market country. The idea is to impose a part of the ; «non-routine profit»; in the market country. The approach plans to rely on transfer pricing rules or opt for the model of unitary taxation and flat-rate distribution of profits (Formularyapportionment).

Pillar 2 concerns the establishment of minimum taxation of multinational companies , leaving certain preferential regimes out of scope. The existing literature has limited itself to analyzing the benefits of the two pillars, posing the hypotheses linked to their development and predicting the pillar which would be the most advantageous. According to an estimate published in 2020

by the OECD, the implementation of the two pillars would make it possible to recover 4% of additional corporate tax revenue globally, or around 100 billion dollars. The profitability rate determining the share of a residual business is 10%. But most of the gains would come from pillar 2. The minimum tax rate used will be 12.5%.

### **3. Factory 4.0, taxation 4.0?**

Companies are adopting more and more forms of production to avoid falling foul of the laws. States are overwhelmed and legislation is the subject of numerous disputes. Such a situation could cost the global economy up to 1% of national GDP and hamper efforts to support recovery from the COVID-19 crisis. The inability of countries to tax MNE profits has led to the adoption of unilateral measures at the national level.

To take into account the particularities of the digital economy and reintegrate connected factories into a fair tax framework, the European Commission proposed two directives in 2018. One of the two introduces a transitional tax on digital services (TDS) – see graph no. 1 -or Digital Services Tax (DST), at the rate of 3%. This is a tax on turnover which will be circumvented by the notion of permanent establishment by relying on the criterion of “significant digital presence” and by considering the number of users or contracts. This approach is based on the country of distribution of the service/product, and no longer on the place of production to define a new right to tax.

**Figure n°1 : Taxes on digital services around the world**



**Source : Les Echos, June 1. 2022**

A unitary tax measured by the number of users on the national territory or even on the data flows exchanged, therefore based on the activity of the platform, was considered. This tax, whether borne by the platform or paid directly to the user, also results in the exclusion of users who have the least interest in the platform. Such taxation would, however, have a significant impact, in particular with regard to the exclusion of certain users and the exploitation of personal data. For the Attac association, unitary taxation is, by far, the best solution since it responds to most of the challenges posed to the IS.

Furthermore, to the extent that the platforms generate significant income from this data received free of charge, another form of taxation - special tax on companies which collect data systematically - could however be introduced, according to the Collin report.

To bring taxation and economic reality into line, unitary taxation seems to be the most appropriate measure. It would consider each multinational as a single entity and not as a set of entities independent of each other which, in the name of the principle of arm's length competition, and by manipulating transfer prices, engage in tax optimization. Taxation would

then be carried out according to a distribution key, on the overall consolidated profits of multinational groups.

In the existing literature, the main findings relating to digital taxation involve electronic commerce. This being much less rigid than physical commerce, has changed the conditions of tax competition between countries in terms of VAT, in particular. It lowers cross-border transaction costs and allows platforms to avoid taxes, which strengthens competition between countries when the origin principle is applied, leading to a reduction in VAT rates. When the destination principle is applied, it reduces competition between countries. Furthermore, ensuring correct collection of this tax on online sales has become a crucial issue for governments on a global scale to the extent that a large part of the operations carried out by platforms are taxable in the State where economic activity takes place. This cyber taxation creates cyber tax havens. (Le Gall, 1998, 164).

Without waiting for any deadline and without hearing the exhortations of the EU and the OECD in favor of a multilateral and coordinated approach, a progressive number of countries are adopting unilateral and uncoordinated measures intended to protect their database. 'taxation.

In 2016, the Israeli tax administration clarified that online services provided to Israeli customers, remotely by a company resident in a state that has not concluded a double taxation agreement, may be taxed on the basis of factors established on the notion of "significant digital presence" such as the number of contracts concluded online between the foreign company and Israeli customers, the significant number of Israeli customers, the significant share of turnover achieved by the company closely linked to the volume of online activities carried out by local users in Israel, or if the foreign company uses a platform equipped with functionalities adapted to the Israeli market (Hebrew interface, payment in local currency, etc.) .

India adopted a similar approach in its Finance Act for 2018, several amendments of which modify the national rules on corporate income tax by integrating the notion of significant economic presence. This aims to allow the taxation of the profits of a company resident in a State which has not concluded a double taxation agreement with India according to the source of income (local turnover and number of users), regardless of the company's degree of physical presence in India.

Some states have chosen to adopt sectoral taxes on turnover struck the revenue from the sale of online advertising service, like the equalization tax set up in India in 2016 (perceived at the rate 6% on the gross amount of remuneration paid in return for online advertising services by non-

residents, the digital transactions tax adopted in Italy in 2017 (levied at the rate of 3% on the remuneration paid in return for the supply of digital services routed electronically), the advertising tax established in Hungary (collected at the rate of 5.3% on the CA excluding VAT of resident and non-resident companies made on the sale of spaces and Advertising niche in Hungary, and the tax on physical video and online broadcasting of audiovisual content instituted in France.

Other States, without creating specific taxes, address the tax challenges raised by digitalization and globalization via the prism of anti-abuse rules aimed at countering the optimizations made possible by the loopholes created by the inadequacy of tax rules. international with current business models in which value is largely generated by intangible and mobile assets.

Many authors of reports and critics have underlined the positions of several countries of the European Union without insisting on those of the countries where the headquarters of the giants of the digital economy are located, such as the United States or China, which are quite supportive of the status quo. Indeed, even if they receive little corporate tax from these giants, they benefit indirectly from significant tax revenues coming from the ecosystems created by these companies, income taxes and transaction (consumption) taxes paid by their employees, etc.

In the absence of consensus, the remarkable growth in digitalization associated with the economic impacts of the pandemic will create blockages for a way out of the fiscal crisis. Supported by economic, but also social, pressures, the risk remains in the implementation by some States of unilateral fiscal measures which will fragment positions and prevent any collective solution. Which would cause political, fiscal and commercial disputes involving the penalization of the business climate, investment and growth, already at half mast. The negative effect of the global crisis would not only be aggravated, but the recovery of national and global economies, post-COVID-19 pandemic, would be jeopardized. There is an urgent need to reach a consensus.

## **Conclusion**

The emergence of the digital economy and the intensification of network effects have opened new horizons in terms of business models as well as new forms of reorganization and production: Airbnb does not operate B&B, Deliveroo does not have restaurant premises, Uber does not own taxis...etc. Not to mention the gig economy. The contours of the digital economy

are not easy to define. The distributive logic of the international tax law system would require that the countries where the users or consumers are located tax the services and products of the companies that delivered them to them. However, all stakeholders agree that taxation must evolve in concert with the digital economy. The existing tax rules which have governed tax systems for a century are based on treaties dating from the 1920s and are embodied today in the network of bilateral tax conventions implicitly distinguishing between the State of source and residence. The work carried out within the framework of the BEPS project has not failed to follow the evolution of the digital economy in an attempt to provide a solution. An answer was found with the concept of value creation which has the merit of moving the lines of the debate. A State has a taxing power when it has created and contributed to the value generated by the digital enterprise. On-demand production reduces the need for complex supply chains. In industry 4.0, it is more common to deliver and sell goods in countries where we do not have a presence, which poses new tax challenges. In industry 4.0, the question raised is: which country will impose? That of residence of the customer which generates the data, or that of the factory which develops the technology? The tax equation is clearly weakened since the answer to the question is probably both, due to lack of international consensus. The new system intends to establish a concrete link between where profits from the digital sector are made and where they are taxed. The part of the BEPS project linked to the digital economy sought to respond mainly to two problems. The first is due to the fact that traditional tax legislation focuses on the condition of physical presence of a company in a specific country to the extent that it will not be taxed on profits made in the country where it is located. physically. The second problem, related to the first, is that most countries only tax the profits of multinational companies made domestically, and not the profits from foreign sources, on the principle that the profits of foreign companies are taxed where they are achieved. The contribution of the OECD through the BEPS project, and the recent communication from the European Commission have largely made it possible to increase substance and transparency in the international tax system. Although attempts at international harmonization focus on the fight against tax optimization which deprives States of significant tax revenue each year, the problem of transfer pricing and tax havens, work on the regulation of the digital economy continue to progress in consultation with stakeholders. However, the taxation of the digital economy remains a global issue with local responses.

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