

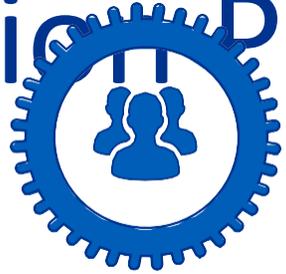
# Permanent Establishment through Digital Presence **With** work ?

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8 December 2018

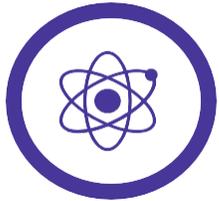


# Background – BEPS

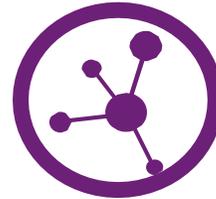
## Action Plan 1



Digital Economy is a result of Information and Communication Technology –  
Technologies are cheaper, more powerful and widely standardized.  
Improving business processes and bolstering innovation



Digital economy becoming the economy itself – difficult to ring fence.



Business models –  
E-commerce, App stores, Online advertising, Cloud computing, participative networked platforms, high speed trading, and online payment services.



Key features – Mobility, reliance on data, network effects, the spread of multisided business models.

Enhanced BEPS risks

Challenges for tax purposes  
***Nexus, Data and Characterisation***

# BEPS Action Plan 1

To avoid difficulties arising from creating new profit attribution rules for purposes of a **nexus** based on significant economic presence, an “**Equalisation levy**” could be considered as an alternative way to address the direct tax challenges of the digital economy

## Equalisation Levy

India

Introduced vide Finance Act, 2016

## Significant Economic Presence

Create a taxable presence in a country when a non-resident enterprise has a **significant economic presence** on the basis of factors that evidence a **purposeful and sustained interaction** with the economy of that country *via* technology and automated tools.

India

Introduced vide Finance Act, 2018

Levy of withholding tax on payments for goods and services purchased online from non-resident providers.

## Withholding tax on digital transactions

India

On-going litigation on software, use of data base, online advertisement etc.

# OECD Interim report

## Common features of highly digitalised business

- Cross jurisdictional scale without mass
- Reliance on intangibles
- Data, user participation and network effects

## Data/User Value Creation

- No consensus on:
- Situs of value creation
  - Identity of value creator
  - Extent of value creation

## Long Term Solution

- Continue work to analyse:
  - Nexus - jurisdiction to tax non-residents
  - Profit allocation - how to allocate profits to jurisdictions

## Interim measures

- No consensus on the need for/form of interim measure
- No recommendations
- Identified risks
- Framework agreed by pro-interim measure countries on how to mitigate risks

# European Commission

## Long term solution Proposal

- Introduce concept of SDP into the tax treaties
- Applies to all entities, including EU entities
- SDP to exist in case of supply of digital services through a Digital Interface (DI), and:
  - Revenues from digital services from users in a MS > EUR 7,000,000; or
  - Number of users in the MS > 100,000; or
  - Business contracts concluded by users in the MS > 3,000
- Situs of user based on usage of device to access the DI in the MS
- Profit attribution based on principles of Article 7(2)
  - Ascertain economically significant activities (ESA) performed by the SDP and attribute corresponding risks and economic ownership of assets to it

# European Commission

## Proposal

- ESA includes:
  - collection, storage, processing & sale of user data
  - collection, storage, processing and display of user generated content
  - sale of on-line advertising space
  - making available of third-party content on digital market place
  - supply of digital services
- Reliance on profit split method for profit attribution
  - Splitting factors may include expense on R&D & marketing, number of users & data collected in a particular jurisdiction

### Interim proposal

- Apply tax @ 3 % on revenues from digital activities like:
  - sale of online advertising space
  - digital intermediary activities
  - sale of data generated from user provided information
- *De-minimis* threshold – total worldwide revenues of €750 million and EU revenues of €50 million

# Global developments in the context of digitalisation

## Israel

Israel has issued a Circular introducing a significant economic presence test

## Slovak Republic

Certain activities through an online platform are deemed to be carried out through a fixed place of business in Slovakia

## Saudi Arabia

Has officially endorsed virtual service PE

## Italy

Introduction of Equalisation tax @ 3% on internet based activities wef 1 January 2019

## U K

Digital Service Tax proposed @ 2% on revenues of certain businesses wef April 2020

Expansion of VAT/ GST coverage on digital transactions:  
South Africa, Turkey, South Korea, Australia, New Zealand etc.

# SEP in India

- SEP of a non-resident in India shall constitute “business connection” in India
- “SEP” shall mean
  - (a) **transaction in respect of any goods, services or property** carried out by a non-resident **in India** including **provision of download of data or software in India**, if the **aggregate of payments** for such transactions exceeds such amount as may be **prescribed**; or
  - (b) **systematic and continuous soliciting of *business activities* or engaging in interaction with such number of users** as may be **prescribed**, in India **through digital means**
- Transactions or activities shall constitute SEP in India, **whether or not**, -
  - the agreement for such transactions or activities is entered in India; or
  - the non-resident has a residence or place of business in India; or
  - the non-resident renders services in India.
- **Income as is attributable** to the transactions or activities referred to above shall be deemed to accrue or arise in India.

# SEP – Key issues

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Transaction in respect of GSP. No reference to digital means

Transaction in India - what it connotes?

Applicability to physical goods?

Systematic & continuous soliciting of business activities – business v/s. business activities

Provision of download of data or software – How will this be tracked?

Engaging in interaction with such number of users – how will this be tracked?

Income attributable to SEP

Interplay with Royalty / FTS and EL

# Way forward

- Is a consensus in EU likely?
  - The Economic and Financial Affairs Council (ECOFIN) of the EU has recently discussed both the proposals of taxation of the digital economy
  - The European Parliament is expected to vote thereon on 12 December 2018
- US has raised significant concerns on EU proposal
- OECD to provide an update in 2019 and to work towards a consensus based solution by 2020
  - Challenges on account of 'value creation' and 'method of allocating profits'
- Global consensus seems challenging; strong political will required to breakthrough the deadlock
- In the mean-while, unilateral measures adopted by countries likely to create uncertainty and potential double taxation



# Thank you

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