

Taxing the Internet: the European Challenge

Longueuil, July 10th 2019



University
of Ferrara

Department
of Law



Outline of the Presentation

- How to begin with ?
 1. Digital Economy, an uncharted land “~~*Yours to Discover*~~”;
 2. Digital Economy, addressing the challenge **bearing in mind** the international rules of taxation “*Je me souviens !*”;
- More to the point:
 1. “*Taxes are what we pay for civilized society*”, Oliver Wendell Holmes, Jr.
 2. Paying the fair share in the territory we belong to, is necessary;
 3. Where does Internet belong ?



The State of the Art, introducing the the *Great Game*





Similarities with the «*Tournament of Shadows*»

1. New, unchartered territory;
 2. Conflict between two Empires (with minor players, such as China);
 3. Soft attrition, no full scale conflict;
 4. Importance of the confrontation, going beyond the specific theatre.
1. New Taxable Base, unveiled;
 2. Conflict between the US (so far) and many other developed countries;
 3. Policy decisions, proposal, recommendations;
 4. Digital war as a segment of a vast confrontation (commercial conflict, ...)



The Latest Developments in the *Great Game*

- OECD Recommendations in the framework of Action 1;
- The *Wayfair vs South Dakota* decision by the US Supreme Court ?
- Proposals by the European Commission on Digital taxation / Fair Taxation / ... (March 21st 2018);
- Decision by States to “go alone”.



Preliminary Findings ...

- Taxation has always been connected with the territory (on some occasions, with citizenship);
- Power to tax has been traditionally justified on different grounds with a link (*allegiance*) with (to) the territory and the state;
- European Concept of sovereignty (*Cuius Regio, Eius Tributum*) – (Whose Realm, Its Tax).



The Westphalia Paradigm



1648, in cities of Osnabrück and Münster the European wars of religion ended



... and How Digital Economy changed

- Digital taxation (1999 – 2018);
- The Net as it was:
 - Facilitate contacts and connections;
 - Increase business opportunities;
 - A channel of contact trough which content is conveyed;
- The Net as it is:
 - A place where content is stored (*cloud*);
 - A place where data are managed and operated;
 - A new territory is born.

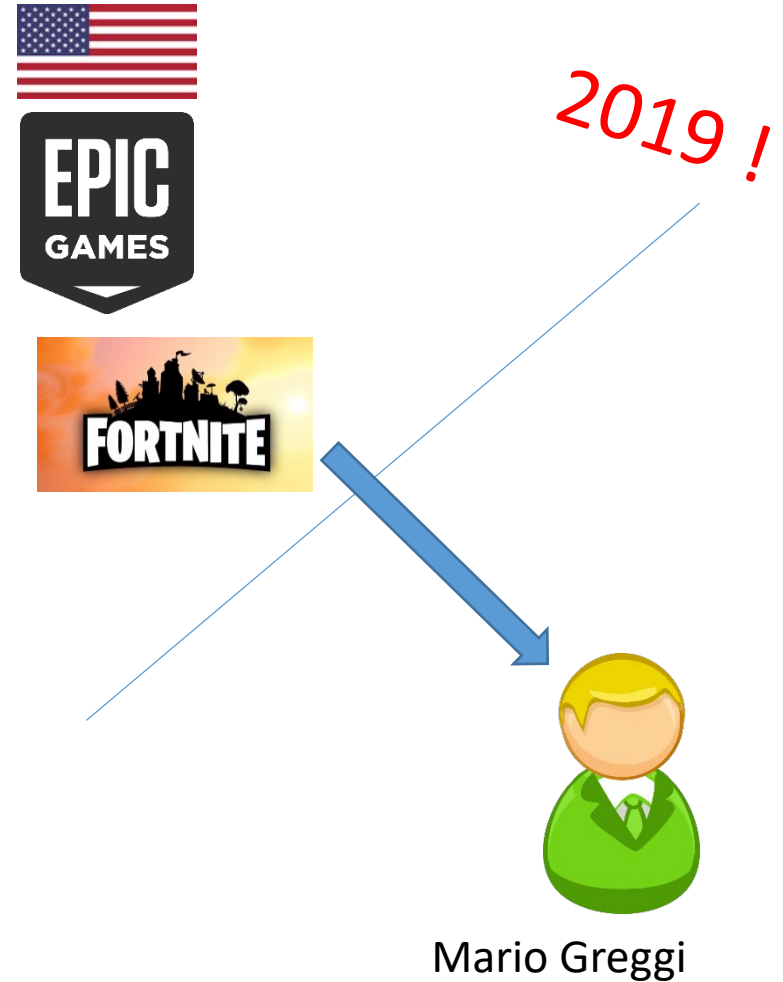
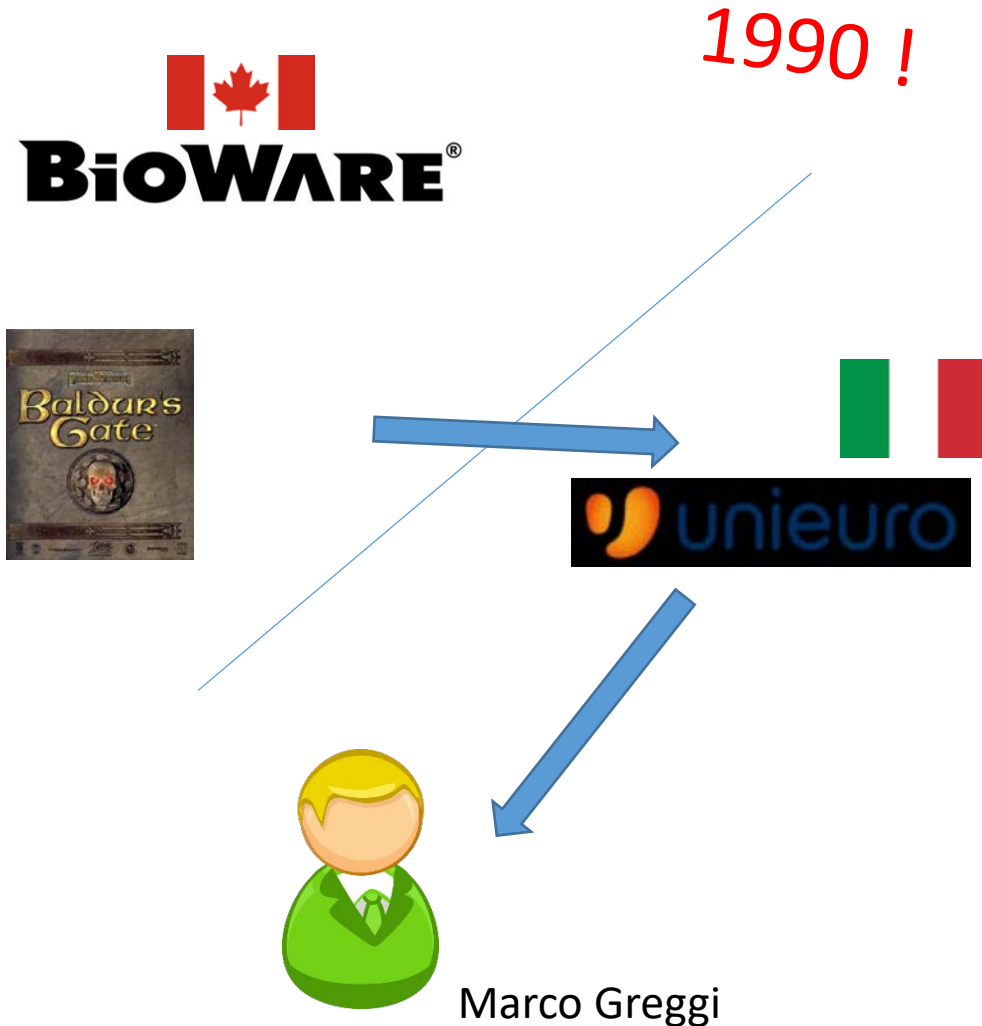


The OECD Position

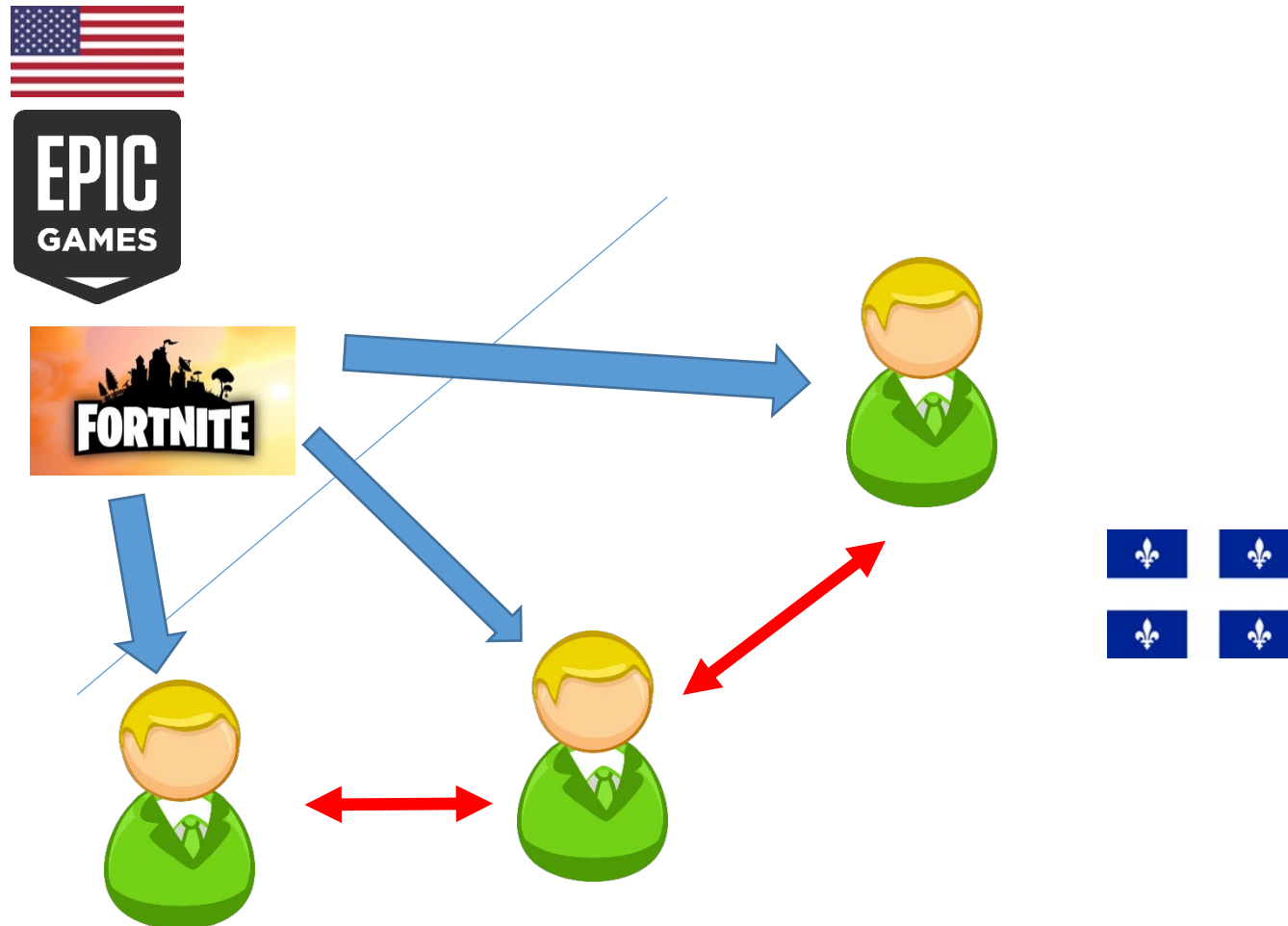
- Base Erosion and Profit Shifting project, Action 1: addressing the **Tax Challenges of the Digital Economy**;
- October 5th 2015, the Final report focuses on three main areas of intervention;
 1. Permanent establishment;
 2. Transfer pricing (taxation ancillary to value creation);
 3. CFC update, as to address digital businesses.
- Not recommended:
 - Equalization levy, *digital presence test*, specific WHT.



Theory and practice



The “Fortnite” model





... and Why It Matters

- **Value Creation** is hard to be defined if a new territory is considered:
 - **Emphasised** the role of the content providers / services related businesses;
- Use of reasonable Proxies:
 - Place where pro-users are resident ?
 - In the VAT: place where consumers are ?
- No sound solutions so far.



Case 1



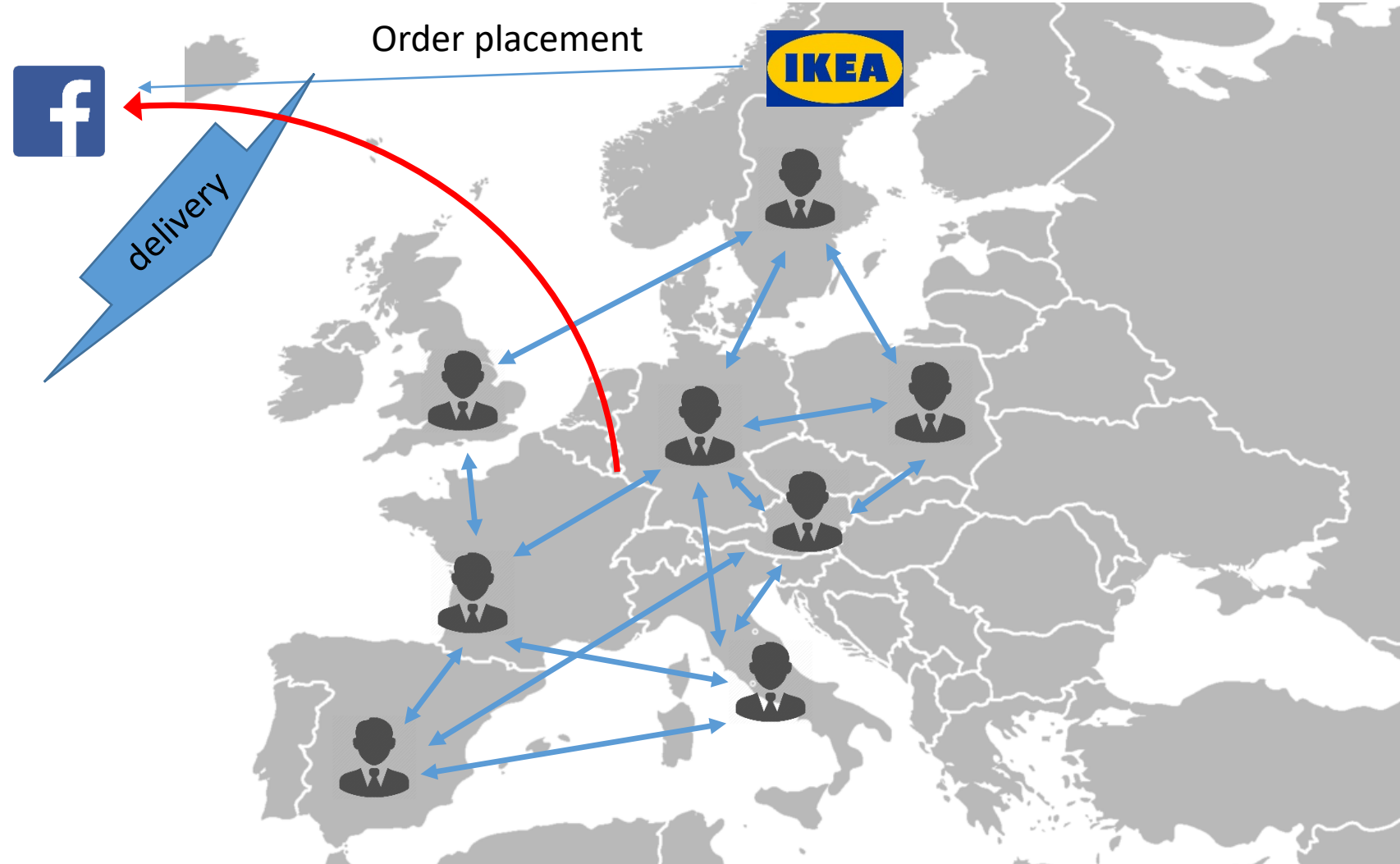


Case 2





Case 3





The *Commissioner's* Strategy

- Two Prongs approach:
 - **Soft law:**
 1. Recommendation to the Member state to re-negotiate wherever / whenever possible DTCs with third countries **consistently** with the necessities of the digital economy;
 - **Hard Law:**
 1. Directive proposal **addressing** the definition of permanent establishment where DTCs are not in force with third countries, as to attract more income in the EU in qualified circumstances COM (2018) 147;
 2. Directive proposal **introducing** a new Digital Tax to target specific digital operations COM (2018) 148.



Digital Presence and the PE

- Article 4, § 3 of the (proposed) Directive.
- A digital presence occurs **when**:
 - Revenue originated via digital services in the country exceeds € 7.000.000 or
 - The number of users exceeds 100.000 or
 - The number of business contracts exceeds 3.000;
- And is applicable **to**:
 - Both EU and non-EU resident businesses;
- And is applicable **if**:
 - A conflicting DTC is not in force with the third Country.



The Web Tax

- "*Third kind*" of (digital) taxation targeting (Article 3):
 1. **Advertising**;
 2. "Multi-sided **digital interface**" (aka social networks);
 3. **Transmission** of data collected about users (for advertising purposes);
- It is triggered if the taxpayer's:
 - Worldwide revenue accounts for more than € 750.000.000 and
 - EU revenue accounts for more than € 50.000.000;
 - ...
- It is applied with a **rate of 3%**;
- Around 19 articles out of the 27 of the Directive deal with compliance duties (...).



Is This for Real ?

- European solution is *VAT-centric* in the case of digital presence and PE definitions, and is *Excise-centric* in the case of the Digital tax;
- Arguments against the actual implementation:
 - Lack (so far) of unanimity within the EU (not a *zero-sum game*);
- Arguments in favor of it:
 - *South Dakota v. Wayfair, Inc.* (US Supreme Court, June 21 2018) overruled Quill;
 - States already acting unilaterally.



Solutions to be Explored ?

- Digital tax is an **Indirect tax** (*Article 113*).
- Enhanced cooperation between member States as a way to overtake unanimity where needed ?
 - Article 20 EU Treaty;
 - Articles 326 –334 TFEU;
- Need to consider the Internet as a whole, including the neutrality paradigm:
 - Withholding taxation;
 - The role of the intermediaries (access providers and network managers);



Italy playing the *Great Game*

- Italy so far has:
 - Unilaterally extended the scope of permanent establishment in 2018 including the hidden PE concept “*A continuous economical presence of a non resident business arranged in a way as not to match the physical presence test*”;
 - Introduced a targeted digital service tax, inspired by EU guidelines (as from January 1st 2019: §§ 35 – 52 Italian Finance Act 2019).



The possible impact of the Tax

- 3% tax on profits generated on the territory (according to the place where consumers are);
- Selective target:
 - Business with a turnover of more € 750.000.000 worldwide (any source) ...
 - ... and more than € 5.500.000 in Italy (Digital source);
- Selected services delivered;
 - Advertisement;
 - Data management;
 - User-generated contents;
 - ...



We are not alone

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ASSEMBLÉE NATIONALE

CONSTITUTION DU 4 OCTOBRE 1958

QUINZIÈME LÉGISLATURE

SESSION EXTRAORDINAIRE DE 2018-2019

4 juillet 2019



PROJET DE LOI

*portant création d'une taxe sur les services numériques
et modification de la trajectoire de baisse de l'impôt sur les sociétés.*



And before that ...

N° 2080
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NATIONALE**
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1958
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Enregistré à la Présidence de
l'Assemblée nationale le 26 juin 2019

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SESSION ORDINAIRE DE 2018-
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Enregistré à la Présidence du Sénat
le 26 juin 2019

PROJET DE LOI

*portant création d'une **taxe sur les services numériques** et **modification de la trajectoire de baisse de l'impôt sur les sociétés**,*

TEXTE ÉLABORÉ PAR LA COMMISSION MIXTE PARITAIRE

Voir les numéros :

Assemblée nationale (15^e législature) : 1^{re} lecture : 1737, 1800, 1819, 1838 et T.A. 256.

Sénat : 1^{re} lecture : 452, 496, 497 et T.A. 101 (2018-2019).

Commission mixte paritaire : 615 (2018-2019).



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Merci de votre attention

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