The Unbearable Lightness of Digital Presence: some Considerations on the EU Web Tax

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1. Introduction. Digital economy: two decades of changes and challenges for state taxation.

Digital taxation has been on the policy agenda of many states and international organizations since the end of the nineties. In that period the International community witnessed the expansion of the first digital bubble, mostly based on the '*.com*' companies. Internet and digital infrastructure where considered as a sort of evolved communication devices, eventually boosting business connections, information, exchange of data.

The internet was regarded as a sort of facilitator in this respect, a kind of a channel of data: not yet a storage place. In this respect, the academic discussion in the field of taxation law was mostly focused on the possibility to consider a website or a server as a sort of permanent establishment, thus reallocating the power to tax of the states involved in the transaction, out of which (or to whom) data were channeled. The OECD guidelines in this respect were essential as to clarify that neither the server nor the website could be considered per se as permanent establishments under Article 5 of the OECD Model convention if other conditions were not met simultaneously.

The later explosion of the bubble, and the subsequent shrinking down of the sector apparently took it away from the priorities of the international academic community in terms of research and policy recommendations.

The IT and the Internet sectors came back under the spotlight at the end of the first decade of the century. During (and after) the global financial crisis many states and relevant stakeholders turned the attention to the business models pursued by the tech giants who survived the first wave, restructured ther model, and remained on the business.

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It would be anyhow fallacious to consider the survivors in term equivalent to the ones of the first generation. The Internet economy was flourishing again, but in a way remarkably different from the business model that was mainstream ten years before.

The Internet now was seen not only as a device to communicate and to exchange data (a stream facilitator, in this respect). The Net turned out to be a storage: a place were profitable data were (and are stored) or where high value services are performed.

In the first stage of the Internet revolution services such as cloud computing and data storage were rare and yet non competitive *vis a vis* the ordinary way in which computer operated.

In the first moment of the internet development, computer's hard drive (local) was an asset. Now the cloud space (remote) is.

This paradigm shift entailed a number of consequences in the field of taxation as well, where Internet is starting to be considered as a new territory rather than a new road. A place where value and wealth resides, not only moved.

This situation brought back in the policymakers' agendas the need for more efficient rules to deal with the IT business in general, and in particular with those using the net as pivot for their business model, considering the net as a territory where new value is created, yet a *terra incognita* (unknown land) for the tax law.

Basically, the International Tax system (if any, as this point is still debated by Academics[2]) was (and still is) on a *westphalian* paradigm. The Westphalia peace signed by states and kingdoms in 1648[3] was grounded on the axiom "*Cuius regio eius religio*": the meaning was that each and every state was free (actually entitled) to settle its domestic affairs in the way it deemed more consistent with the tradition, culture, will of the governing individual (being either a King, a prince of whatsoever). It was the born, in a way, of the concept of sovereignty as it is commonly understood in these days[4].

The westphalian principle rather than being limited to religious issues, was subsequently extended to other fields of social life, including taxation. In this case, the *Westphalia*

[2] Avi-Yonah, R. S. (2007). *International Tax as International Law: an Analysis of the International Tax Regime*. Cambridge: Cambridge University Press.

[3] Croxton, D. (1999). The Peace of Westphalia of 1648 and the Origins of Sovereignty. *The International History Review*, *21*(3), 569–591.

[4] Krasner, S. D. (2007). Sovereignty. In G. Ritzer (Ed.), *The Blackwell Encyclopedia of Sociology* (Vol. 41, p. 20). Oxford, UK: John Wiley & Sons, Ltd. See also on the Westphalian idea of World Order, Kissinger, H. (2015). *World order*. Penguin Books.

Principle rules that within its territory, the state is free to set taxation as it considers more consistent with the priorities of the case[5].

Mainstream academics nowadays confirm that a genuine link is needed between the taxpayer and the state to legitimately impose taxes[6]: in this respect a number of links are commonly accepted, including residence, source, and so on. Yet in their differences, all of them make reference to the territory, to the land. A political scientist[7] would argue that all of the make reference to a common *Nomos* in a way that a state can impose taxes only insofar the taxable base shows some connections with the land. A number of academics already addressed this feature of the International tax system, observing that this conclusion may be justified under the light of the benefit principle, or of the common sacrifice, of according to many other peculiar perspectives, ranging from state to state and from region to region[8]. In any case the land and the connection to it of the taxable base is the only feature that does not vary in all these situations.

There are specific circumstances where apparently the territory is not relevant, just like the case of the US where the liability to tax by the individuals depend on citizenship as well. However, even in this situation citizenship is granted upon the birth in the territory of the Union: so the allegiance of the taxpayer is in a way justified ever since the beginning[9].

Once the tax allegiance is justified, it becomes obvious for the state to tax either individuals or corporations according to the domestic provision of the case and to the technicalities prescribed. Taxation is this respect is not only justified, but in a way due as the wealth generated by the taxpayer belongs both to him and to the sovereign power under whose protection the business is managed, or the activity carried on. This basic assumption is echoed at constitutional level in some states, including Italy, where private enterprise and

[5] Qureshi, A. H. (1987). The Freedom of a State to legislate in Fiscal Matters under General International Law. *Bulletin for International Fiscal Documentation*, *41*(1), 16–21.

[6] See for further references Gadžo, S. (2018). The Principle of "Nexus" or "Genuine Link"as a Keystone of International Income Tax Law: A Reappraisal. *Intertax*, *46*(3), 194–209. See also Greggi, M. (2015). Genuine Nexus or Perpetual Allegiance ? (Some Considerations on the "Diverted Profit Tax" Proposal). *ITax*, *4*(1), 1–27.

[7] Schmitt, C. (1997). *Der Nomos der Erde im Völkerrecht des jus publicum Europaeum*. Duncker & Humblot. First edition in 1950. The author used the Italian translation published by Adelphi in 1991. For the English version see Schmitt, C. (2003). *The Nomos of the Earth*. (G. L. Ulmen, Trans.). New York: Telos Press.

[8] Edrey, Y. (1990). Income Tax Base: Moving from the British Source Doctrine to the American Concept of Accretion to Wealth--The Israeli Experience. *Transnational Lawyer*, *3*, 427.

[9] For a critical view see Mason, R. (2015). Citizenship Taxation. *Southern California Law Review*, *89*(2), 169–240.

even property rights are far from being absolute, but rather granted only insofar they achieved a social goal or purpose as defined by the legislator[10].

The wealth created in the territory of the state may then be framed according to different definition: income, capital or even consumption. Yet in every case the value created (just to mention the most recent OECD surveys in this respect,making continuous reference to the 'creation of value'[11]) is deeply rooted in the territory of the country. This situation helps to understand the reason why the Internet or the digital revolution was so disruptive in this respect, as it *de facto* cut the knot between the power to tax and the territory on one side, and between the 'value creation' and the power to tax on the other. In the westphalian sense "*cuius regio eius tributum*" is true no more.

The word 'Revolution' is very often abused in social sciences, as most of the changes affecting the *status quo* are labelled a revolutionary, whilst just some of them would arguably deserve this qualification. Apparently this is not the case, as the ever increasing centrality of Internet and digital economy drives a real qualitative changes to the common understanding of International tax law and a paradigm shift. Traditional nexuses are progressively blurring and, with them, the power to tax of many states[12]. This chaotic situation might eventually lead either to circumstances where no states charge with tax the creation of value or cases where the several power to taxes are exercised together simultaneously addressing the very same base. Arguably, the legal concept of border shall have to be redefined by International tax lawyers as it is currently by social scientists[13], in the search of definition more consistent with the new ways of understanding and implementing the local power to tax.

[10] See for instance Article 41 of the Italian constitution: "*Private economic initiative is free. It cannot be conducted in conflict with social utility or in a manner that could harm safety, liberty, and human dignity. The law determines appropriate planning and controls so that public and private economic activity is given direction and coordinated to social objectives*".

[11] This is true in particular for Transfer pricing guidelines as defined in Actions 8, 9 and 10 of the BEPS Project. See Schön, W. (2015). Transfer Pricing Issues of BEPS in the Light of EU Law. *British Tax Review*, *50*(3), 417–428.

[12] Ross, J., & Herrington, M. (2013). A Call to Rewrite the Fundamentals of International Taxation: The OECD BEPS Action Plan. *International Transfer Pricing Journal*, *20*(6), 369–373.

[13] Nail, T. (2016). *Theory of the Border*. Oxford University Press.

2. Balancing Taxation with Net Neutrality.

Despite the most recent contributions and achievements in the field: the connection between the internet and Taxation is not a new research area as it has been investigated by academics since the second half of the nineties[14], and by some prominent scholar even before[15]. The common position in this respect was that as the Internet and the Digital economy was to be considered as a new and unprecedented development of doing business the traditional rules were unfit to address, the best option would have been to maintain a neutral approach to the Net. The decision taken on both sides of the Pacific ocean was, at a first stage, to leave problem unaddressed as the wealth generated (more properly, the value) was not of great impact in the global scenario, and that carefully written anti avoidance provision would have prevented improper uses of the tax planning possibilities granted from the Net[16].

It was a short sighted approach anyway. It was rooted on the basic assumption that the Digital revolution was still in fieri and the implementation of new taxing provisions to address it would have curbed its potentiality[17]. On the other side it was also argued in this respect that as the Internet revolution was global, the answer to it would have been global as well. No state, with the only exception of the US in some respect, had the power to unilaterally regulate it. And this *status quo* was entirely consistent with the westphalian paradigm mentioned at paragraph 1 above. As the Net was, technically, a new territory, no state was entitled to regulate it , and as a conundrum, no state was legitimate to tax exclusively the value created on it, or through it. Just to mention the social scientist cited above[18], the Internet was a *Terra Incognita* to whom the *Ius Commune Gentium* was not entirely applicable.

[14] Doernberg, R., Hinnekens, L., & International Fiscal Association. (1999). *Electronic Commerce and International Taxation*. Kluwer Law International.

[15] Skaar, A. A. (1991). *Permanent Establishment: erosion of a Tax Treaty Principle* (Vol. 13). Kluwer Law International.

[16] Cobb, P., Kobrin, S. J., & Wagner, E. (2000). Taxing E-Commerce: The Landscape of Internet Taxation. *University of Pennsylvania Journal of Int'l Law*, *21*(3), 659–678. Cockfield, A. J. (2000). Transforming the Internet into a Taxable Forum: A Case Study in E-Commerce Taxation. *Minnesota Law Review*, *85*(5), 1171–1266. Schafer, C. J. (2001). Federal Legislation regarding Taxation of Internet Sales Transactions. *Berk. Tech. LJ*, *16*(1), 415–433.

[17] The policy justification was summarized in Associated Press Ashington. (2000, May 10). Five-Year Extension of Internet Tax Moratorium Clears House. *The New York Times*, p. 1.

[18] Schmitt, C. (2003). *The Nomos of the Earth*. (G. L. Ulmen, Trans.). New York: Telos Press.

Neutrality as applied to the Net and Digital economy determined a number of consequences in the way in which the business was developed and the taxation conceived in the next years, till today. Neutrality was interpreted in the broadest sense of the concept, as free access to the Net and free circulation on the internet irrespective of the website contacted or the services delivered[19]. The basic assumption was that the traffic on the network could not have been discriminated depending on the website accessed or the service requested by any server in the world, and particularly in the US and in Europe. This was a decision taken by the Presidency of the US in that historical moment[20], the only power in the world that could have influenced the development of the net in a different way. Most notably, the postulate of the neutrality was kept alive till a very recent time[21].

This political decision was not *neutral* for taxation, no matter how paradoxal this position would sound. It helped the development of businesses heavily reliant on the net neutrality such as social networks, search engines and streaming services which generate immense traffic digital traffic, but that yet can be accessed effortlessly by all the internet navigator in the world free of extra charge. This sort of neutrality, not directly mentioning taxation, is nonetheless of dramatic importance to understand the most recent recommendations by the OECD, in particular those making reference to the necessity to link the power to tax to the 'Value creation'[22]. The point is that net neutrality (the neutral access to it) scramble the

[19] The debate concerning Net neutrality is immense. See *inter alia*, Bauer, J. M., & Obar, J. A. (2014). Reconciling Political and Economic Goals in the Net Neutrality Debate. *The Information Society*, *30*(1), 1–19. Cheng, A. S., Fleischmann, K. R., Wang, P., Ishita, E., & Oard, D. W. (2012). The Role of Innovation and Wealth in the Net Neutrality Debate: A Content Analysis of Human Values in Congressional and FCC Hearings. *Journal of the American Society for Information Science and Technology*, *63*(7), 1360–1373. Cheng, H. K., Bandyopadhyay, S., & Guo, H. (2011). The Debate on Net Neutrality: A Policy Perspective. *Information Systems Research*, *22*(1), 60–82. Ganley, P., & Allgrove, B. (2006). Net Neutrality Debate. *Computers & Law*, *17*(3), 24–27. Hahn, R. W., & Wallsten, S. (2006). The Economics of Net Neutrality. *The Economists' Voice*, *3*(6), 1–7. Hart, J. A. (2011). The Net Neutrality Debate in the United States. *Journal of Information Technology & Politics*, *8*(4), 418–443. Peha, J. M., Lehr, W. H., & Wilkie, S. (2007). The state of the debate on network neutrality. *International Journal of Communication Systems*, *1*(1), 709–716. Pil Choi, J., & Kim, B.-C. (2010). Net neutrality and investment incentives. *The Rand Journal of Economics*, *41*(3), 446–471.

[20] Hart, J. A. (2011). The Net Neutrality Debate in the United States. *Journal of Information Technology & Politics*, *8*(4), 418–443. . Lessig, L., & McChesney, R. W. (2006, June 7). No Tolls on The Internet. *The Washington Post*.

[21] Kang, C. (2017, February 5). Trump's F.C.C. Pick Quickly Targets Net Neutrality Rules. *The New York Times*. Retrieved from https://www.nytimes.com/2017/02/05/technology/trumps-fcc-quickly-targets-net-neutrality-rules.html

[22] Schwarz, J. (2018, May 21). Value Creation: Old wine in new bottles or new wine in old bottles? - Kluwer International Tax Blog. Retrieved August 5, 2018, from http://kluwertaxblog.com/2018/05/21/value-creation-old-wine-new-bottles-new-wine-old-bottles/

value creation, shifting the most of it to business which would be less profitable it the neutrality of the net would not be imposed by a political decision.

In the long run, this would entail the necessity to allocate the value created in different ways, taking into account the cost of accessing the infrastructure in the several states interested as well, if the principle of net neutrality would be abandoned, as it appears to be the case in the US[23].

The second way to understand neutrality of the Net concerns directly tax law. At the end of the nineties the US Administration expressy refused to conceive and implement specific taxes addressing the Internet and the Net business[24]. Even if some fascinating models were presented by academics and stakeholders, just like the then-forgotten *Bit tax* proposal[25], no significant changes were made to the US tax system, while in Europe some significant updates affected VAT only[26]. The basic assumption was that rules, definitions and concepts already in force were enough to address the digital revolution. In this respect, a significant debate arose on the definition of permanent establishment[27] or on the income qualification [28] (business income or royalties) but no common decisions were taken. It's still hard, and in some respect useless, to assess whether this decision was taken by the US with a clear vision of the possible future development of the net and the American supremacy on it, or not. It is significant nonetheless to observed that the neutrality (or inactivity) that characterised the legislator on the two sides of the Pacific ocean fostered the development of the Net and the primacy role of content-provider businesses in a way that is nowadays commonly accepted.

This granted the primacy of qualified Digital companies (those granting the services) on others (access providers). The overall outcome contributed dramatically to the complexity academics and practitioners together with stakeholders are supposed to address today, as it makes harder and harder to assess the place the company belong to and the country where

[23] See footnote 24 above.

[24] Hart, J. A. (2011). The Net Neutrality Debate in the United States. *Journal of Information Technology & Politics*, *8*(4), 418–443.

[25] Cordell, A. J. (1997). Taxing the Internet: the Proposal for a Bit Tax. *Journal of Internet Banking and Commerce*, *2*(2), 1–8. Soete, L., & Kamp, K. (1996). The "Bit Tax": The Case for Further Research. *Science & Public Policy*, *23*(6), 353–360.

[26] Council Directive 2002/38/EC.

[27] Skaar, A. A. (2000). Erosion of the Concept of Permanent Establishment: Electronic Commerce. *Intertax*, *28*(5), 188–194.

[28] De Hosson, F. C. (1992). Taxation of Cross-Border Software Payments (Article 12). *Intertax*, *20*(12), 682–687.

value is actually created, as essentially the value of the content is separated from the value of the access.

The development of the case-law was consistent with this policy position, as in the US the landmark case *Quill vs. North Dakota*[29] the US supreme court ruled that the state of the source could not charge a sale tax on goods sold remotely by a business without a significant presence in the State[30]. And to those objecting that this position would have allowed an unjust business advantage to the internet company *vis a vis* the local one the Court objected that the US Constitution in general an the Commerce Clause[31] in particular would have prevented alternative decisions to this one.

It was, all in all, a *westphalian* ruling[32] in the sense clarified above, and it is noteworthy to observe that it took till this year (2018) to the US supreme court to overrule that decision.

3. Comparing Models of Digital Taxation: the EU and the US experiences (Consumption Taxation before and after 2003).

The first structural attempt ever made by the EU to address digital taxation was made in the field of VAT in 2002[33], and it was another case of *technology push*. As a matter of fact, the change in the territorial principles regulation the application of the European consumption tax was due to the ever increasing incidence of electronic commerce and the relentless erosion, *ante litteram*, of a taxable base that would have been otherwise to be charged within the EU. Till 2003 VAT was supposed to be charged in the State where the seller was deemed to be resident for VAT purposes. From 2003, in case of ecommerce (or e-commerce equivalent sales) the place VAT was supposed to be charged was shifted to the state where the consumer (or her place of business) was located. This change was lately confirmed by

[29] 504 U.S. 298 (1992).

[30] The case actually concerned the possibility to make the non resident business acting as a proxy for the collection of tax. Under the law, the resident consumer is supposed to spontaneously report the purchase and pay the due tax. Experience demonstrated tha spontaneous compliance was anyway rare.

[31] Article 1, Sec. 8, Clause 3 of the U.S. Constitution.

[32] That is, a decision consistent with the theoretical framework described above at § 1.

[33] See footnote 29 above. Hinnekens, L. (2002). An Updated Overview of the European VAT Rules concerning Electric Commerce. *EC Tax Review*, *11*(2), 65–71.

the so called VAT package in 2008 (directive 2008/8/EU), which also validated the way and means through which the non resident taxpayer was supposed to pay the tax due[34].

VAT application to ecommerce (and to remote sales as well) before 2003 was in a way consistent with the *Quill* rule in the US, but not entirely for the same reasons. Both Sales taxes (or Use taxes) in the US and VAT in Europe could not be charged to remote sales due to the lack of a significant territorial connection between the seller and the territory where consumption occurred. The reasons were in a way different. In *Quill* the US Supreme Court decided on the basis of the Commerce clause applicable to a single-stage consumption tax[35]. The finding of the Court was that while the tax could potentially be charged aso to ecommerce transaction from one state to another, nonetheless the seller could not be requested to discover, calculate and charge the sale tax of the state jurisdiction he was not resident within. This task would have created an intolerable complexity to cross border (but within the Union) sales of good incompatible with the commerce clause and the goals it seeks to pursue. In the US, therefore the application of indirect taxes to ecommerce transactions was possible in theory, but unfeasible in the practice[36]. In the EU, on the contrary, the statutory provision prevented the application of VAT to that kind of business without any possibility. A statutory change was needed in 2002 to adjust the application of VAT to ecommerce and charge those transaction with the European tax[37].

The change made to European VAT was coherent and consistent. It was coherent with the scope of the tax, namely to charge the consumer, and it become obvious that VAT should be charged (and paid) by (and to) the tax jurisdiction the consumer is resident in. The technical complexities affecting e-commerce and digital taxation were easily solved via the progressive implementation of software and electronic solution aimed at easing the compliance of the business. It also determined a situation and a legal regime very similar to the one qualifying the importation of goods through the Customs. In both cases (importation of goods and delivery of internet services from outside the EU to inside) VAT was charged on the value of them as invoiced. The system was therefore homogeneous and

[34] Greggi, M. (2010). Rethinking the Place of Consumption: New Issues Under the VAT System. *Tax Notes International*, *59*(13), 1057–1066. Raponi, D. (2000). EC Developments: VAT treatment of electronically delivered services. *EC Tax Review*, *9*(3), 188–189.

[35] See footnote 34 above.

[36] See footnote 33 above.

[37] See for references to the provisions and how they were changed Hinnekens, L. (1998). The Challenges of Applying VAT and Income Tax Territoriality Concepts and Rules to International Electronic Commerce. *Intertax*, *26*(2), 52–70.

efficient in this respect. The tax has to be paid where the consumption occurred, and this place was supposed to coincide with the country the consumer was resident in. Practitioners know well that the equivalence is not always respected, as the actual consumption might occur in a state different from the one where the consumer (or its permanent establishment) is located. Nonetheless, with a certain margin of appreciation, the simplification can be accepted and held for true.

The solution adopted by the EU was also coherent, quite surprisingly, with the principles regulating the legal system of the US. It did not charge the seller with the local use tax in case of cross border delivery of services (quite obviously a US resident business delivering services to a European consumer was not charged by any indirect tax in the US). In this way, no double taxation occurred to the business transaction, and no loophole (double non taxation) was registered.

Some prominent stakeholders and academics[38] objected that the end of the game was in favor of the European Union, as in this was the power to tax of the countries in the old continent was extended to situations and transactions that were not covered in the past, however this extension was made coherently with the spirit of the tax and upon the assumption that the US didn't opt for an extended application of their local taxes, mostly because of the commerce clause as implemented domestically. As it was consistent with the legally system of both the states (considering the EU as a state for VAT purposes as the territoriality regime is fully harmonized) it could be argued that the overall outcome was *westphalian* in its nature[39] as well.

4. Continued (Direct Taxation before BEPS Action 1).

The application of direct taxes to 'Digital businesses' or 'Digital economy' has alway been always more complicated and uncertain: this arguably also because of the ambiguous nature of the words used to address the phenomenon. A common understanding is that the reference should be intended to the Tech Giants operating on the internet, most of which are US based. This is obviously true under a descriptive point of view, albeit 'Digital economy' or 'Digital' business' are no more definitory than the concept of 'Analogic

[38] Kogels, H. A. (1999). VAT@ e-commerce. *EC Tax Review*, *8*(2), 117–122.

[39] See the clarifications at footnote 35.

company' or 'Analogic business'. As a matter of fact most of the traditional business, "brick and mortars" ones as they are frequently referred to, have digital components in their system of value creation. As a conclusion, digital economy is an inaccurate concept used to frame a vast number of businesses that is used in this paper, because it was suggested in the past by stakeholders, including the European commission in particular[40], and of common use.

Direct taxation of digital business proved to be less flexible than VAT or sales tax, and there are multiple reasons for this situation.

First of all, no significant international treaties or agreement have ever been signed in the past in the field of VAT or consumption taxes as they were for direct tax purposes: the international situation was therefore more flexible and adaptive for VAT in comparison to Income taxation.

Secondly, because the development of the international tax system throughout decades conveyed rules and principles that were progressively changed by the development of digital economy and the tax planning opportunities attached. In other words, the extreme mobility of the digital businesses together with the principles regulating residence and permanent establishment under double taxation conventions allegedly allowed qualified multinational enterprises to erode their tax liability in the residence state and in the source state, virtually reaching a status of double non taxation[41].

Under a purely philosophical perspective, it could be argued that most of the extremely sophisticated business schemes discovered an criticized[42] were enacted to overtake the *wesphalian* approach described above. Once it is commonly understood that a company is supposed to pay taxes (is liable to tax) in the country it belongs to[43], the tax planning schemes led to a situation were the business (or the value added) belonged to nobody (*neminis regio, neminis tributum*). This is unless more bold reform of international corporate taxation are implemented[44]. Philosophers including Van Groot[45] ad social scientists like

[40] See for instance the *Digital Market Strategy* of the European Commission, as described at https://ec.europa.eu/digital-single-market/en.

[41] See for further references the BEPS Project Action 1, OECD. (2015). *Addressing the tax challenges of the digital economy, Action 1 - 2015*. OECD.

[42] See for instance Duhigg, C., & Kocieniewski, D. (2012). How Apple sidesteps billions in Taxes. *The New York Times*, pp. 1–5.

[43] Couzin, R. (2002). *Corporate Residence and International Taxation* (pp. 1–280). Amsterdam: IBFD.

[44] Devereux, M. P., & De La Feria, R. (2015). *Designing and implementing a destination-based corporate tax*. Oxford Business School. Devereux, M. P., & Sørensen, P. B. (2006). *The Corporate Income Tax: International Trends and Options for Fundamental Reform*. Department of Economics, University of Copenhagen. .

Schmitt[46] observed that international law iura gentium, were to be applied and considered to be binding on the Old continent only, where in the colonies or in the *Mare Liberum* (Free open sea) they were not applicable at all. This commonly accepted rule allowed centuries ago the UK to wage war against Spain in the colonies while remaining at peace in the continent[47]. Hard to be framed in one state or in another, business income derived from ecommerce was easy to be channeled in low tax jurisdictions: this probably lead to a misunderstanding that still haunts the debate nowadays, and a bias that still exists in the two European directive proposal that will be discussed in the forthcoming paragraphs.

The point is that that concerns related to taxation of digital economy are twofold. On one side they derive from the risk for income to be taxed neither in the source state nor in the residence state (as far as these two concepts could be applied to the 'Digital businesses'). On the other side concerns are that business income would be taxed by a state not deserving to do it. In either one, of course, the calculation of the taxable base and the tax due is complex and always uncertain.

Before and during the intervention of the OECD in this field (most notably with Action 1[48]) states reacted to this situation unilaterally, with most of the initiatives induced by the ongoing global financial crisis affecting most of the developed countries. Despite the singularity of each remedy, three different positions could be identified. On one side there are the developing countries, with little or no technical capacity to address the issue. These states were left virtually unaffected by the problem as their domestic market was not structured enough to become sensitive to digital taxation. On another side there are the *digital exporting* countries (such as the US and probably in the short run China as well) that opted to stay consistent with the neutrality principle cited above, possibly using traditional anti avoidance provisions to curb the most aggressive planning cases. Eventually, a third group of countries was found in a different, and to some extend ambiguous situation.

Devereux, M. P., & Vella, J. (2014, November). *Are We Heading Towards a Corporate Tax System Fit for the 21st Century?* Oxford Business School.

[45] Grotius, H. (2012). *Hugo Grotius on the Law of War and Peace: Student Edition*. Cambridge University Press. The reference is to the concept of *Mare Liberum*.

[46] Hildebrandt, M. (2013). Extraterritorial Jurisdiction to enforce in Cyberspace ? Bodin, Schmitt, Groitus in Cyberspace. *The University of Toronto Law Journal*, *63*(2), 196–224. Schmitt, C. (2003). *The Nomos of the Earth*. (G. L. Ulmen, Trans.). New York: Telos Press.

[47] See for further references Coleman, M. (2011). Colonial war: Carl Schmitt's deterritorialization of enmity. In S. Legg (Ed.), *Spatiality, Sovereignty and Carl Schmitt Geographies of the Nomos*. Routledge.

[48] See footnote 44.

These states were developed enough to understand the threats digital revolution was posing to the collection of taxes, with more and more income liable to tax elsewhere as it was generated vis schemes falling outside the traditional definition of permanent establishment. Yet at the same time they were not in the position to be considered as service exporters, thus not indirectly benefiting from the digital revolution, and will few or no domestic digital champions to protect. This was the case of most of the European countries, of Australia, arguably New Zealand and most of the BRICS states. Not surprisingly, the first unilateral moves to address digital business came from the - in a way - losers of the Digital competition on a global scale.

The challenge posed by digital taxation was unprecedented and launched directly to the *westphalian* order. In the vision of the developed or developing countries, a significant amount of taxable bases were eroded in favor of another country and, more than that, on some occasion of no state at all. In this second direction the challenge was *non-westphalian* in its nature. The policy reaction therefore was urged in a way as to make these Tech Giants (and the other minor companies) to pay their *fair share*[49] of taxes ... to the state which was legitimate to ask for them.

Digital taxation raised two question at the same time, in need of separate answers. Namely: make businesses liable to tax, and make them pay where they ought to. The answer to the first question, in the eyes of the european policymakers was quite simple as it could be delivered in a way that was already - successfully - used with VAT. And due to the reluctant behavior of the US Administration (in particular, the former one) to charge big Tech Giants with US taxes allowing form of deferral[50], the European policy decision would not overlap the power to tax of another state.

This help to understand the decision taken by the Commission that led to the drafting of the two directives[51]. They were, basically, an attempt to use VAT friendly concept and a VAT

[49] *Fairness* in taxation is another idea often conveyed by newspapers and qualified stakeholders: eventually it has contaminated the European commission too (https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en). Under a legal perspective, the concept is so vague and subject to the discretion of the interpreter that it can be hardy of any use in the current debate.

[50] See in particular the new BEAT (Base-erosion and anti-avoidance tax) provisions in the Trump's reform. Nguyen, L. (2018, May 1). Which taxpayers are potentially subject to the new "BEAT"? Retrieved August 6, 2018, from

[51] Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant Digital Presence, COM(2018) 147 *final* delivered on March 21st 2018. Proposal for a

approach to direct taxes. The strategy was, and still is, to expand the power to tax of the European states far beyond the usual borders assuming that this expansion is consistent with the traditional rules of the *ius commune*. Europe tried to reshape borders in a *Terra incognita* arguing that the US would have accepted the *status quo* as coherent and consistent as clarified above.

A European academic might see strong points and flaws in this approach. On one side the European strategy clearly makes confusion between the two challenges posed by the Digital economy. Claiming to fight against double taxation, the European proposals are aimed at expanding tax liability in the exclusive interest of the countries of the European union, and of the states where the largest pool of consumer is located (another evidence of the VAT-centric approach).

There are also lights anyway. The very recent and landmark case *Wayfair vs South Dakota* decided by the US Supreme Court[52] overruled the *Quill doctrine* opening ground to the possibility to use the Digital Presence test as a catalyst for the power to tax of the different states of the Union.

The *Wayfair* decision brings such an innovation[53] to the way in which Digital taxation shall be conceived in the years to come that goes far beyond the US, and would potentially justify some of the policy decision taken by the EU. In the next paragraph essential aspects of the two directive shall be addressed in the light of the ruling, trying to find the point where the EU and the US approaches are closer to each other. In any case, the *Wayfair* decision was taken in the framework of a consumption tax case and the possibility to transplant its conclusion beyond the ocean and to income taxes might be more challenging that would seem at first glance.

Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 *final*, delivered on March 21st 2018

[52] Decided on June 21st 2018. 585 U.S. ___

[53] Avi-Yonah, R. S. (2018, June 25). *Designing a 21st Century Taxing Threshold: Some International Implications of South Dakota vs. Wayfair*. *http://www.law.umich.edu/*. University of Michigan Law School. https://doi.org/10.2139/ssrn.3201418

5. The Commissioner *Moscovici*'s Proposal for Digital Taxation in the European Union (and its Consistency with BEPS Action 1).

On March 21st 2018 the European Commission delivered a comprehensive proposal concerning taxation of the 'Digital economy'. It didn't came out of the blue, as it was developed after a careful consultation of local (European) and International stakeholders and abiding (as much as possible) by the recommendation that the OECD expressed in the framework of the BEPS project in general, and Action 1 in particular. The decision to unveil the proposal was taken after an unexpected leak to an international online newspaper[54] that was able to unveil some of the details to the public and right after the decision of some states (like Italy and the UK) to act independently in this field passing respectively a Diverted profit tax and a Digital tax both nicknamed "*Google Taxes*" even if with little or no common background and functioning.

The proposal of the Commission is articulated both under a qualitative and a quantitative points of view. The complexity derives from the delicacy of the themes addressed, the understanding that any decision actually implemented might ignite reactions by other important states and business partners, and from the fact that actually the bold step by the European union would be taken outside any *westphalian* framework. This is very true in particular for the Digital tax proposal[55].

The interaction between the different sources of law should not be underestimated as well. The Commission proposal is also supposed to strike a balance between different sources of rules currently regulation *in parte qua* the digital taxation. There are domestic provisions (differing from each other), OECD recommendations (*soft law*) inspiring the decision to be taken[56], double taxation conventions and international tax law arrangement to be considered as well and that can not be easily overwritten by any European decision (in particular in the field of direct taxes where the power of the European union to legislate is limited for the well known reasons[57]).

[54] https://www.politico.eu/article/eu-plans-tax-on-tech-giants-revenue-report/. The text leaked was dated February 26th 2018 and it did not mirror entirely the final proposal as made public.
[55] COM(2018) 148 *final*.
[56] Gribnau, H. (2008). Soft Law and Taxation: EU and International Aspects. *Legisprudence*, *2*(2), 67–117.
[57] Ganghof, S., & Genschel, P. (2008). Taxation and democracy in the EU. *Journal of European Public Policy*, *15*(1), 58–77.

This is arguably the reason why the Commission proposed two directives and a recommendation with the support of the European parliament, which already had the opportunity to express his view about that[58]. The sophisticated mix between hard law and soft law provisions is arguably the best feasible option to each changes capable of efficiently interact with international treaties and local decisions.

The quantitative dimension is also addressed considering that some of the decisions taken by the Commission are aimed at reshaping the notion of permanent establishment within the EU[59], some other the very same notion in treaties with third countries[60] and eventually finalized at the implementation in the EU of a brand new, unprecedented tax supposed to target the qualified digital transaction[61]. This new tax should be indirect but not consumption based. And of course aimed at the non resident entities doing business in the EU.

The strategy apparently is to cut the gordian knot that bonds the European union to the principles characterizing income taxation on a global scale, and the peculiar application of VAT that has already been changed as described in paragraph above[62]. Consumption taxation based on turnover cannot be amended further on in this respect.

The tax borders of the European union appear to be expanded, virtually encompassing this time taxable bases that would normally fall outside the power to tax of the European partners, including taxable bases virtually left untouched so far.

6. Introducing the *Significant Digital Presence* Test.

The highlights of the European intervention in the Digital economy were briefly summarized above. The Commissioner proposed to intervene on the definition of Permanent establishment for direct taxes purposes. The Commission, actually, suggested to patch the current definition adding the the "*Digital presence test*" to non resident businesses carrying on their activities in another state. This sort of add-on to the notion of PE, however should be used only insofar the treaty of the case is supposed to be applicable between member

[58] During the Plenary Session on March 15th 2018, Resolution P8_TA(2018)0087.

[59] Article 4 of the Directive proposal.

[60] See the Recommendation of the Commission C(2018) 1650 *final*, released on March 21st 2018.

[61] Articles 3, 5 and 6 of the Directive proposal COM(2018) 148 *final*.

[62] See § 3 above.

states of the European union[63]. The second proposal (actually, a policy guidelines) addresses the states of the Union and encourage them to negotiate (or renegotiate) double taxation convention (either inspired or not by the OECD model) as to accommodate the notion of significant Digital Presence in them in the years to come[64]. The Commission understands that an hard law instrument in this respect would have not been feasible, as it would have determined a violation of International law (*pacta sunt servanda*) a treaty override[65] and a possible liability of the member state for breach of the applicable Convention. The third document (a directive proposal) concerns the much-celebrated digital tax, to be charged from delivery of qualified digital services, including those from outside the EU. Far from being an Income tax or a VAT, the Digital tax appears to be a brand new indirect fee innovative as Financial Transaction Tax was, and pretty much similar to a sort of Excise duty on digital services.

The current paragraph is dedicated anyway to the proposed changes to the notion of permanent establishment, as to make it consistent with the revolution of the internet and of the services delivered electronically.

The proposal makes the most of the findings academia reached at the end of the nineties[66] (whilst no credits or references are made to that debate) while addressing the issue of digital commerce (or ecommerce). There was evidence, in that historical moment, that the notion of permanent establishment was somehow surpassed as the business models development was making easier and easier for non resident companies to do business elsewhere without the need of fixed seat or a stable representative.

[63] Article 4 of the proposal. The Commission states literally that the aim is to determine a "*Digital footprint*" to the taxpayer in the member states.

[64] See footnote 63 above.

[65] Avi-Yonah, R. S., & Xu, H. (2017, March 17). *A Global Treaty Override? The New OECD Multilateral Tax Instrument and Its Limits*. *http://www.law.umich.edu/*. University of Michigan Law School. https://doi.org/10.2139/ssrn.2934858

[66] Kobetsky, M. (2011). *International Taxation of Permanent Establishments*. Cambridge: Cambridge University Press. Reimer, E. (2011). Permanent establishment in the OECD model tax convention. In E. Reimer, N. Urban, & S. Schmid (Eds.), *Permanent Establishment - A Domestic Taxation, Bilateral Tax Treaties and OECD Perspective* (Vol. 1, pp. 1–178). Alphen aan den Rijn: Kluwer Law International. . Reimer, E., Urban, N., & Schmid, S. (2011). *Permanent Establishments: A Domestic Taxation, Bilateral Tax Treaty, and OECD Perspective* (Kluwer Law). Kluwer Law International. Requena, J. Á. G., & González, S. M. (2017). Adapting the Concept of Permanent Establishment to the Context of Digital Commerce: From Fixity to Significant Digital Economic Presence. *Intertax*, *45*(11), 732–741. Schön, W. (2007). Attribution of Profits to PEs and the OECD 2006 Report. *Tax Notes International*, *46*(10), 1059–1072. . Skaar, A. A. (1991). *Permanent Establishment: erosion of a Tax Treaty Principle* (Vol. 13). Kluwer Law International.

A number of cases were raised at that time, long before the e-commerce boom, and some solutions were found by the judiciary in an interpretive way, stretching as much as possible the traditional definition of permanent establishment[67], it was suggested to consider as such a website, a server or many other technical equipment necessary to operate the commerce online[68].

None of these solutions was found satisfactory. Criticism[69] emphasised the uncertainty attached to each one of them, and the possibility by the taxpayer to arrange the presence of a website or a server in a way as to minimize the tax burden. It would have been very simple, as it currently happens but not for tax purposes, to allocate the servers in friendly jurisdictions.

The European Court of Justice contributed greatly to this extend in the field of VAT adding that in order to have a fixed seat of business for VAT purposes a human presence was needed[70]. Obviously this ruling (then transformed by the Council in a statutory provision[71]) curbed the possibility to extend the interpretation of permanent establishment or to have a uniform understanding of it for direct tax and VAT purposes in Europe.

The efforts made valiantly by the OECD never went beyond policy recommendations and changes to the Model Convention as it was not possible at policy level to reach a significant consensus between the states. This reluctance to proceed would eventually leave a significant leeway to the member states to act unilaterally. Some of them used this opportunity and implemented unilateral provisions aimed at targeting the Tech Giants and their business model.

The unilateral reactions are not following the same pattern. Some of them are addressed at tax planning structures, and the UK solution does. In this respect, the *Google Tax* is triggered when an abusive behavior by the taxpayer is detected[72]. Others, just like the Italian one, are

[67] Greggi, M. (2008). The Concept of "Permanent Establishment of a Group of Companies" in a Recent Case of the Italian Supreme Court (Corte Di Cassazione). *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.1321799

[68] A more conservative position was taken recently by the Administrative Court of Paris (Tribunal Administratif de Paris) in the case n° 1505126/1-1 decided on July 12nd 2017 in the *Google Ireland Ltd*. Case.

[69] Choudhary, V. (2011). Electronic Commerce and Principle of Permanent Establishment under the International Taxation Law. *Int'l Tax J.*, *37*(4), 33–57.

[70] The landmark case is ECJ C-168/84, July 4th 1985, "*Gunter Berkholz*". See also more recently C-605/12, October 16th 2014, "*Welmory*".

[71] EU Regulation 2011/282/EU, Article 11.

[72] Greggi, M. (2015). Genuine Nexus or Perpetual Allegiance ? (Some Considerations on the "Diverted Profit Tax" Proposal). *ITax*, *4*(1), 1–27.

structural and supposed to be applied irrespectively from the tax actually paid abroad by the taxpayer. The British solution appears to be more *westphalian* in this respect. The Italian one definitely is not.

The European Commission moved in the attempt to strike a balance between the need to raise more revenue in member states, where value is actually created, and the one where the foreign business is incorporated.

It does not target the Digital companies as a whole, but only those delivering specific kind of services, with the exclusion of indirect e-commerce, but in considered the amount of sales delivered in the respective countries[73].

A Digital presence is deemed to exist when an amount of sales triggers a specific amount for a number of transaction is reached even without the presence of a permanent establishment in the traditional sense[74]. When these conditions are met while doing the kind of business specifically mentioned in the directive, then a presence is considered to exist and business income is taxed in the state of reference.

As the first comprehensive solution ever delivered at european level, it is characterized by pros and cons that have already been put under the spotlight by academics and practitioners[75].

On one side, it is clearly inspired by the VAT approach in this kind of situation. Despite the technicialites, the complexity of the definition and the overall system, there is no doubt that the legislator intended to emphasise the importance of the sales that occurred in a specific state. The reason is that if a non resident company reaches a specific number of sales in another state, then that company is deemed to have a base there. Under a theoretical perspective this conclusion may be justified in a number of ways: none of them has been forgotten by the Commission in the preliminary *Consideranda*. It could be argued (and actually was) that once a significant amount of sales occurs, then the non resident company actually exploit the network existing in another state, or that it has access to the market, or that it makes the most from the legal framework the sales occur in. All these observations are reasonable and sound.

[73] Two Annexes at the directive (II and III respectively) provide a list of the services to be considered and to be excluded from the scope of the proposal.

[74] For further details and thresholds specification see Article 4, § 3 of the proposal.

[75] O'Shea, T. (2018). The EU's proposed "significant digital presence" framework. *Tax Notes International*, *90*(12), 1295–1299.

Yet, there is no doubt that Digital Presence has been introduced for the first time in the EU legal system with a strong bias: the reference is obviously to VAT. The nexus proposed by the Commission in strongly linked with the one used for VAT purposes and diverges from the recommendation of the academia[76]. Besides the definitions delivered by the Commission, it is evident that the Digital Presence depends on the level of consumption occurred in the specific state. The higher the amount of sales, the likelyer the possibility to be deemed resident for (direct) tax purposes.

It was a clear trade off between legal certainty for the taxpayer and the nature of income tax. The Commission decided for the first regulating income taxation according to benchmarks fot for VAT.

Across the ocean, the US SUpreme court had to address a similar challenge in Wayfair, but with one remarkable difference. In the US the COurt was asked to decide for consumption taxes only, and its definition of Digital presence (quite surprisingly mirroring in principle the European one) is consistent with the challenged tax that that was, in a way, the equivalent to VAT in the Old continent (although structurally different).

In the *Wayfair* case[77], the US Supreme Court ruled that once a company is considered digitally present for Sales tax purposes (with the benchmark linked to the amount of sales or the turnover realized in the other state[78]) then it may be requested from the state of the case to collect taxes from the customers and pay them to the other relevant state of the Union.

This is pretty much the very same approach followed by the Commission in Europe, with the only distinction that in the EU this is made applicable (or would be made) to income taxes as well.

The European proposal, VAT flavored, should not trigger an harsh reaction by third Countries, including the US. First of all, the scope of the directive is limited to intra EU transaction and intra EU business operation. At worst, this would collide with treaty provisions benefitting other states in case of benefit extended to third countries, but it's

[76] Devereux, M. P., & De La Feria, R. (2015). *Designing and implementing a destination-based corporate tax*. Oxford Buisiness School.

[77] See footnote 55.

[78] See pages 22 and 23 of the decision, with reference to the *Substantial nexus* of the *Complete Auto* precedent. Even the dissenting opinion delivered by Justice Roberts apparently share this view, making reference to the compliance strategy pursued by Amazon in the US (see page 5 of the opinion supported also by Justices Breyer, Sotomayor and Kagan).

hard even under a theoretical level to imagine such a violation (this would be the case of a EU state which committed itself in front of a third country to respect the OECD definition of permanent establishment). So in this respect it would not impact on the non European companies doing digital business in the EU operating from outside the old Continent.

The situation obviously is different if the focus is shifted to an intra-EU situation. Here there are winner and losers. In particular, the directive clearly has the goal to reallocate income generated by the European subsidiaries of non European MNEs, which are generally conveniently located in the most favourable tax jurisdiction of the Union, such as Ireland, Luxembourg and others. In this respect it would be easier for another member state with a huge market made accessible to those companies, to attract a base that would be otherwise lost to the detriment of the domestic needs for revenue.

Because of the domestic (that is, European) scope of the directive, that would have been the good occasion for extending the jurisdiction of the ECJ in all those cases where the Digital Presence is challenged by the taxpayer, in order to provide a more robust and comprehensive case law to be used in doubtful cases in the years to come.

Likely, the instrument of the enhanced cooperation[79] between states would have been an interesting tool to override potential the double taxation convention extending the scope of the Digital Presence far beyond the limits set to the directive to get unanimity, and cover in this way also the profit generated by the traditional e-commerce that are currently falling outside the scope of the provisions discussed so far.

7. Rise (and Decline ?) of the European Digital Tax.

After more than 20 years from the first boom of the Internet economy (the "*.com*" bubble), the Net is yet a *Terra Incognita* (Unknown land) to many respects. This is also true for taxation of it, and in particular when new kind of taxes and taxable bases are considered.

The decision by the Commissioner to propose a brand-new tax in this field is justified on practical grounds. First of all, another multiple-stages consumption tax would have missed the actual target, eventually overlapping the already existing VAT, which is supposed to be the only consumption tax of this kind applicable in the EU.

[79] Art. 20 Treaty on European Union.

On the other side any income tax would have been *a bridge too far* for the policymakers in Bruxelles. Under a legal standpoint, the juridical basis for a direct tax to be applied in the Union are feeble at best, inconsistent as worst. They could be vetoed by one state only. Besides these technical features of the EU decision making process, an income tax targeting digital company would have collided both with the Digital Presence status described at paragraph 6 above (making it or that quite redundant) or with the network of the double taxation conventions already in force. It would have determined a massive treaty override by the states of the Union, hard to be defended by third countries such as the US, China, India and so on.

The choice that was actually made appears more reasonable: it invents from scratch a new tax to be charged on qualified digital transaction delivered in the European Union. This tax is supposed to be charged on the turnover with a rate of 3% and in favor of the State the clients are resident it. Under a theoretical perspective, it does perfectly make sense with the VAT-centric attitude of the Commission, using nexuses and links familiar to the european consumption tax to make other taxes workable in the continent.

The justification chosen by the Commission is that in most (although not every) digital service, the consumer (the client) make a significant contribute in the creation of the value[80] . This is very true in cases mentioned by the Commission in the *Consideranda* and preliminary report, just like the social networks and the other user-generated portals. The Commission observes that the creation of the value does not depend entirely from the skills of the computer programmer or the creativity of the inventor of the social network, of the search engine or so, but also from the people using it, while data are then probably shared to carry on further profiling. If we were to put this example to the extreme, it could be argued that the value of a search engine would be zero without websites to search in, and therefore that value of search engines such as *Google* (just to mention the most prominent one) is derived from the web it operates on. This is an argument that perhaps goes to far, but sounds reasonable in the eyes of the Commission as it justify a modest surcharged to the business managed.

[80] Article 3 of the Proposal.

If we accept the assumption that the user (the client) of the service is actually a part of the very same services delivered (a *Prosumer*[81]: producer and consumer together), the it sounds perfectly reasonable to link the power to tax to the state where the user is located, to be assessed. This is essentially because, in the eyes of the Commission, there is where the value is created.

The point is that despite the enduring efforts by the OECD and the EU Commission, value is an entity hard to be framed: it's even harder in the field of law in general or in tax law in particular. Prominent academics and philosophers have spent centuries debating on the concept of value and wealth[82]. The only conclusion they arguably agree on, is that the idea of value depends on a number of factors that can not be easily managed, depending as they are on the time, the place, the peculiar relations between the two parties in the contract and the social environment they live it. So the cornerstone of the OECD policy and EU directive is anything but certain, and can be accepted only with a huge margin of approximation both by academics and practitioners.

Value is nonetheless essential in the European architecture as to ground, using traditional concepts, the power to tax to the European soil. It is, in a word, the genuine link (International Tax law's *Holy Grail*) allowing a state to tax a cross-border wealth.

As it appears, the base is determined by the revenue of the non resident entity deriving from advertising and the sale of promotional spaces on the internet or on the mobile app[83]. All the other internet business models are excluded (such as, for instance, traditional e-commerce or streaming services). Further provisions of the proposal clarifies that the tax is charged with a rate of 3%[84] to the overall turnover generated in the framework of these activities, with the revenue to be allocated to each state depending on the number of clients (user-generating) resident there. In this respect, the IP (or other equivalent parameter) should be considered to assess the residence status to the purposes of this tax[85].

[81] Kotler, P. (1986). The prosumer movement: A new challenge for marketers. *Advances in Consumer Research*, *13*(1), 510–513. Ritzer, G., & Jurgenson, N. (2010). Production, consumption, prosumption: The nature of capitalism in the age of the digital "prosumer." *Journal of Consumer Culture*, *10*(1), 13–36.

[82] See Robbins, L. (1998). *History of Economic Thought: The Lse Lectures*. Princeton University Press. The Italian version was used to the purposes of the part of the paper: Robbins, L. (2001). *La misura del mondo. Breve storia del pensiero economico*. Ponte alle Grazie.

[83] Article 3 of the Proposal.

[84] Article 8.

[85] See Articles 6 and 10.

If we are to use the classical terms to qualify this brand-new tax, it would be possible to label it as a sort of Excise of the new millennium. It is charged on specific businesses with a possible trickle down effect (although more complex than the one characterizing the classic ones) and on the actual amount of the services generated. It also determines a problem of double taxation (as arguably advertisement spaces might be subsequently sold by the purchaser), an overlap with other taxes such as VAT and income taxes as well (the excise is charged of the price of the service net of VAT, but it is not clear whether it would impact on the taxable base of the consumption tax as customs fees does; on the other side, the proposal confirms the possibility to deduct if for income tax purposes).

Besides the remarkable technicalities and burdensome compliance tasks to be addressed together with the necessity to cope with other crucial recent provisions enacted by the Council (including the GDPD and the directive concerning crowdfunding and investment schemes on the Net[86]) the proposal appears to be a tailor made suit. Rather from addressing the Digital services world at large, or the Digital economy as it is commonly defined, the Directive proposal is aimed at specific, qualified forms of business, targeting in particular at the advertisement revenues. It does that using links different from those commonly implemented for VAT purposes where such an apportionment between states of the tax charged is not admissible.

There are, moreover a number of cases where the value generated by user is completely disregarded by the legislator, and where, on the contrary it should be taken into account to this purpose. The *Amazon* business model, for instance, is also based on user-generated opinions of the merchandise sold, and the services delivered. Opinions concerning the equipments bought and their actual quality are left by the clients. These public opinion have a quasi-advertising effect on others, eventually boosting up (if positive) the sales. This would be a case of application of the tax if the traditional ecommerce would not be explicitly excluded by the european proposal.

It is therefore an extraordinary fee, aimed at selective multinationals with peculiar business models, trying to fix distortions … with further distortions.

[86] See § 5, page 9 of the Explanatory memorandum to the proposal.

8. Concluding Remarks.

The words taken from Kundera's Masterpiece to open this paper[87] defeat the years passed and appear to be appropriate to describe the forthcoming news in the field of Digital taxation. In order to figure out the possible consequences deriving from the implementation of the whole package (consisting of two directives and a policy recommendation) it is necessary to summarize the fields it intervenes on and the *status quo* it will arguably disrupt.

Within the EU, it will modify the long time settled definition of Permanent establishment for income tax purposes, fixing the double taxation conventions in force and eventually overriding them where they are unfit to allocate income generated in the Source state. Specific thresholds are set to limit the scope of the changes suggested.

In the relation with third states the Commissioner proposes a new tax to be charged on qualified, specific and limited digital services delivered across the internet. They are not specifically mentioned, but it is evident that the core of the tax is intended to be applied on advertising and shall be due by those platforms (either resident in the EU or not) that make extensive application of user-generated content in order to profile and optimize the advertisement service.

This new tax is indirect by its nature and to be charged together with others, if due.

Even if not all these changes as they are currently drafted are consistent with the OECD recommendations, with the Organization of Paris being more prudent and reluctant to intervene in this way, they appear to confirm an overall trend by states of the Union and others overseas and in Asia[88].

It is therefore hard to try and draw conclusions on proposals still under scrutiny and making reference to a scenario that is in continuous change: in Europe and beyond. Yet some points, of strength and weakness, appear to emerge.

It is positive and consistent arguably with the OECD inspiration, that a qualified way of doing business is under the spotlight by many legislators. It is however disappointing that the European proposal uses references to 'Digital business' or 'Digital tax' as they mean little

[87] Kundera, M. (1984) *The Unbearable Lightness of Being*. Faber & Faber.

[88] Alley, C., & Emery, J. (2017). Taxation of cross-border e-commerce : response of New Zealand and other OECD countries to BEPS Action 1. *Journal of International Taxation*, *28*(9), 38–45. Bagadiya, T. M. (2018). India: New nexus-based concept of significant economic presence. *Tax Planning International Review*, *45*(4), 3.

more than nothing. Once the Internet has attained a central role in the everyday life, digitalisation is a cross sectorial feature of many business, including the traditional ones. Digital tax should be hence targeted in parte qua to "*Brick and Mortars*" entrepreneurs as well as long as they make use in their business model of marketing solutions similar to those mentioned in the directive proposal.

It is positive that the European Union boldy tried and find a coherent and homogeneous solution to be applicable to an entire region of the globe, waiting for more comprehensive remedies, as many stakeholders cited above observe.

Yet the point to be addressed is that whether the solution to digital challenge is to be qualified as a remedy or not.

The non-territorial status of the Digital business defies the traditional, *westphalian* way of addressing taxation law: it's a feature, rather than a threat. Most of the solution aimed at finding a connection, a genuine link, between income produced by MNEs appearst to be fictitious or inappropriate as they *de facto* transplant consumption tax criteria to income taxation.

Other solutions should be investigated, with a different starting point: the idea that tax changes should be suggested taking into consideration all the characteristics of the business to be addressed. This position assumes a paramount important particularly when purely digital businesses are targeted, like those developing social network, search engines and so on. Namely, business solution born "of the web, by the web, for the web" if we are to paraphrase President Lincoln's statement.

The first element in this respect is the net neutrality, as it was specified at § 2 above. It is almost impossible to assess the value creation chain without taking into account the fact that the way in which the net was developed is *per se* distortive, and allocates improperly revenues and profits deriving from the net business. The right to access on equal footing several websites allow the companies operating the portals to extra profit they would not obtain if they were to manage the network, including cables and wireless towers actually granting access to the web. Namely, sectors of the business that are still easily to be allocated in the different states.

It would be possible to understand the the digital business is far less *digital* than we imagine it to be, and we would shift the burden of taxation from the digital companies to the ones granting access to the digital services, which are obviously fixed and establishment in one country or another.

Withholding taxation, then, would be a more appropriate road to be explored focusing on the access providers rather than the content delivered. This would provide a more workable solution, lightweight for the business and consistent with the power to tax of the countries, with no need to invent new taxes, new taxable bases, new compliance duties as the Commissioner is proposing.

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