Nuove imposte ed economia digitale*

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The clear problem of shifting from a manufacturing, material and industrial economy which inspired a certain kind of tax rules to an immaterial economy, where the values are made through intangible goods (trademarks, patents), born and developed on the Internet, in a world without territory, an a-territorial and a-spatial economy, is that taxation must follow that economy and intercept these forms of display and circulation of wealth.

In Italy we are currently trying to adapt the traditional categories of tax law, first of all the notion of tax territoriality, resorting to a necessarily different paradigm, i.e. that of a territoriality no longer considered, as it has always been, as bound to the territory, to a physical portion of the world, where the State exercises its sovereign power.

For some time constitutional law scholars have criticised the notion of territoriality, considering sovereignty and territory as two not coinciding aspects, even though the traditional view see them both as part of the attributes of a state. From this point of view, in the field of taxation territoriality has been shaped in a different dimension so as to link it to social allegiance, to the social community of reference being located in a certain territory. They may seem to be theoretical categories, but it is necessary to start from their analysis in order to be able, then, to understand how to intercept forms of wealth circulating in a digital, a-material and a-spatial reality.

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If we follow this reasoning (tax territoriality detached from the concept of territory as a well-identified portion of the world), we may very well imagine tax models that may help to intercept such new forms of wealth that are becoming the real wealth, with a capital "w".

Notwithstanding this shift in the theoretical and constitutional paradigm from which we must set off, the complete implementation of new taxes that may succeed in intercepting such forms of wealth is not always simple, given that the current tax system has been created for a material economy. Faced with such a rapid change in the economy, the fiscal system can hardly adapt, and especially can hardly adapt the traditional international tax law categories to the new digital economy. Until now all answers have been unilateral and on this problem a political debate has grown on the need to tax the new digital activities, though not always aware of the juridical limits imposed on all states.

Starting from the field of direct taxation, i.e. income taxation, in Italy much controversy has been raised with concern to a provision that introduced a form of taxation called "web tax", enacted at the beginning of 2015, but which would have required the introduction of regulations that have not been approved because the lawmaker has then repealed the new form of taxation. Such web tax would have worked around a mechanism which would have focused on a permanent establishment of an international business providing digital and IT services to Italian consumers. The regime was clearly discriminatory because it was in contrast with EU rules, imposing presence and registration on a foreign business. With said web tax being repealed, the debate did not soothe and led to a new proposal to try to intercept the new forms of wealth produced by "digital giants", with a new name: no longer "web tax", but "digital tax" , as defined by the press.

Besides the change of name, the new regime revolves around new mechanisms, in which the anti-avoidance purpose would seem to prevail. The digital tax would affect two fundamental aspects: the re-definition of the notion of permanent establishment, with (though it is still unclear) a re-shaping of transfer prices, and a system of withholding taxes on financial

flows for the payment of such services purchased from digital businesses with their legal seat located abroad.

It is evident that this proposal has its limit too: first of all, juridical limits connected to the unilateral possibility for a state to impose a different notion of permanent establishment, which is a concept born and developed in the context of international tax law and is enshrined and defined in international double taxation conventions. Therefore, the first problem is whether Italy would manage to impose to its partners, i.e. the other States with which it signed a tax treaty, such a different notion of permanent establishment.

In the international scenario, the permanent establishment requires a material element, of physical presence on the territory where the relevant activity is performed. It follows that binding, as the Italian lawmaker tries to do, a permanent establishment to a significant digital presence in the territory of the foreign subject may make it seem, first of all, there to be a clash with international tax law principles and sources. It may be objected that a State has the possibility not to comply with the obligations provided by a double taxation convention, with consequences that, however, are not easily predictable.

Besides such juridical issues, one should not overlook the possible technical problems. The object of the measures at hand are the financial flows going from an Italian entity to international businesses located in Europe with particularly advantageous fiscal regimes. It should be remembered, however, that the identification of such financial flows it is not always simple (often, for example, other companies providing IT services are interposed). A very common scheme is to interpose companies located in European countries that are not part of the EU, such as Switzerland, thus making it more difficult to identify flows. Again, such payments are made based on contracts which are executed abroad and not regulated by Italian law, thus subject to a foreign jurisdiction. May it be said that a foreign subject, without a permanent establishment being located in Italian territory, can produce income in Italy because it has executed a contract abroad with an

Italian subject? The connection with the Italian state would be totally lacking. Therefore, practical problems would add to the general juridical ones.

On the contrary, there has been a significant improvement in the field of indirect taxation. In 2015 the Moss, mini one stop shop, has been adopted across Europe, i.e. a mechanism of VAT implementation allowing digital economy businesses to register in only one country and for the tax due to be levied in all countries based on the rates of the states of end consumers. It is undoubtedly a smart system, which would seem to be considerably functional and effective, at least in the first period.

All of this does not eliminate the juridical limits for tax administrations. The Market is now one, whereas tax administrations remain national and may, therefore, exercise their control powers only on facts and circumstances falling within their areas of competence. Faced with Moss, however, this structure is destined to fall apart, given that for all businesses that will decide to adhere to such a system there will be just one European country that will exercise control powers, notwithstanding the fact that the tax being levied will be the tax of the country of destination. According to this system, the business that will register in Malta and sell digital products online in Germania is a subject charging German VAT, that will be paid to Germany but that will be controlled by the Maltese Government. In this picture, the German Tax Administration will have to rely on the effectiveness of Maltese controls. Such controls will not only concern VAT compensation and applicability of the tax, but the system as a whole, including VAT deductibility, which, in case of a non-effective control, would possibly endanger the functioning of the tax giving leeway to fraud or international evasion.

Coming to the end: with regard to income taxa, we have a problem of non-existing taxation for international income, since, to the best of my knowledge, and notwithstanding all the proposals and studies, I do not know of any juridical well-founded and financially efficient solution to

intercept the income produced by digital giants. Therefore, one might say that we are in "year zero" of income taxation with concern to such fields.

On the other hand, in the field of consumption taxation, on VAT one might say that something has actually moved, notwithstanding all doubt and criticism. Which demonstrates once again that the problem of the taxation of digital economy is a world-wide one and concerns all countries and that also the envisaged solution with regard to income taxation have not been efficient so far because they have been of an unilateral nature and, thus, totally inadequate to face a world-wide issue which crosses national borders many times over.

Something is being done in those fields of taxation that are governed by EU rules prevailing over domestic ones. It has not been mere chance that the Moss would seem to have been met with a certain success and tax is being regularly collected for foreign operations as well. We would most certainly need to verify whether such system will work properly, being it quite new as of today.

Let me conclude with a Jeff Bazos (Amazon CEO) quote, who, to the question "Why have you set up a sale platform that is totally automatised, dematerialised and totally human?", answered: "We have done so to get rid of tax lawyers and, regrettably, we have not succeeded yet".