6th International Conference of PhD Students and Young Researchers

DIGITALIZATION IN LAW

CONFERENCE PAPERS

03 – 04 May 2018
Vilnius University Faculty of Law
Vilnius, Lithuania

A "EUROPEAN" APPROACH TOWARDS DIGITAL ECONOMY: SOME RECENT TAX LAW DEVELOPMENTS

Liotta Alessandro[1]

Abstract

The aim of this paper is to identify the solutions proposed by the EU Commission to tackle the hideous problems deriving from the (mis)use of digital technologies in the MNEs structures. First, the proposed paper will attempt to give a quick overview of OECD BEPS Action Plan, focusing on Action 1 and, consequently, on the position adopted by the EU Commission on the digital economy. Secondly, the paper will give a glimpse at the short-term solutions initially proposed by the Commission, and then it will focus on the interim solution that has eventually been elaborated by the Commission. In addition, it will give a critical point of view regarding the questionable approach of the EU Commission towards these direct tax issues emerging from the digital economy and the use of legislative power in a context where it is debated whether the EU has competence. This is also a good occasion to evaluate the relationship between competition law issues and the power of the Commission to protect and enforce the internal market on the one hand, and the tax sovereignty of the Member States on the other hand. The interim solution will also be evaluated in respect to its compliance with the fundamental freedoms and the EU State aid legislation as set forth by Article 107 TFEU. Finally, the paper will briefly point out the main aspects of the long-term measure, which sets forth provisions regarding the virtual permanent establishment.

Keywords: Tax Digital Economy EU competition

Introduction

The publication of the Final Reports of the 2015 BEPS (Base Erosion and Profit Shifting) Action Plan allowed the OECD to identify the most serious and urgent tax issues its Member States were required to tackle, given the technological development the world has faced in the last years. More specifically, Action 1 of the above-mentioned project, entitled "Addressing the Tax Challenges of the Digital Economy" dealt with the various shapes aggressive tax planning could take thanks to digital platforms[1].

The European Institutions, inspired by the work carried out by the OECD, have felt the urge to stop phenomena of tax avoidance that often characterizes the business models of the MNEs that make use of intangibles. If, on the one hand, the EU has recognised the necessity to intervene rapidly as a community, rather than waiting for the governments of the Member States to adopt the needed measures, on the other hand it has realized that it is impossible to deal with the problem at issue in short term.

Or, better yet, to give an effective response to the problem in short terms.

[1] *Master of Laws at Università degli Studi di Palermo, LL.M. in International Tax Law at King's College London, PhD candidate in "Law and Business", LUISS Guido Carli (Rome), Faculty of Law, with a dissertation in Tax Law on the application of CFC legislation to IP Holding Companies. Visiting Researcher at UNIL (Université de Lausanne), from October 2017 to December 2017 and currently Visiting Scholar at UC Berkeley, Boalt Hall Law School. Main interests: Tax Law, both from a domestic and an international perspective, and EU Law issues, especially those related to Tax Law. Email address: aliotta@luiss.it*

[1] As it was underlined by the Final Report of the BEPS Action Plan 1, p. 82, for what concerns VAT, […] "under certain conditions opportunities for tax planning by businesses and corresponding BEPS concerns for governments in relation to VAT may arise with respect to (i) remote digital supplies to exempt businesses and (ii) remote digital supplies acquired by enterprises that have establishments (branches) in more than one jurisdiction (MLE) that are engaged in exempt activities". Conversely, with reference to direct taxes, the BEPS Action Plan 1, p. 78 highlighted profit splitting could occur in four different ways: "1. Minimisation of taxation in the market country by avoiding a taxable presence, or in the case of a taxable presence, either by shifting gross profits via trading structures or by reducing net profit by maximising deductions at the level of the payer; 2. Low or no withholding tax at source; 3. Low or no taxation at the level of the recipient (which can be achieved via low-tax jurisdictions, preferential regimes, or hybrid mismatch arrangements) with entitlement to substantial non-routine profits often built-up via intra-group arrangements; 4. No current taxation of the low-tax profits at the level of the ultimate parent".

In this respect, the European Commission has identified some short-term measures, which should give a first, albeit not definitive answer to the tax issues, and which are going to be followed by other long-term measures.

1. BEPS Action Plan 1 and the objectives of the EU initiatives

The OECD BEPS Action Plan Final Reports, issued in late 2015, describe and deepen the hideous phenomenon known as profit splitting, which represents a priority concern for the Tax Administrations of the OECD Member States, as it allows MNEs to divert their profits to low tax jurisdictions, to lower their tax base in the high tax jurisdictions where they have subsidies or P.E., this resulting in a consistent loss of revenue for the OECD Member States. Most of these Actions somehow deal with the challenges arising from the use (or the misuse) of intangibles and digital economy[2] and struggle to find solutions that can reconcile the necessity to tax certain types of revenue[3] with the needs of those enterprises that are involved in the production or distribution of digital goods and/or services.

Given the importance of the problem, the EU Commission invited the other European Institutions to introduce a legislative framework known as "Fair and Efficient Tax System in the European Union for the Digital Single Market".

On September 21st, 2017, the Commission sent a Communication to the Parliament and the Council[4], claiming the necessity to understand and provide solutions for the distortive effect that aggressive tax planning of certain MNEs in the context of digital economy might have in the common market. According to the Commission, "the Digital Single Market (DSM) is one of the 10 political priorities of the European Commission. The DSM strategy aims to open up digital opportunities for people and businesses in a market of over 500 million EU consumers. Completing the Digital Single Market could contribute to EUR 415 billion per year to Europe's economy, create jobs and transform our public services". This was followed by the conclusions adopted on October 19th, 2017[5].

On December 5th, 2017, the ECOFIN Council[6] looked forward to appropriate Commission proposals by early 2018, taking into account relevant developments in the ongoing discussions at the OECD. Eventually, on March 21st, 2018, the Commission published two proposals, which are supposed to introduce an interim solution[7] and a long-term solution[8], and two respective Communications, as well as an Impact Assessment Report.

Even though the EU Institutions push hard and encourage the adoption of the required measures, they are aware of the difficulties and that it is not possible to introduce effective fast and long-lasting tax tools in a short period of time. Consequently, the strategy the EU has decided to carry on implies the introduction of an interim-solution[9] (the digital services tax Directive Proposal), as part of a huge and far more complex plan.

---

[2] The Action Plans at issue are designed to counter tax avoidance and tax evasion at an international level and should be read as part of a general and more complex plan. They are meant to introduce different suggestions and solutions to certain tax problems, which might also be overlapping. This might be the case of Action 3 (Designing Controlled Foreign Company Rules), or Action 6 (Prevent Treaty Abuse), or even Action 7 (Prevent the Artificial Avoidance of PE Status). Whereas others were tailored around the concept of intangible, and might address more specific issues, such as Action 5 (Counter Harmful Tax Practices More Effectively) and Action 8-10 (Aligning Transfer Pricing Outcomes with Value Creation). It is indeed interesting that Action 1, despite its very specific target, attracts and sums up some aspects of each of the above-mentioned Actions. In this respect, see P. Saint-Amans and R. Russo, 'The BEPS Package: Promise Kept, in Bulletin for International Taxation' [2016] IBFD, p. 236.

[3] As frequently underlined by the EU Commission, there are weaknesses in the international tax rules as they were originally designed in the 1920s for "brick and mortar" businesses and have now become outdated. In particular, this has led to a misalignment of the place where value is created, notably in the case of user contributions, and the allocation of the taxing rights and ability to enforce taxation.

[4] Proposal for a Council Directive COM (2017) 547.

[5] European Council meeting – Conclusions EUCO 14/27.

[6] ECOFIN Council conclusion, "A" Item note 15175/17.

[7] Proposal for a Council Directive COM (2018) 148: Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services.

[8] Proposal for a Council Directive COM (2018) 147: Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence.

[9] Conversely, Action Plan 1 of the BEPS Project criticizes the adoption of interim-solutions. The Final Report of Action Plan 1 states that "[…] none of the other three options analysed by the TFDE [(Tax Force on the Digital Economy)] were recommended at this stage. This is because, among other reasons, it is expected that the measures developed in the BEPS Project will have a substantial impact on BEPS issues

In fact, alongside with these proposals, the Commission has already launched the CCCTB (Common Consolidated Corporate Tax Base)[10] and a new VAT Directive on e-commerce[11] has been recently approved by the Council[12]. These pieces of legislation are meant to be the pillars of a new tax system that, as far as the Commission is concerned, should prevent, or contribute to considerably reduce, the level of tax avoidance within the internal market and, thus, could create a level playing field.

2. The short-term solution

The above-mentioned Directive Proposal on the digital service tax (DST) is not the first solution elaborated by Commission to tackle the tax issues arising from digital economy, as on September 21st, 2017, it proposed three alternative measures, such as an equalisation levy on the turnover of digital companies, a withholding tax on digital transactions and a levy on revenues generated from the provision of digital services or advertising activities.

Even though the Commission has not reproduced these solutions, it might be interesting to summarize the main aspects of such measures.

While the equalisation levy was meant to tax the turnover of digital companies, that is to say the gross revenue of those entrepreneurial (either B2B or B2C) activities carried out on the internet[13], the withholding tax on digital transactions was supposed to be applied as a global withholding tax on all the payments made to non-resident subjects[14], and the levy on revenues generated from the provision of digital services was conceived to take into consideration, for tax purposes, all the transactions carried out remotely in case the providing company were to have a significant economic presence in the country where the service is provided.

What the Commission ended up with is a Directive proposal, the scope of which is "to put forward a measure that targets the revenues stemming from the supply of certain digital services and that is easy to implement and helps to level the playing field in the interim period until a comprehensive solution is in place"[15]. The Commission points out that the introduction of the Digital Services Tax (DST) is in line with the general objectives of the proposal, whose aim is: to protect the integrity of the Single Market and to ensure its proper functioning; to make sure that the public finances within the Union are sustainable and that the national tax bases are not eroded; to ensure that social fairness is preserved and that there is a level playing field for all businesses operating in the Union and; to fight against aggressive tax planning

previously identified in the digital economy, that certain BEPS measures will mitigate some aspects of the broader tax challenges, and that consumption taxes will be levied effectively in the market country".

[10] Proposal for a Council Directive COM (2016) 683.

[11] Proposal for a Council Directive COM (2016) 757.

[12] Some commentators have underlined that, despite the action of the whole EU and of its Institutions could improve the cohesion and the harmonization of the internal market, this would essentially keep the international scenario unchanged. Consequently, a global approach would be recommended. According to M. F. De Wilde, 'Taxation of Multinational Enterprises in a Global Market: Moving to Corporate Tax 2.0?', in Bulletin for International Taxation [2016] IBFD, p. 182, "the OECD/G20's package addresses the various issues through a series of specific action points; however, it leaves the existing international corporate taxation framework essentially intact. The same is basically true for the approaches currently being taken within an EU context (at least at present), given that the Commission has recognized the need for a long-term solution for the European Union in its proposals for the Common Consolidated Corporate Tax Base (CCCTB). Although the long-term EU solutions envisaged take matters a step further than the OECD (G20 has done, at least analytically , any EU-wide solution, regardless of its merits, will be subject to geographical limitations that would allow base erosion and profit shifting issues to continue to arise beyond the water's edge, i.e. in respect of economic activities beyond the European Union's outer geographical borders".

[13] The equalisation levy has already been adopted in India, where it is applied at a 6% tax rate on the commissions paid by resident enterprises to non-resident subjects for online advertising services worth more than 1'500 US Dollars (100'000 Indian Rupees) during the tax year. To deepen the Indian equalisation levy, see, *ex multis*, S. Basak, 'Equalisation Levy: A New Perspective of E-commerce Taxation' in Intertax, Volume 44, p. 845; S. Varansi and M. Nagappan, 'Financial Budget for 2016-2017: Has India put Its BEPS Foot Forward?' in Intertax, Volume 44, p. 550; M. K. Singh, 'Taxation of Digital Economy: And Indian Perspective' in Intertax, Volume 45, p. 467.

[14] This type of tax was encouraged by part of the commentators. More in details, Y. Brauner and P. Pistone, 'Adapting Current International Taxation to New Business Models: Two Proposals for the European Union, in Bulletin for International Taxation' [2017] IBFD, claimed that "the withholding tax solution would be a flexible, immediate solution to the most acute challenges of the digital economy. It is a solution that would avoid critical technical problems and would work in the direction of better cooperation between states to arrive at collaborative solutions, even if, at present, such a solution has not yet presented itself. It could also become an implementation mechanism for a virtual PE solution, of one were to be agreed on by a sufficient number of the Member States".

[15] Proposal for a Council Directive COM (2018) 148, p. 3.

and to close the gaps that currently exist in the international rules which makes it possible for some digital companies to escape taxation in countries where they operate and create value.

Preliminarily, it is worth noticing that the Commission puts the stress on the competition issues deriving from nowadays digitalized economy and considers tax measures as tools to create a homogeneous and – as far as possible – harmonized market.

If, on the one hand, this competition-oriented approach can be appreciated, since it represents the essence of the activity of the Commission and, more broadly, of the EU in general, it might be claimed that the introduction of pieces of legislation that limit the legislative power of the Member States in tax matters could be beyond the competence of the EU, even though according to the Commission, the Directive proposal is based on Article 113 of the TFEU[16]. This provision enables the EU Institutions, with a special legislative procedure, to adopt provisions for the harmonisation of Member States' legislation concerning other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition. The Commission states that an action at EU level is needed in order to mitigate the fragmentation of the internal market and the creation of distortions of competition within the Union due to the adoption of divergent unilateral actions at national level.

After this brief introduction regarding the legislative technique and procedure chosen by the EU to adopt this piece of legislation, it is necessary now to summarize the key elements of the Directive proposal that should introduce an interim solution to the problems at issue.

In a nutshell, the Digital Service Tax is going to levy on revenues from the supply of certain digital services, as defined and qualified by Article 3 of the proposed Directive[17]. Taxable revenues should be those resulting from the provision of the following services: (i) the placing on a digital interface of advertising targeted at users of that interface; (ii) the making of multi-sided digital interfaces which allow users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users (sometimes referred to as "intermediation" services); and (iii) the transmission of data collected about users and generated from such users' activities on digital interfaces. Consequently, if no revenues are obtained from the supply of such services, there should be no DST liability. Article 3, paragraph 3, specifies that point (i) shall apply whether or not the digital interface is owned by the entity responsible for placing the advertising on it and that where the entity placing the advertising does not own the digital interface, that entity, and not the owner of the interface, shall be considered to be providing a service falling within point (i), whereas paragraph 4 underlines that point (ii) shall not include: a) the making available of a digital interface where the sole or main purpose of making the interface available is for the entity making it available to supply digital content to users or to supply communication services to users or to supply payment services to users; b) the supply by a trading venue or a systematic internaliser of some services referred to in Annex I to Directive 2014/65/EU; (c) the supply

[16] Even if the Commission promotes a supranational strategy to rule and regulate the phenomenon of digital economy, especially given its concerns related to the protection of competition within the internal market, commentators have stated that the EU should not have a "full legislative power", at least in the direct taxes field. In this respect, see H. Panayi, 'The Compatibility of the OECD/G20 Base Erosion and Profit Shifting Proposals with EU Law' in Bulletin for International Taxation [2016] IBFD, p. 95, who claims that "[…] the European Union cannot interfere with how a Member State exercises its taxing rights with regard to other countries". The legal basis of the Directive proposal COM(2018)147 (which will be analysed in the following paragraph) is Article 115 TFEU, which j provides for the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, to issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market. This provision is commonly used by the EU where taxes other than indirect taxes are involved. Furthermore, the EU may introduce tax law provisions according to Article 352 TFEU, which requires the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, to take appropriate measures to attain one of the objectives set out in the Treaties if those Treaties have not provided the necessary powers.

[17] According to Article 3, "the services falling within the scope of DST are those where the participation of a user in a digital activity constitutes an essential input for the business carrying out that activity and which enable that business to obtain revenues therefrom. […] These services can be provided remotely, without the provider of the services necessarily being physically established in the jurisdiction where the users are and value is created. Therefore, such businesses models are responsible for the greatest difference between where profits are taxed and where value is created. However, what is subject to taxation are the revenues obtained from the monetisation of the user input, not the user participation in itself". User participation can contribute to the value of a business in various ways. For example, digital businesses can derive data about users' activities on digital interfaces, which is typically used to target advertising at such users, or which can be transmitted to third parties for consideration. Another way is through the active and sustained engagement of users in multi-sided digital interfaces, which build on network effects where, broadly speaking, the value of the service increases with the number of users using the interface.

by regulated crowdfunding service provider of any of the services referred to in Annex I to Directive 2014/65/EU, or a service consisting in the facilitation of the granting of loans. Point (iii) shall not include the transmission of data by a trading venue, systematic internaliser or regulated crowdfunding service provider.

Article 4 establishes when a subject might be deemed a taxable person in the context of the DST and it sets forth the following conditions: (i) the total amount of worldwide revenues reported by the entity for the relevant financial year exceeds EUR 750.000.000; (ii) the total amount of taxable revenues obtained by the entity within the Union during the relevant financial year exceeds EUR 50.000.000.

Article 5 identifies the place of taxation by determining which proportion of the taxable revenues obtained by an entity has to be treated as obtained in a Member State for the purposes of this tax. In other words, it establishes that DST is due in the Member State or Member States where the users are located[18]. Paragraph 2 provides that "with respect to a taxable service: a user shall be deemed to be located in a Member State in a tax period if: (a) in the case of a service falling within Article 3(1)(a), the advertising in question appears on the user's device at a time when the device is being used in that Member State in that tax period to access a digital interface; (b) in the case of a service falling within Article 3(1)(b): (i) if the service involves a multi-sided digital interface that facilitates the provision of underlying supplies of goods or services directly between users, the user uses a device in that Member State in that tax period to access the digital interface and concludes an underlying transaction on that interface in that tax period; (ii) if the service involves a multi-sided digital interface of a kind not covered by point (i), the user has an account for all or part of that tax period allowing the user to access the digital interface and that account was opened using a device in that Member State; (c) in the case of a service falling within Article 3(1)(c), data generated from the user having used a device in that Member State to access a digital interface, whether during that tax period or any previous one, is transmitted in that tax period. Paragraph 3, then describes the ways the proportion of an entity's total taxable revenues that is treated under paragraph 1 as obtained in a Member State shall be determined. The DST tax rate shall be 3% (Article 8).

After having mentioned the key points of the Digital Services Tax, it is possible to address some of the most interesting and controversial aspects of the EU action in the area of tax law.

As it appears from the current situation, the EU Institutions seem to have realized that the internal market issues and the problems deriving from the coexistence of 28 law systems often involve tax law, and they have started to introduce pieces of legislation that certainly limit the power of the Member States to shape their tax systems the way they prefer.

What the EU is undoubtedly doing is using tax law as a tool to protect the internal market and to prevent the companies from distorting the market by exploiting the different legislations of the Member States. While the solutions initially proposed by the Commission could be claimed to be incompatible with certain fundamental principles of EU Law like, for example, the freedom of establishment, as set forth by Article 49 of the TFEU[19], the interim-solution eventually chosen seems to be compliant with this fundamental freedom, as it is supposed to be applied in the whole territory of the EU. In fact, the EU Institutions believe the introduction of a sole tax, adopted by all the Member States would not lead to any

[18] According to the Directive Proposal, "The taxable revenues resulting from the provision of a taxable service have to be treated for the purposes of this Directive as obtained in a Member State in a tax period if a user with respect to such services is deemed to be located in that Member State in that tax period according to the rules in Article 5(2), which have to be applied for each type of taxable service. In the case of users involved in a taxable service which are located in different Member States or non-Union jurisdictions, the taxable revenues obtained by an entity from the provision of that service would have to be distributed to each Member State proportionally and according to the several allocation keys laid down in Article 5(3) for each type of taxable service. Such allocation keys have been set out taking into account the nature of each of the taxable services and, in particular, what triggers the receipt of revenues for the provider of the service. In the case of a taxable service consisting in the placing of advertising on a digital interface, the number of times an advertisement tax has appeared on users' devices in a tax period in a Member State is taken into account for the purposes of determining the proportion of revenues to be allocated in that tax period to that Member State".

[19] The compatibility of the tax tools used by the Member States with the freedom of establishment has been subject to the attention of the ECJ in various judgment. See, *ex multis*, Case C-446/04 FII GLO; Case C-35/11 Test Claimants FII; Case C-492/04 Lasertec; Case C-251/98 Baars; Case C-436/00 X e Y; Case C-264/96 ICI; Case C-446/03 Marks & Spencer; Case C-337/08 X Holding; Case C-18/11 Philips Electronics; Case C-231/05 OY AA; Caso-250/95 Futura Participations Singer; Case C-293/06 Deutsche Shell; Case C-414/06 Lidl Belgium.

violation of the EU principles, whereas if the Member States were allowed to design their own tax, this could interfere with the aforementioned principles[20].

It might be argued that the DST is not compatible with Article 107 TFEU and the EU State aid principles. One of the conditions that needs to be fulfilled according to Article 107 TFEU is selectivity[21]. It could be said that the adoption of the proposed Directive could lead to a distortion of competition under the paradigm of EU State aid law where the transactions taxed according to the proposed Directive were deemed to be comparable with those operations that have the same content (e.g. advertising) but are not carried out digitally. It is extremely hard to establish whether the DST, as applied and implemented by the Member States, could be considered a State aid.

However, also in the context of competition law, it is possible to point out the relation between the policy of the EU and the tax policies of the Member States[22].

Finally, the purpose of the DST is not only to prevent any distortion in the internal market, but also to tackle those episodes of tax avoidance that may take place in the context of digital economy. Article 6 of the Anti-Tax Avoidance Directive (ATAD)[23] allows a Member State to ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part. Since Article 6 is a general provision that establishes an important principle in the context of EU law, the DST Directive proposal must be read and applied accordingly, considering its anti-avoidance purpose.

3. The long-term solution: the key points

The second Directive proposal issued by the Commission regards the concept of permanent establishment and, more in details, the definition of significant digital presence, as suggested by the OECD. Although Action 7 of the BEPS Action Plan provides some solutions to the avoidance of the status

[20] Even if this type of approach is understandable in principle, it might be claimed that in many past cases, the ECJ did not recognize the taxing rights of the Member States as relevant reasons to restrict the application of the fundamental freedoms, even though the taxpayers had transferred their legal seats in low tax jurisdictions. In other words, the application of low tax rates was not conceived as a problem for the integrity of the internal market, whereas the ECJ tended to preserve the freedom of establishment. What seems to be happening nowadays is that the EU wants to preserve that freedom by introducing a tax, that is the same for all the Member States, and, simultaneously, wants to preserve the taxing rights of the Member States, not because they are considered a value themselves, but because they appear useful in the context of the internal market and in the perspective of a digitalized economy.

[21] About the concept of selectivity see, *ex multis*, A. Jones and B. Sufrin, 'EU Competition Law, Cases & Materials' (Oxford 2010), Fourth Edition, p. 1279. N. Phedon and I. E. Rusu, 'The Concept of Selectivity: an Ever Wider Scope' in European State Aid Law Quarterly [2012] p. 791; C. Quigley, 'General Taxation and State aid' in A. Biondi, P. Eeckhout and J. Flynn, 'The Law of State aid in the European Union' (Oxford) p. 207; G. M. Barbara, 'Advocate General Opinions on Tax Autonomy of European Region: from the Basque Country Case (1999) to the Gibraltar Case (2011)' in European Taxation [2012] p. 164; R. Schütze, 'European Law' (Cambridge 2015) p. 770; J. Temple Lang, 'The Gibraltar State Aid and Taxation Judgment – a "Methodological Revolution?"' in European State Aid Law Quarterly [2012] p. 805. The concept of geographical and material selectivity has been variously interpreted by the ECJ. See, *ex multis*, Case C – 256/97 DMTransport; Case T – 127/99, T – 129/99 e T – 148/99 Territorio Històrico de Alava – Diputaciòn Foral de Alava and others v Commission; Case C – 75/97 Belgium v Commission; Case C – 143/99 Adria-Wien Pipeline; Case T- 445/05 Associazione Italiana del Risparmio Gestito e Fineco Asset Management v Commission.

[22] See T. Lyons, 'The modernisation of EU state aid law and taxation*'* [2014] British Tax Review, p. 113. The Author states that "so far as EU law is concerned, it has for many years been clear that tax falls within the ambit of state-aid law". The problem of the role of States in the internal market (both players and regulators) has been highlighted by A. Kardachaki and M. Van Hulten, 'Report on the EUCOTAX Conference "State Aid, Intangibles and Rulings"' [2017] EC Tax Review p. 284. The Authors point out that "[…] the current debate illustrates that the EU fiscal State aid may have limits to its reach. States act both as regulator and as a market operator in tax matters, and those roles cannot be reconciled if we want to tackle competition between States. The current criteria to assess fiscal State aid are focused on competition between undertakings and the intervention of States in the internal market. But what if we try to define the actions of the State as an operator in the tax law market? Could we for instance interpret the advantage test better by thinking about the objectives of States? Given these complexities, political rather than legal solutions seem better suited to solve this problem".

[23] Council Directive 2016/1164/EU.

of permanent establishment[24], Action 1 deals with the digital permanent establishment more specifically[25]. In this respect, the Commission adopted the suggestion of the OECD and issued a Directive which is going to redefine the concept of permanent establishment.

Essentially, the proposal, after having identified its scope (Article 2) and having defined the various concepts for applying the provisions in the Directive (e.g. digital services, digital interface, revenues, entity, user and tax period) in Article 3, describes what significant digital presence in Article 4 and warns that it should be regarded as an addition to the existing permanent establishment concept, and enlists the profits attributable to the significant digital presence in Article 5.

According to Article 4, a permanent establishment shall be deemed to exist if a significant digital presence through which a business is wholly or partially carried on exists. Paragraph 3 provides that a SDP shall be considered to exist in a Member State in a tax period if the business carried on through it consists of digital services through a digital interface and one or more of the following conditions is met with respect to the supply of those services by the entity carrying on that business, taken together with the supply of any such services through a digital interface by each of that entity's associated enterprises in aggregate: (a) the proportion of total revenues obtained in that tax period and resulting from the supply of those digital services to users located in that Member State in that tax period exceeds EUR 7.000.000; (b) the number of users of one or more of those digital services who are located in that Member State in that tax period exceeds 100.000; (c) the number of business contracts for the supply of any such digital service that are concluded in that tax period by users located in that Member State exceeds 3.000. The provision establishes, thus, three different thresholds which allow to identify when a significant digital presence occurs and, consequently, if there is a (virtual) permanent establishment. Paragraph 4 underlines that a user shall be deemed to be located in a Member State in a tax period if the user uses a device in that Member State in that tax period to access the digital interface through which the digital services are supplied, while paragraph 7 establishes that the proportion of total revenues referred to in paragraph 3 (a) shall be determined in proportion to the number of times that devices are used in that tax period by users located anywhere in the world to access the digital interface through which the digital services are supplied.

Briefly, Article 5 states that the profits that are attributable to or in respect of a significant digital presence in a Member State shall be taxable within the corporate tax framework of that Member State only. While paragraph 2 identifies the type of profits attributable as those that the digital presence would have earned if it had been a separate and independent enterprise performing the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks

[24] Action 7 of the BEPS Action Plan addresses several issues, such as: the artificial avoidance of PE status by the use of commissionaire arrangements; the abuse of the "independent agent" exception in Article 5(6) of the OECD Model and instances in which such an agent could be closes related to the principal; the artificial avoidance of PE status by way of the specific activity exception in Article 5(4); the related concern with regard to enterprises misusing the exceptions in Article 5(4) by fragmenting activities; and the abuse of the exception in Article 5(3) by splitting of contracts.

[25] Action 1 basically identifies the importance of the digital economy and sets out its features and typical business models. It also raises the question of redefining the nexus for taxation in the source state and suggests, as a solution, the introduction of the significant economic presence (SEP) nexus. See B. Larking, 'A Review of Comments on the Tax Challenges of the Digital Economy, in Bulletin for International Taxation' [2018]: "Allocation of profits to a SEP is the next tricky issue and the OECD considers both the possibility of adapting traditional profit allocation principles […] as well as alternative methods such as formulary (fractional) apportionment or deemed profit-based methods". The Author believes the SEP would not work, as problems would arise regarding both threshold and profit allocation. Other commentators put the stress on the threshold. See Y. Brauner and P. Pistone, 'Adapting Current International Taxation to New Business Models: Two Proposals for the European Union': "[…] in order to avoid an excessive fragmentation of the taxable base, we envisage that the application of the virtual PE should take place along the lines of a *de minimis* threshold. This could operate with a similar function to that which a construction PE has in Article 5(3) of the OECD Model. With reference to an intervention on this topic at EU level, the Authors believe that "the introduction of a virtual PE concept into EU law would be a constructive step forward and an effective global action to bring international tax categories and concept back into line with the business models. It would also represent a friendly development in cooperation with the OECD, as it would essentially preserve the OECD PE standard and facilitate OECD action to realize a possible expansion of this solution at a later time. Finally, it would not prevent the European Union from applying this solution in a context of formulary apportionment, provided, of course, that the factors along which the formula applies were amended in a way that would take into account the different features of the new business models connected with the digital economy".

assumed, through a digital interface, paragraph 3 describes the way such profits are determined[26], and paragraph 5 enlists the economically significant activities.

Conclusions

The initiative of the EU is surely in line with the most recent international developments in the area of digital economy and is aimed at tackling the above-mentioned issues. The effort of the Commission is to be appreciated, because its purpose is to redefine corporate taxes under a European paradigm, in a homogeneous and complete framework (especially if we think about how these new proposals will interact with the CCCTB Directive proposal), in order to prevent distortive and abusive phenomena. It is still too early to evaluate if and how these proposals will manage to reach their objective in an effective and satisfactory way, but it is true that the aggressive action of the EU limits (maybe too much) the ability of the Member States to rule their own tax systems and it could represent a political issue with reference to the relationship between the EU and its Member States.

Bibliography

1. G. M. Barbara, 'Advocate General Opinions on Tax Autonomy of European Region: from the Basque Country Case (1999) to the Gibraltar Case (2011)' in European Taxation [2012].
2. S. Basak, 'Equalisation Levy: A New Perspective of E-commerce Taxation' in Intertax, Volume 44.
3. Y. Brauner and P. Pistone, 'Adapting Current International Taxation to New Business Models: Two Proposals for the European Union, in Bulletin for International Taxation' [2017] IBFD.
4. Case C – 143/99 Adria-Wien Pipeline.
5. Case C-18/11 Philips Electronics.
6. Case C-251/98 Baars.
7. Case C – 256/97 DMTransport.
8. Case C-264/96 IC.
9. Case C-293/06 Deutsche Shell.
10. Case C-337/08 X Holding.
11. Case C-35/11 Test Claimants FII.
12. Case C-414/06 Lidl Belgium.
13. Case C-436/00 X e Y.
14. Case C-446/03 Marks & Spencer.
15. Case C-446/04 FII GLO.
16. Case C-492/04 Lasertec.
17. Case C – 75/97 Belgium v Commission.
18. Case C-231/05 OY AA.
19. Case T – 127/99, T – 129/99 e T – 148/99 Territorio Històrico de Alava – Diputaciòn Foral de Alava and others v Commission.
20. Case T- 445/05 Associazione Italiana del Risparmio Gestito e Fineco Asset Management v Commission.
21. Caso-250/95 Futura Participations Singer.
22. Council Directive 2016/1164/EU.
23. ECOFIN Council conclusion, "A" Item note 15175/17.
24. European Council meeting – Conclusions EUCO 14/27.
25. A. Jones and B. Sufrin, 'EU Competition Law, Cases & Materials' (Oxford 2010), Fourth Edition.
26. A. Kardachaki and M. Van Hulten, 'Report on the EUCOTAX Conference "State Aid, Intangibles and Rulings"' [2017] EC Tax Review.
27. B. Larking, 'A Review of Comments on the Tax Challenges of the Digital Economy, in Bulletin for International Taxation' [2018].

[26] For the purposes of paragraph 2 the determination of profits attributable to or in respect of the significant digital presence shall be based on a functional analysis. In order to determine the functions of and attribute the economic ownership of assets and risks to, the significant digital presence, the economically significant activities performed by such presence through a digital interface shall be taken into account. For this purpose, activities undertaken by the enterprise through a digital interface related to data or users shall be considered economically significant activities of the significant digital presence which attribute risks and the economic ownership of assets to such presence.

28. T. Lyons, 'The modernisation of EU state aid law and taxation' [2014] British Tax Review.
29. OECD BEPS Action Plan 1 "Addressing the Tax Challenges of the Digital Economy" Final Report.
30. H. Panayi, 'The Compatibility of the OECD/G20 Base Erosion and Profit Shifting Proposals with EU Law' in Bulletin for International Taxation [2016] IBFD.
31. N. Phedon and I. E. Rusu, 'The Concept of Selectivity: an Ever Wider Scope' in European State Aid Law Quarterly [2012].
32. Proposal for a Council Directive COM (2016) 683.
33. Proposal for a Council Directive COM (2016) 757.
34. Proposal for a Council Directive COM (2017) 547.
35. Proposal for a Council Directive COM (2018) 148.
36. Proposal for a Council Directive COM (2018) 147.
37. C. Quigley, 'General Taxation and State aid' in A. Biondi, P. Eeckhout and J. Flynn, 'The Law of State aid in the European Union' (Oxford).
38. P. Saint-Amans and R. Russo, 'The BEPS Package: Promise Kept, in Bulletin for International Taxation' [2016] IBFD.
39. R. Schütze, 'European Law' (Cambridge 2015).
40. M. K. Singh, 'Taxation of Digital Economy: And Indian Perspective' in Intertax, Volume 45.
41. J. Temple Lang, 'The Gibraltar State Aid and Taxation Judgment – a "Methodological Revolution?"' in European State Aid Law Quarterly [2012].
42. S. Varansi and M. Nagappan, 'Financial Budget for 2016-2017: Has India put Its BEPS Foot Forward?' in Intertax, Volume 44.
43. M. F. De Wilde, 'Taxation of Multinational Enterprises in a Global Market: Moving to Corporate Tax 2.0?', in Bulletin for International Taxation [2016] IBFD.