DIGITAL ECONOMY AND TAXATION,
BETWEEN COOPERATION AND COMPETITION.
INTERNATIONAL PERSPECTIVES AND DOMESTIC INTERVENTIONS

The digital economy is not a field of the economy, nor a separate economic market, but a way of carrying on a business activity which is strongly influenced by the Internet and, more generally, by the Information and Communication Technologies. In other words, it is the modern meaning of doing business, which changes along the technological progress and its continuous and growing development. As a consequence, the digital economy is a phenomenon whose evolutionary dynamics can be observed and, therefore, examined only when they occur, being difficult to predict them; in fact, it is impossible to know in advance how such development will occur and, consequently, which impact it will have on the socio-economic dimension.

In this meaning, the digital economy overlaps with the "traditional" economy, which can sure digitize itself (more or less) choosing to exploit information technologies in production processes.

In any case, history teaches that the digitalization of economy and society is a revolution. The communication and information technologies, radically changing the way of doing business, have in fact attributed to business activity completely new characteristics. On the one hand, the new economy is characterized by the prevalent use of intangible assets, already known to the brick and mortar economy but not as significant for the old economies and, on the other, it has completely new features, as the consumers' input, the user's input, the data and the network effects.

It is easy to appreciate that the digital economy is the economic representation of the general current digital society; even Don Tapscott, the first author who used the term "*digital economy*", immediately defined it as a concept "*not only about the networking of technology* [...] *but about the networking of humans through technology* [that] *intelligence, knowledge, and creativity for breakthroughs in the creation of wealth and social development* ".

The new digital characteristic of the economy, and of the society itself, have significantly impacted on laws and principles tailored to the old economy in all areas of law, including, of course, the fiscal ones.

Anyway, it would be erroneous to assume that the tax debate approaches this problem now, for the first time. In fact, an economic context quite similar to the current one existed when the States agreed the common bases to define an international tax structure. In particular, in the 20s of the last century, an important wave of globalization, determined also by the diffusion of communication technologies (among all, the invention of the telegraph), followed by the deep crisis caused by the First World War, called the governments to open the discussion on such matter. A that time, the starting point was very clear: each Country had structured its own domestic taxation without worrying about the interaction between its tax system and other Countries' ones, with the consequence that double taxation had become a very serious obstacle to international trade, a "*trade barrier*" to be removed.

Under the leadership of the League of Nations, the foundations of international taxation were built, privileging the taxation in the States of residence and attributing to the source taxation a secondary role, justified and measured – for business income – by the permanent establishment; such definition, however, was strongly affected by the economy of that time and was normatively characterized by fixity and materiality, since companies could not carry out their business abroad without having a fixed place of business in the market Country.

A hundred years later, the debate on international taxation has predictably reopened and it seems that the digital economy has a fundamental role in such discussion. In fact in 2013, in order to fight against the base erosion and profits shifting, the OECD has launched a global initiative, aimed at restoring the international tax system in force for (all) multinational companies.

The fifteen actions of the project are explicitly "*focused on combating the erosion of tax bases and the dispersion of profits*", but "*do not aim directly at modifying the existing international standards for the assignment of cross-border income tax*". This approach is focused on the of abuse, assuming that "*fundamental changes are essential to effectively prevent practices that result in double non-taxation or low taxation through practices that artificially separate taxable income from the activities that generate it*".

And in fact, it cannot be denied that OECD studies have demonstrated that multinationals enterprises exploit the mismatch of international and domestic tax rules to minimize the total tax burden of groups; not surprisingly, many of these groups have a digital core and, using primarily intangible assets, can more easily structure their tax planning trying to lighten their overall tax burden. This problem has been effectively tackled by the BEPS project, which has provided States with important instruments to counteract abusive dynamics; in fact, the latest studies show that the overall fiscal pressure of digital groups has increased in recent years and is likely to grow even more in light of the recent US tax reform, aimed (among all) to recapture the income eroded by groups belonging to US holding companies (which, in this sector, are notoriously the majority).

Nevertheless, Action 1 of the BEPS Action Plan, specifically dedicated to the digital economy, has revealed that the discontent of States does not depend (only) on abusive practices, but also on the current international tax structure that, anchoring the imposition in the source State to fixed criteria, obviously deprives the same source States of high shares of taxation. In this perspective, the digital economy has become the first - and best - example. In fact, all the current proposals referred to new *nexus* principles intend to subvert the same theoretical framework under the traditional notion of permanent establishment, achieving "*a new dimension for the sourcing theory*". Such proposals look for a "*connection with the economic life of a Country*", a link that is found in elements as the participation of users, playing a significant role in the "*value creation*" of companies.

The choice for the worldwide or source-based approach does not only reflect the preference for a model of fiscal policy, but also for a different technical-legal structure of taxation. Today, the majority of authors seem to prefer a source-based approach, in response to the pulverization of income sources and the dematerialization of the concept of residence itself; however, it is pointed out that this choice requires to find out a coordinated source criterion among States and would draw a tendentially real tax system, referred to the wealth itself, and not to its holder. Moreover, this approach does not reflect the concept of a modern State, which is no longer referred to the territory, but above all to the organization of people (and entities) that participate in it.

Nearby, some proposals - as the European CCCTB - aim to spread the income according to formula-apportionement, based on the unitary determination of taxable income and on the subsequent distribution of it between the different legal systems which it would be referable to, according to specific criteria. These criteria seem to aspire to a global tax model, where the revenue is distributed according to pre-established criteria, but do not bypass the problem of choosing the distribution factors for that income; for example, the use of macroeconomic factors, such as national added value, gross domestic product or amount of public investments in infrastructure, certainly seem more efficient, being objectively measurable; however, the choice of microeconomic factors, such as labor costs, capital or turnover, is certainly more in line with fairness in the distribution of the taxable income, since it is based on elements that reflect the characteristics of the taxpayer and its real ability to pay.

During the international reflection, some domestic legislators have introduced, or tried to introduce, internal rules aimed at regulating this problem.

Some rules are structurally adopted in the context of direct taxation, with a very uncertain function, aimed either to counteract the abuse or to modify the allocation rules, which however are often in contrast with the double taxation conventions that are binding in many of the Countries affected by the phenomenon.

Other measures are adopted in the field of indirect taxation, mostly (but not totally) untied from international obligations, many of which underlie an equalization intention. In some cases, they aim to realign the taxation of resident enterprises to the non-residents' one, assuming that the latter pay lower taxes through aggressive tax planning; as such, measures like these are destined to disappear if the same aims are achieved by other measures, e.g. through international or domestic anti-abuse instruments or through modifications to the allocation of the taxing rights. In other cases, the same interventions seem to realign the competitive gap between digital and "traditional" companies, risking to create discriminatory effects.

Lastly, the European Union gave its contribution too, in order to intervene on the taxation of digital companies operating in Europe.

All the aforementioned interventions have not found, at the moment, a harmonious international composition, which however everyone wishes. It is well known that the digitalization of companies and, more generally, of society is one of the major levers of development, so that the introduction of unreasonable taxes or levies, sometimes introduced for pure revenue intents, risks to generate (as, in fact, has sometimes engendered) dangerous counterproductive effects. These effects not only affect companies, discouraged to explore the digital development channels, but also the markets of the same Countries, from which companies move away; in extreme cases, such measures risk to limit the exercise of fundamental rights, such as the right of information through social interaction, which are often exercised through digital communication networks.

Moreover, since the digital economy has a clear multinational dimension, the best solutions are undoubtedly those that derive from interventions shared and coordinated between the various Countries in which the said economy is carried on; a contrary approach risks to alter the market equilibrium, damaging the weaker companies and re-establishing that situation which, in the 1920s, led the States to intervene in order to coordinate their respective taxing powers. In other words, it risks to re-introduce those trade barriers that have been removed at that time.