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Quelle fiscalité pour la France et l'Europe lors des cinq prochaines années ?

QUELLE FISCALITÉ POUR LA FRANCE ET L'EUROPE LORS DES CINQ PROCHAINES ANNÉES ?

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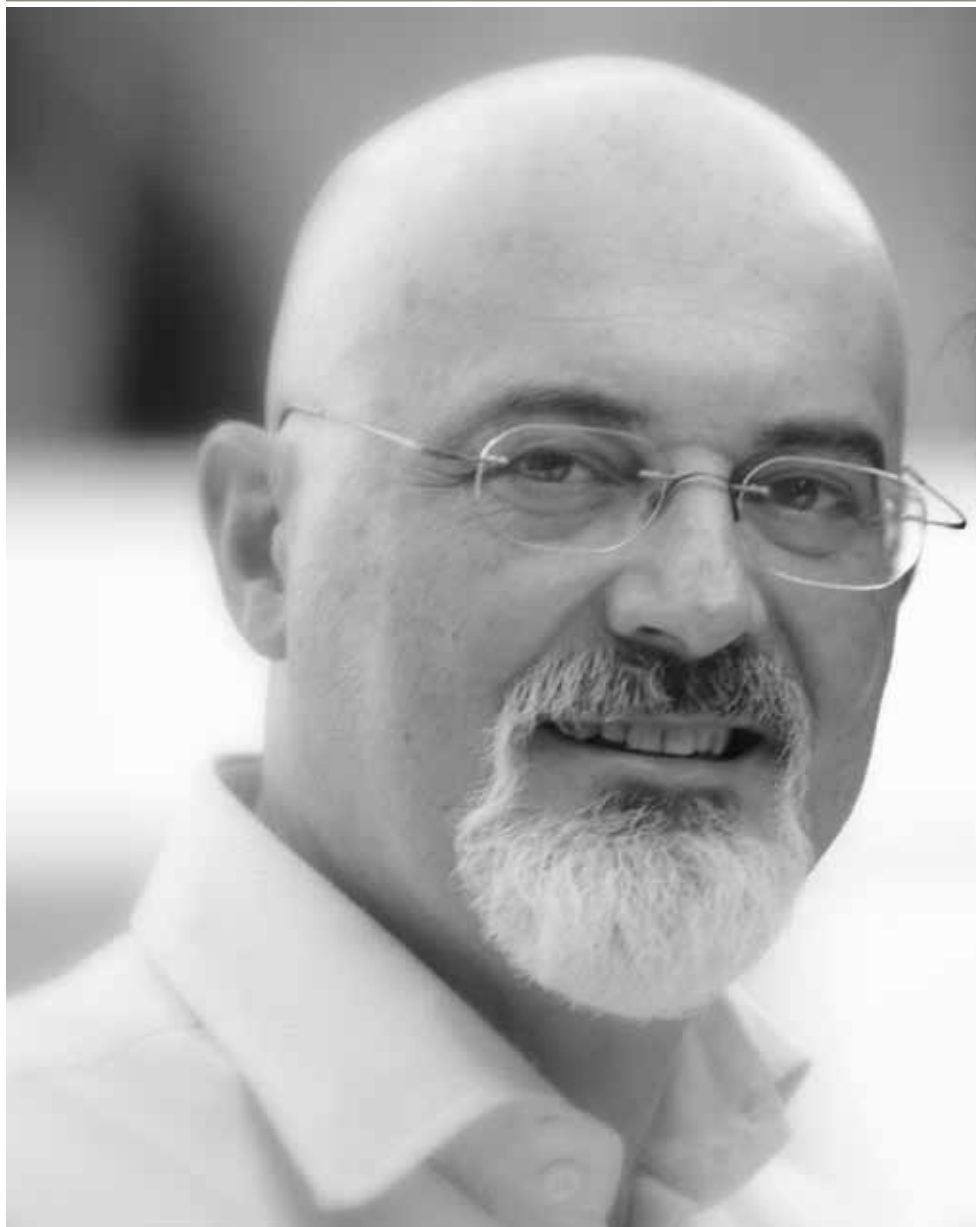
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Digitalization Making the Best out of International Taxation's Disrupters

International taxation is undergoing the most tremendous overhaul of the last 100 years. New standards have been identified at international level, bilateral tax treaties are re-negotiated in a multilateral context, discussions are ongoing on the next changes.

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Introduction

International taxation is undergoing the most tremendous overhaul of the last 100 years. New standards have been identified at international level, bilateral tax treaties are re-negotiated in a multilateral context, discussions are ongoing on the next changes.

The outburst of the transformation is usually identified about five years ago, when the OECD launched its Base Erosion and Profit Shifting (BEPS) Project, in 2013. However, the change had in fact started much earlier, when new technologies began revolutionizing our every-day lives. Distances shortened. Time inten-

sified. A new world order arose, where virtuality is the new reality and ideas the new gold.

In light of the above, this paper will explore the implications of this new reality for international taxation. In particular, this paper shall focus on:

- the impact of the new context on the existing legal framework (part 2);
- the need to adjust the current legal framework (part 3); and
- the steps that have been made in this direction (part 4).

New business models emerge through digitalization

The impact of digital technologies is most evident in the business sector. On the one hand, traditional ways of doing business, e.g. retail commerce, are digitalizing in order to reach more customers, more quickly, more effectively. On the other, completely new business models have arisen, often resulting in an expansion of the value chain to include new participants in unprecedented ways. The OECD provided a detailed presentation of the new ways of doing business in its Final Report on BEPS Action 1. Amongst the most interesting examples are participative networked platforms and sharing or collaborative economic models.

To begin with, participative networked platforms provide the environment for the creation and exchange of digital content among their users. They constitute a multilateral communication tool, which specific outlook shall depend on the features of the targeted content. Hence, there are platforms for the exchange of information, e.g. Wikipedia, platforms for the exchange of videos, e.g. Youtube etc. Common feature of these platforms is that they have neither rights nor responsibilities regarding the specific content they are hosting. Rights and responsibility remain with the user that has uploaded such content, while the platform's profit is, in principle, derived from advertising.

Sharing or collaborative economic models could be described as targeted online marketplaces. In essence, they provide the space and the conditions for their users to come in contact with one another and offer and/or purchase services. An illustrative example is AirBnB or BlaBlaCar, which have enabled large scale customer-to-customer (C2C) services, thus also granting employment to otherwise unemployed persons or additional income to low-earners.

The current international tax framework is no longer adapted to these models

Taking into account that economy is moving to unexplored areas, the question is to what extent the current tax rules can effectively and fairly extract tax revenue therefrom. Given that these tax rules were developed about 100 years ago to fit to a bricks-and-mortar economy, it would be surprising if they could equally suit to a virtual one. In fact, there seems to be

broad consent that they don't. Certain special features of the new economy seem to generate considerable doubts as to how they should be treated under the existing rules.

By way of an example, in participative networked platforms, the figure of the user is central. A successful platform needs not only users but also active users, users willing to create and share content. While the users most probably make no profit, the platform does. Yet the platform's profit does not arise directly from the content or from the users – who do not need to pay to share or access content – but from advertising. On such premises, it needs to be clarified how the value chain is constructed, who participates in the creation of value and subsequently which country is entitled to tax the revenue produced.

Another example of potential inconsistency between current production of value and tax framework refers to the sale or exploitation of users' data. In many cases, an online platform collects data from its users, which it elaborates for statistical purposes or for the promotion of targeted content, on the basis of specific users' interests. Alternatively, the platform might sell the users' data to third parties for elaboration, extraction of information and further sale. There is no doubt that sale of data means value creation. The question is whether or not the fact that the raw material - the data - is user data implies that the user has contributed to the value creation and to what extent.

France and all other European countries need to promote the changes required in the tax field updating their own tax policy but also fostering international cooperation

The more the economy is digitalizing, the more urgent it becomes to answer questions such as the above. While the questions remain pending, income from the new economy is not taxed or not taxed fairly, i.e. at the place where value is created.

The need to identify a proper tax framework for the taxation of the digital economy has been recognized in the context of the Inclusive Framework on BEPS.



Taking into account that economy is moving to unexplored areas, the question is to what extent the current tax rules can effectively and fairly extract tax revenue therefrom.



Digitalization of the economy is challenging the efficiency of the international tax framework. While the need to modify the framework is shared around the globe, the steps that have been made until today can sometimes imply unilateralism.

In an Interim Report published in early 2018, the more than 110 jurisdictions of the Inclusive Framework committed to work together to tailor a commonly agreed solution until 2020. The solution is envisaged to be based on the modification of the rules on nexus and profit allocation. In other words, main point of focus are the factors deemed to link a jurisdiction with the production of income and hence justifying its right to tax it. The same Report stresses the importance of wide consensus on any solution adopted.

A week after the publication of the aforementioned Report, the European Commission published the Digital Tax Package. This Package includes two proposals for two directives aiming at the taxation of digital business models, in the short-term and in the long-term. The long-term proposal envisages a revision of the concept of permanent establishment within the EU, in the same direction as the Interim Report described above, but not identical. The short-term proposal touches an issue raising strong disagreement at international level, suggesting a kind of equalization levy on gross revenue from specific digital services. However, the most controversial aspect of the Package is that it seems to be pursuing an EU-wide regime for digital economy prior to the conclusion of the relevant international discussion and despite recognizing the need for a world-wide regime. The justification invoked is the risk of fragmentation of the EU Single Market due to unilateral actions of Member States.

Conclusion

Digitalization of the economy is challenging the efficiency of the international tax framework. While the need to modify the framework is shared around the globe, the steps that have been made until today can sometimes imply unilateralism.

Yet, a digital world is by definition highly interconnected, de facto unlimited by national borders and fictitious jurisdictions. Such a context does not afford limited solutions. On the contrary, it demands cooperation and coordination at international level. Hopefully, legislators shall stand up to this demand. ●

1. In November 2017, the OECD Council approved new update to the OECD Model Tax Convention, while a new version of the OECD Transfer Pricing Guidelines had been published in July 2017; see OECD, *OECD Council approves the 2017 update to the OECD Model Tax Convention*, 23 November 2017; see also, OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, 10 July 2017.

2. P. Valente, *The Release of the Multilateral Instrument*, 45 *Intertax* 3 (2017).

3. Interim Framework on BEPS; *Tax Challenges Arising from Digitalization - Interim Report 2018*, 16 March 2018.

4. OECD, *About the Inclusive Framework on BEPS*, available at: <http://www.oecd.org/tax/beps/beps-about.htm> (accessed on 19 July 2018).

5. OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, 5 October 2015.

6. However, platforms might have obligations, e.g. to exclude certain content, to comply with criminal law etc.

7. European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence and Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services*, SWD(2018) 81 final/2, 21 March 2018.

8. Inclusive Framework on BEPS, n. 2 above.

9. European Commission, *Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services*, COM(2018) 147 final, 21 March 2018.

10. European Commission, *Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence*, COM(2018) 147 final, 21 March 2018.

11. The most important difference lies in the criteria proposed to connect a jurisdiction with a business operator (through the qualification of a digital permanent establishment). While the proposed Directive envisages criteria related to revenue, number of users and number of contracts, the Inclusive Framework seems to be considering digital factors, e.g. domain name, instead of number of contracts; see P. Valente, *Digital Revolution. Tax Revolution?*, in 72 *Bulletin for International Taxation* 4a (Special Issue), 26 Mar. 2018.

12. J. Becker, J. Englisch, *EU Digital Services Tax: A Populist and Flawed Proposal*, in *Kluwer International Tax Blog*, 16 Mar. 2018.

13. See European Commission, n. 9 above, Explanatory Memorandum. ●