

The Italian Web Tax between National Ambitions and the International Context

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Premise

- ▶ Current rules still based on the **principles** set under the League of Nations (Bruins-Einaudi-Seligman-Stamp;1923):
 - ▶ The income tax is a tax on production, not consumption
 - ▶ For the sake of administration the most convenient minimum threshold for taxing foreign enterprises is the existence of a p.e.
 - ▶ Taxation in the source country based on its accounts on an annual basis
 - ▶ p.e. also represented the best index of economic allegiance with the local jurisdiction
- ▶ The digital revolution: enterprises can enter markets from remote, without heavily relying on physical presence
 - ▶ Market jurisdictions are not only the destination of goods/services, they also produce data which are then elaborated (abroad) and contribute to the creation of value
 - ▶ Issue: should the collection of data be considered as contributing to the creation of value? Art. 5 issue
 - ▶ If so, in what proportion? **Art. 7 issue, which is actually fundamental** (see League of Nations 1923)



Beginning of the discussions (almost ten years ago)

- ▶ BEPS: «Profits should be taxed where economic activities deriving the profits are performed and where value is created»
 - ▶ **No revolution: the income tax still is a tax on production:**
 - ▶ Work to be done in the following years to establish a new nexus
 - ▶ In alternative: withholding at source or equalization levy
- ▶ Permanent subcommittee – May 2013: «MNEs do not pay a fair share, however legal their structures may be»
 - ▶ Issues in the parent companies' jurisdiction (USA) were the focus
 - ▶ But third parties were interested in the findings as well: minimization of the physical presence in the market jurisdictions – challenges on undisclosed p.e. were already in place in Italy and a few other countries
 - ▶ Local companies performing sales and marketing support, usually paid on a cost plus basis (occasionally coupled with a percentage on turnover) and bearing minimal or no risks



Multifaceted confrontations and current stalemate


- ▶ Recovery of State Aids by the EU Commission
 - ▶ Cases still pending
- ▶ Stiff reply by the Secretary of the Treasury:
 - ▶ No retroactive application of EU approach to arm's length/good faith-bad faith/institutional organization of the EU should not override bilateral agreements
- ▶ US Tax Reform of 2017
 - ▶ Letter by 5 Ministers of Finance (France, Germany, Italy, Spain and United Kingdom)
- ▶ EU Proposals of 2018
 - ▶ Provisional remedy: web tax
 - ▶ Final remedy: significant digital presence as a new nexus
 - ▶ **EU is not united**: some countries actually benefit of the *status quo*

Single States try and force the negotiations: Italy

- ▶ Early 2010s → challenges against undisclosed p.e. of foreign MNEs:
 - ▶ Not a transfer pricing challenge on the local entity (as it could/should be); most times dependent agent clause against the foreign entity/commissionaire arrangement, sometimes recharacterization of payments as royalties subject to WHT under art. 12
 - ▶ Undisclosed p.e. allows longer SOL, higher monetary sanctions, criminal charges
 - ▶ Settlements struck with Public Prosecutor in Milan most times (unlike in the Google case in France, Italian case law on p.e. based on a substantial approach, ever since Philip Morris in 2002)
- ▶ 2017: voluntary disclosure program for undisclosed p.e.
 - ▶ Reduction of monetary sanctions
 - ▶ No criminal charges
 - ▶ Attribution of profits based on cooperation between Tax Agency and Taxpayer
- ▶ **Extension of domestic definition of p.e.:** significant economic presence organized «so as to not trigger a physical presence»
 - ▶ *Halfway b/w extension of nexus and antiavoidance*
 - ▶ but what income?!?
- ▶ Finance bill for 2018: web tax (first edition) – never implemented
- ▶ Finance bill for 2019: web tax (second edition) – never implemented
- ▶ April 2019 (in view of EU Dir. 2455/17, effective from Jan. 1st 2021): duty on facilitators/intermediaries through digital platforms/web sites through which the sale of goods is made to report data of the sellers
 - ▶ Failure to report → joint liability for VAT not paid by the seller
- ▶ Finance bill for 2020: web tax (third edition) – in force as of Jan. 1st 2020 – amends Finance Bill 2019

The Italian web tax (third edition), main features

- ▶ Obviously not an income tax, but rather a 3% levy on revenue deriving from specific activities:
 - ▶ Placing of **targeted advertising** through digital interfaces (softwares, web sites, apps)
 - ▶ Putting a **digital interface** at the disposal of its users so that they can be in **contact and interact**, also for the **exchange of goods/services**
 - ▶ fee based virtual clubs included
 - ▶ **Transmission of data collected** from the users of a digital interface while they use it
 - ▶ Numerous carve outs (Art. 1, par. 37bis of the Finance Bill 2019, as modified by the Finance Bill 2020): direct sale of goods/services, banking and financial sector, oil&gas
 - ▶ Infragroup transactions not taxable
- ▶ Thresholds:
 - ▶ 750 mio euro of group ww revenue (previous year – accrual basis)
 - ▶ 5,5 mio euro of revenue from relevant activities on Italian market (previous year)
- ▶ Taxable period: calendar year
- ▶ Territorial relevance: **where the user is** when connecting to the digital interface (par. 40bis: IP address... or any other geolocalization tool...?)
 - ▶ Privacy issues to be clarified

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- ▶ Payment is due on February 16th 2021
 - ▶ Tax return is due on March 31st 2021
 - ▶ Appointment of a single entity within the group requested
 - ▶ Foreign entities w/o p.e. must obtain a VAT number
 - ▶ Entities w/o p.e. and resident in a non EU-non EEA must appoint a tax representative
 - ▶ Local entities of the same group held jointly liable, regardless of their biz line
 - ▶ Reassessment, collection, sanctions and litigation follow the rules on VAT, where feasible
 - ▶ Specific bookkeeping on a monthly basis
 - ▶ Implementing rules to be released by the Director of the Tax Agency (still to be seen; the tax is already in force though)
 - ▶ Should be **deductible** under art. 99 ITA
 - ▶ Some incentive to locate regional entities in higher tax countries and get a deduction for any other web tax paid in other countries – US FTC then probably available?

Open issues of the IWT

- ▶ Unintended taxpayers (web sites, newspapers, intermediaries and other media already paying full income tax in the country, 5,5 mio is pretty low as a threshold and could capture bigger groups with negligible online activities)
- ▶ **Cascading** effect for online advertising services and articulated chains (spared under art. 3.3 of the EU Proposal)
- ▶ Tax on gross: effective burden varies across sectors/companies
- ▶ **Shifting** of the burden on smaller enterprises/advertisers and publishers **expected**
- ▶ Intermediary platforms that also make direct sales
 - ▶ Same good will undergo taxation or not: small enterprises trying to sell online through platforms will pay both the commission and (indirectly) the web tax
- ▶ «targeted» advertising



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- ▶ Separate bookkeeping: additional burden
- ▶ Mixed services: unclear whether the gross payment will be taxed in full/how to segment
- ▶ Territorial link is weak
 - ▶ data of foreign tourist googling (for whatever) in Venice → IWT
 - ▶ Data of Italian resident googling in Rome for French products → IWT
- ▶ Expected revenue: possibly overestimated
- ▶ Sunset clause is vague: OECD, EU, MLI?
- ▶ **Risk of retaliatory measures**: Section 301 of the US Trade Act



2020: a watershed year? ... not really, in the end

- ▶ Release of the OECD proposals expected
 - ▶ Next steps in June, July, November (Statement by the Inclusive Framework of Jan. 31st)
 - ▶ November 2020: **release of the Blueprint on Pillar one and Pillar two**
 - ▶ The US are still against Pillar one, if not merely as a **safe harbour** (Pillar two would be more ok for them ... GILTI)
- ▶ Pillar one: new nexus and consequent additional taxing powers to market jurisdictions
 - ▶ **amount A deviation from ALP as the substitute for the web tax**
- ▶ Pillar two: minimum taxation of MNEs