

PRAWO / LAW**SALVATORE ANTONELLO PARENTE****TAX PROFILES
OF THE DIGITAL ECONOMY****1. Internet’s development and activities carried out
by the giants of the web**

The development of the internet – contraction of the english phrase interconnected networks¹ – and the tools of information technology (IT) has encouraged the spread of economic relations intersubjective in transnational scope², expounding a multiplicative factor in terms of development and socio-economic growth of a country³: being activities that might acquire economic value, in terms of tax, we wondered if, for to emergencies raised by the digital economy⁴, is sufficient to adapt the existing fiscal instruments (status quo approach)⁵ choosing less costly, cautious, conservative and apply immediately, based on the assumption that the cyberspace is mere offshoot of the physical world⁶

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¹ Comp. A. Uricchio, *Presentazione*, in F. Montalcini – C. Sacchetto, *Diritto tributario telematico*, Torino, 2015, p. XVII.

² Comp. P. Valente, *Ipotesi di tassazione del reddito transnazionale di internet*, in *Riv. dir. fin. sc. fin.* 3(1998), I, p. 408.

³ Comp. C. Scaglioni, *La fiscalità delle «multinazionali digitali»: il caso italiano*, in *Riv. dir. trib. int.* 2(2013), p. 233.

⁴ On the matter, comp. R. Hammond, *Digital business: surviving and thriving in an on-line world*, London, 1996; R. Kamerling – N. Negroponete, *Being digital*, New York, 1996; D. Tapscott, *The digital economy: promise and peril in the age of networked intelligence*, New York, 1996; J. Van Der Putten, *Controle, digitalisering en mondialisering*, *Praktijkblad voor de MKB-adviseur*, 1997, p. 11 ff.; D. Coyle, *The weightless world: strategies for managing the digital economy*, Cambridge, 1998; P. Garrone – S. Mariotti (a cura di), *L’economia digitale*, Bologna, 2001; P. Cellini, *Economia digitale. L’industria e i mercati di internet e dei nuovi media*, Roma, 2015; P. Valente – G. Ianni – F. Roccatagliata, *Economia digitale e commercio elettronico. Fiscalità in internet nella gestione d’impresa*, Milano, 2015.

⁵ In these terms, comp. B. Westberg, *Tassazione del reddito derivante dal commercio elettronico internazionale*, in R. Rinaldi (edited by), *La fiscalità del commercio via Internet: attualità e prospettive*, Torino, 2001, p. 100; G. Marino, *Aspetti fiscali del commercio elettronico*, in G. Sacerdoti – G. Marino (a cura di), *Il commercio elettronico: profili giuridici e fiscali internazionali*, Milano, 2001, p. 145.

⁶ Comp. L. Del Federico, *La via italiana alla tassazione del web: un intervento poco meditato ma dalle condivisibili finalità*, in *Riv. trim. dir. trib.* 4(2014), p. 919.

– or is necessary to devise new forms of levy (revolutionary approach)⁷, creating a virtual world taxation⁸.

It is known that the tax law analyses the changes in the economic reality in order to locate the ability to pay to be subject to tax⁹. In this context, the network does not address taxation issues are completely new, but old problems – involving the allocation of tax claims between those who hold the taxing rights – in a radically revamped: the digital economy, the web and the interactions that are made¹⁰.

The tributaries profiles of the network must be analyzed in three perspective (national, transnational and virtual), which reflects its scope, on account of the differences between the online transactions, a vocation tend incorporeal and intangible, and traditional activities, characterized by only two dimensions (national and transnational), by reason of the character of the same material and tangible: taxation of the internet has, therefore, for both national in scope as that transnational virtual products income¹¹.

In this context, special emphasis hiring tax profiles the activities carried out by large multinational companies (Google, E-bay, Amazon, Apple, Facebook, Twitter, Airbnb, Netflix, Spotify, Alibaba, Didi Chuxing) company, with subsidiaries in various countries, that can produce very high incomes, hardly taxed in the source State, or at least frequently taxed to a lesser extent than the ordinary tax regime.

In doing so, those who work in the digital economy can create dangerous phenomena of international tax planning¹², resulting in a significant erosion

⁷ In this sense, comp. G. Tremonti, *La fiscalità del terzo millennio*, in *Riv. dir. fin. sc. fin.* (1998), p. 79.

⁸ Comp. A. Uricchio, *Evoluzione tecnologica e imposizione: la cosiddetta «bit tax»...*, p. 754; S. Cipollina, *I confini giuridici del tempo presente. Il caso del diritto fiscale*, Milano, 2003, p. 289 ff.; L. Del Federico, *La via italiana alla tassazione del web...*, p. 919; E. Marellò, *Le categorie tradizionali del diritto tributario...*, p. 595; G. Corasaniti, *Profili fiscali del commercio elettronico*, in *Dir. prat. trib.* 4(2003), I, p. 609, nt. 6. On the matter, comp. J. D. Cigler – H. C. Burrit – S. E. Stinnet, *Cyberspace: the final frontier for international tax concepts?*, in *Journal of International Taxation* 7(1996), p. 340 ff.; Aa.Vv., *International tax issues in cyberspace: taxation of cross-border electronic commerce*, in *Intertax* 4(1997), p. 120 ff.; D. Cottrell – R. G. Worsham, *Internet resources for international tax practitioners are emerging and expanding*, in *Journal of International Taxation* 1(1997), p. 10 ff.; L. Hinnekens, *New age international taxation in the digital economy of the global society*, in *Intertax* 4(1997), p. 116 ff.; F. Roccatagliata – A. Fiorelli, *World Wide Web – Problemi fiscali legati all'uso commerciale di Internet*, in *Il fisco* 30(1997), p. 8514 ff.; I. Spence, *Globalization of transnational business: the challenge for international tax policy*, in *Intertax* 4(1997), p. 143 ff.; P. Adonnino, voce *Internet IV) Diritto Tributario...*, p. 1 ff.; L. Del Federico, *La digital economy ed il sistema tributario: considerazioni introduttive*, in L. Del Federico – C. Ricci (edited by), *La digital economy nel sistema tributario italiano ed europeo*, Padova, 2015, p. 1 ff.

⁹ Comp. G. Melis, voce *Commercio elettronico nel diritto tributario*, in *Dig. disc. priv., sez. comm.*, Aggiornamento, vol. 4, Milanofiori Assago (MI), 2008, p. 64.

¹⁰ Comp. C. Garbarino, *Nuove dimensioni della transnazionalità dell'imposizione*, in *Raff. trib.* 3(2000), p. 870.

¹¹ Comp. C. Garbarino, *Nuove dimensioni della transnazionalità...*, p. 873–877.

¹² Comp. C. Garbarino, voce *Pianificazione fiscale internazionale*, in *Dig. disc. priv., sez. comm.*, Aggiornamento, vol. 4, Milanofiori Assago (MI), 2008, p. 670 ff.

of the tax base¹³, through the artificial transfer of profits reduced taxation or tax havens in countries¹⁴.

In this context, the traditional principles of international taxation soon appeared inadequate, as the term «of a distant time when the physicality of the goods appeared to ensure the preservation of tax claims»¹⁵.

The Italian legal system has tried to remedy this widespread phenomenon, with timid actions which seek to establish, first, a Google tax, then a digital tax, before arriving to the web tax, recently adopted in two different subsequent versions (before “digital transactions tax” and after “digital services tax”), but characterized by an uncertain future¹⁶.

2. The troubled Italian experience: the “Google tax”

The operators of the “digital economy”, taking advantage of regulatory deficiencies of various legal systems, not in line with the fast-paced technological development, and displacing their activities in privileged taxation states, implement a series of “steps” aimed at limit the tax burden.

These behaviors that would be difficult to implement in the old economy and that they would have resulted in tax penalties, by way of tax avoidance, in the new economy does not seem to be attributable to a net and defined framework, in given the high degree of “dematerialization” and “relocation” which characterises the economic activity carried out.

In such cases, the Italian legislator, echoing the experiences of other European Union Member States and non-EU citizens¹⁷, has tried to remedy with the establishment of the web tax, fiscal tool who lived a regulatory procedure rather tormented and for which it has been necessary proposals, united by the same finality: to subject to tax network giants to ensure tax fairness and ensuring compliance with the competition rules.

The first timid attempt was performed by article 1, paragraph 33, law 27 December 2013, n. 147 (Stability law 2014), embodying the primal version of the web tax, also called “Google tax”¹⁸. By virtue of that provision, was inserted

¹³ Comp. P. Mastellone, voce *Contrasto all'erosione nel diritto tributario internazionale*, *Dig. disc. priv., sez. comm.*, Aggiornamento, vol. 8, Milanofiori Assago (MI), 2017, p. 46 ff.

¹⁴ Comp. G. Corasaniti, *Profili fiscali del commercio...*, p. 613, nt. 23; V. Uckmar, *Introduzione*, in *Corso di diritto tributario internazionale*, coordinato da V. Uckmar, Padova, 2002, p. 17. On the preferential tax regime countries, comp. C. Garbarino, voce *Paesi a regime fiscale privilegiato*, in *Dig. disc. priv., sez. comm.*, Aggiornamento, vol. 4, Milanofiori Assago (MI), 2008, p. 657 ff.

¹⁵ P. Valente, *Ipotesi di tassazione del reddito...*, p. 383.

¹⁶ Comp. A. Uricchio – W. Spinapolice, *La corsa ad ostacoli della web taxation*, in *Rass. trib.* 3(2018), p. 451 ff.

¹⁷ Comp. L. Bernardi, *Internet and taxation in the European Union...*, p. 311–312.

¹⁸ Comp. A. Uricchio – W. Spinapolice, *La corsa ad ostacoli...*, p. 460 ff.; L. Del Federico, *La via italiana alla tassazione del web...*, p. 913 ff.; C. Trenta, *The Italian “Google Tax”*. *National Taxation and the European E-Economy*, in *Riv. trim. dir. trib.* 4(2014), p. 889 ff.; L. Quarantino,

in article 17-bis, decree of the President of the Republic, 26 October 1972, n. 633, on the VAT system which make the purchase of advertising space online by foreign giants (such as Google) which, while maintaining stable relationships with Italian operators often do not pouring, as they should, taxes in Italy, starting at the registered office abroad – mostly in Ireland (as in the case of Apple, Google, Facebook) or Luxembourg (such as for Microsoft and Amazon), countries with the lowest tax, in terms of rates or of determination of the taxable amount, income of enterprise at Community level or in privileged fiscal jurisdictions or in tax havens such as the Cayman Islands or the British Virgin Islands – or using artificial tax maneuvers, elusive character, aimed to limiting the revenue not only for the host country but also to the country of origin¹⁹.

The entry into force of the provision, originally set at 1 January 2014, was subsequently postponed until 1 July 2014; before that date, however, the rule was repealed by the article 2, paragraph 1, lett. a), decree-law, 6 March 2014, n. 16, converted with amendments by law 2 May 2014, n. 68.

Actually, the Italian “Google tax”, although it never entered into force, has not been free from criticism of who²⁰, while recognizing the shared objectives of the news statement, it stressed the inadequacy, because of existing differences compared to EU principles – founding the European single market – and the BEPS project (Base Erosion and Profits Shifting)²¹, intervention promoted by the OECD, during the G20 Summit in Moscow with the action plan of 19 July 2013, in order to combat conducted made by digital multinationals, aimed to minimizing the tax burden through tax base erosion and transfer of profits between different tax jurisdictions²².

Therefore, the idea of imposing restrictions of subjective and territorial nature in the field of VAT, to online advertising, has attracted quite a few misgivings, which helped to speed the repeal of article 17 bis of decree of the President of the Republic n. 633/1972 even before its entry into force²³.

New provisions regarding the taxation of the digital economy, in *European taxation* 5(2014), p. 211 ff. On comparative profiles of the institute, comp. S. Ariatti – R. Garcia, *La nuova e variegata frontiera della “Google Tax”: profili comparatistici*, in L. Del Federico – C. Ricci (edited by), *La digital economy nel sistema tributario italiano ed europeo*, Padova, 2015, p. 247 ff.

¹⁹ Comp. C. Scaglioni, *La fiscalità delle «multinazionali digitali»...*, p. 234.

²⁰ Comp. L. Del Federico, *La via italiana alla tassazione del web...*, p. 913 ff.; C. Trenta, *The Italian “Google Tax”...*, p. 889 ff.

²¹ Comp. Oecd/G20 (2014), *Base Erosion and Profits Shifting*, in <http://www.oecd.org/ctp/beps.htm>; L. Bernardi, *Internet and taxation in the European Union...*, p. 316 ff.

²² The transfer of profits (profits shifting) in the jurisdiction most advantageous for tax purposes can be achieved through funding policies or by transfer pricing practice, as part companies belonging to the same group, as a result of which, the multinational enterprise sets a lower price for the goods sold subsidiaries located in countries with higher tax rates and a higher price for goods sold to affiliated companies located in countries with lower tax rates; thus, the flow of trade to (or from) companies located in countries with higher tax rates will be low (or high), compared to trade to (or from) companies located in countries with lower tax rates. On this point, comp. C. Scaglioni, *La fiscalità delle «multinazionali digitali»...*, p. 236–237 and 247.

²³ Comp. L. Del Federico, *La via italiana alla tassazione del web...*, p. 916.

The reasons behind the failure of the legislative news can be summarised as follows: lack of a preliminary phase of study, being a legislative news in emergency character, contingent and improvised; lack of coordination with the OECD and addresses with similar initiatives taken by other countries; ambiguity of legislative intervention, whose drafting technique is characterized by large and innominate formulas – for example, online advertisements, sponsored links online – which does not shine with some clarity and precision; the marginal nature of the measure, in view of the limited scope of digital advertising services; poor coordination with the Community VAT discipline substrate in the field of electronic services; limitation in the purchase of online services; need for providers of online advertising arm of VAT number issued by the Italian Revenue Agency; contrary to the constitutional principles and Community competition and freedom of economic initiative and the principle of proportionality, given the tightening and excessive restrictions provided for by article 17 bis of decree of the President of the Republic n. 633/1972, even if you want to justify the rigidity of the arrangement in an anti elusive optics or tax evasion contrast²⁴.

3. The proposal establishing of the “digital tax”

Subsequently, there was a bill introduced on 27 April 2015²⁵, which, resuming the studies developed by the Oecd, in order to counter tax avoidance transactions conducted electronically, amended the definition of “permanent establishment”²⁶, under article 162, decree of the President of the Republic 22 December 1986, n. 917 (Tuir), and promoted the establishment of “digital tax”, consisting of a withholding tax, amounting to 25%, payments made by persons resident in Italy at the time of purchase of products or services digital at a digital operator (e-commerce), residing abroad. As you know, as part of the digital economy you can operate in a local market without having to maintain a physical presence inside, configurable as permanent establishment, resulting in liability to taxation in such State of profits of the intangible company. However, consumers cannot be qualified as a substitute for sets, the only way to apply the withholding tax is to involve the financial institutions in charge of regulating the payment of online purchases, except if the digital multinationals have not

²⁴ Comp. L. Del Federico, *La via italiana alla tassazione del web...*, p. 916–917; C. Trenta, *The Italian “Google Tax”...*, p. 892ff.

²⁵ Comp. Atto Camera n. 3076, in http://documenti.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0034110.pdf.

²⁶ Comp. C. Garbarino, voce *Stabile organizzazione (nel diritto tributario)*, in *Dig. disc. priv., sez. comm.*, Aggiornamento, vol. 5, Milanofiori Assago (MI), 2009, p. 663 ff.; C. Ricci, *La digital economy ed il problema della stabile organizzazione nell’esperienza italiana*, in L. Del Federico – C. Ricci (edited by), *La digital economy nel sistema tributario italiano ed europeo*, Padova, 2015, p. 57 ff. On the previous concept of permanent establishment, comp. G. Corasaniti, *Profili fiscali del commercio...*, p. 615; A. Lovisolo, *Il concetto di stabile organizzazione nel regime convenzionale contro la doppia imposizione*, in *Dir. prat. trib.*(1983), p. 1128 ff.; A. Fantozzi, *L’imposizione fiscale delle stabili organizzazioni: problematiche e prospettive*, in *Riv. dir. trib. int.* 1(2002), p. 9 ff.

secured a permanent establishment on the Italian territory or have concluded an agreement with the financial administration (tax rulings), in order to subject to tax the proceeds of the activity carried out in Italy. This bill, however, has remained a dead letter, having received no approval.

4. The transient “web tax”

A further step in this regard was made in the conversion of decree law 24 April 2017, n. 50, by the law 21 June 2017, n. 96, through the inclusion of article 1-bis, laying down the rules of procedure “enhanced cooperation and collaboration”, which, on the lines of existing arrangements, such as the international ruling and cooperative compliance²⁷, allows multinationals, whose revenues are in excess of 1 billion euros annually and have carried out supplies of goods and services in the territory of the State in an amount exceeding 50 million euro, to give life to a strengthened compliance through advance arrangements with the Agency Revenue in order to verify the existence of the requisites constituting a permanent establishment and access to collaborative compliance regime, so to prevent the emergence of disputes with the Italian Revenue Agency, averting also the application of sanctions following the finding of misconduct.

In the presence of its requirements, even the giants of the web can take advantage of the compliance procedure: indeed, the norm, although applicable in theory to other economic operators, is meant primarily to facilitate the great player of network, surging to major recipients of available²⁸. In doing so, these taxpayers have the ability to regulate their relations with the tax authority, bringing out profits in the abstract subject to taxation in Italian territory, but they hardly appear to be in practice, because of the obstacles inherent in identifying a permanent establishment in Italy: the enhanced compliance procedure serves to determine in advance the amounts due in order to comply with the tax burden as a result of activity on the Italian territory²⁹.

Therefore, the tool, commonly defined, atmospherically, “transient web tax”³⁰, rather than build a real set, represents a form of voluntary emergence – given the optional nature – with prize effects on sanctions plan, of the permanent establishment in Italy of non-residents working in the field of digital economy and with the requirements of available³¹.

²⁷ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 526.

²⁸ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 526.

²⁹ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 525–526.

³⁰ On the matter, comp. D. Avolio – L. Imperato, *Effetti premiali per la nuova voluntary della stabile organizzazione*, in *Corr. trib.* 29(2017), p. 2269 ff.; L. Rossi – G. Ficai, *Web tax: prime considerazioni*, in *Boll. trib.* 18(2017).

³¹ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 525.

5. The first version of the Italian web tax: the “digital transactions tax”

Only with the law 27 December 2017, n. 205 (Budget Bill 2018) (paragraphs 1011–1017 in article 1), following the outcome of the informal Ecofin summit, held in Tallinn on 15 and 16 September 2017 and the communication from the Commission to the European European of 21 September 2017 [COM (2017) 547 final] on “a fair and effective tax system in the European Union for the digital single market”, was established the digital transaction tax (so called, web tax)³², which applies to supplies of services made by electronic means in favour of persons residing in Italy, who have not adhered to the flat-rate scheme and to the taxation of the benefit, and for the benefit of permanent establishments of non-residents located in Italy.

This instrument of taxation, whose connotations are much closer to those of indirect taxation³³, represents the Italian response to the debate on procedures for taxation of the digital economy; many, though, are the profiles of critical issues raised by current legislation and in view of the differences compared to similar initiatives taken in other legal systems³⁴.

The domestic tax web appears a buffer and emergency solution, becoming almost a “turnover tax”, which, it could become definitive³⁵, because of the difficulty in achieving broader structural funding – international level the multilateral – susceptible to change and conventional forecasts, entrenching taxing even taking into account the location of the “significant presence”, as well as identifying suitable income allocation policies in order to contest digital activities to the creation of value³⁶.

With regard to the objective scope, the budget bill 2018, resuming the definition of article 7, paragraph 1, of Council regulation EU n. 282/2011 of 15 March 2011, implementation of directive n. 2006/112/EC on the common system of value added tax (so called “recast directive”) considers “supplied by

³² On the matter, comp. A. Uricchio – W. Spinapolice, *La corsa ad ostacoli ...*, p. 461 ff.; M. Antonini – E. Toschetti, *Web tax e obsolescenza degli attuali sistemi impositivi*, in *Corr. trib.* (2017), p. 3177 ff.; C. Attardi, *Procedura di cooperazione e collaborazione rafforzata nel panorama dei modelli attuativi*, in *Il fisco* 43(2017), p. 4150 ff.; G. Fransoni, *Prime considerazioni sulla web tax ovvero sull’iniziativa congiunta di Francia, Germania, Italia e Spagna di tassare le società attive nel settore della digital economy*, in *Riv. dir. trib.*, supplementon-line of 19 September 2017; E. Della Valle, *La web tax italiana e la proposta di Direttiva sull’Imposta sui servizi digitali: morte di un nascituro appena concepito?*, in *Il fisco* 16(2018), p. 1507 ff.; D. Avolio – D. Pezzella, *La web tax italiana...*, p. 527 ff.; A. Bisioli – A. Zullo, *Web tax: una lettura in chiave comunitaria*, in *Corr. trib.* (2018), p. 1032 ff.; G. Odetto, *La web tax parte dal 2019 con molti problemi aperti*, in *Eutekne.info* of 4 January 2018; F. Telch, *Imposta sulle transazioni digitali: la web tax*, in *Prat. fisc.* 3(2018), p. 90 ff.; A. Tomassini, *L’incerta corsa alla tassazione dell’economia digitale*, in *Corr. trib.* 3(2018), p. 169 ff.

³³ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 527.

³⁴ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 525.

³⁵ Broadly sceptical, comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 529.

³⁶ Comp. E. Della Valle, *La web tax italiana e la proposta di Direttiva sull’Imposta sui servizi digitali...*, p. 1508.

electronic means” the services provided using the Internet or an electronic network, the nature of which renders the provision essentially automated, with minimum human intervention and impossible to guarantee in the absence of information technology³⁷.

It is a broad concept and unnamed, able to cover multiple services provided through the use of electronic networks, such as mobile networks used for telephony, and those used for financial services those that serve to transmit radio and television signals³⁸.

The domestic web tax incorporates a rate of 3% on the value of the transaction, namely the digital fee payable for these obligations, net of VAT, irrespective of the place of conclusion of the transaction³⁹. The tax is applied against the party lender, whether resident or non-resident, irrespective of the legal form, which carries out, over the course of a calendar year, a total number of transactions greater than 3,000 units⁴⁰, regardless of their value; given the wide wording of the provision, the quantitative threshold is calculated taking into account only the number of potentially taxable transactions, that is made in respect of clients having the status of withholding agent⁴¹.

This parameter, which, in the intention of the legislator would serve to exempt from the obligation to pay the tribute occasional providers of services, as individuals whose risk is rather limited, might, in fact, appear inefficient, since, in the absence of a parameter of economic importance, it would be paradoxical situations such as that of subjecting to tax those who implement multiple small transactions, exempting, by contrast, operators who, despite the small number of work accomplished, they perceived huge sums⁴².

The tribute is withdrawn, upon payment of the consideration, by the purchasers of services, as a source-withholding tax, with the obligation of recourse on providers, except where registrants provide indicate in to invoice for the benefit or in any other appropriate document to be sent together with the invoice, not to exceed the above limit of transactions within a calendar year⁴³; the correct identification of concerns arise time reference (previous calendar

³⁷ Comp. E. Della Valle, *La web tax italiana e la proposta di Direttiva sull'Imposta sui servizi digitali...*, p. 1508; G. Odetto, *La web tax*, in Aa.Vv., *Le novità della Legge di bilancio 2018 e del D.L. collegato*, Quaderni Eutekne, Torino, 2017, p. 188; D. Avolio – D. Pezzella, *La web tax italiana...*, p. 528.

³⁸ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 528.

³⁹ Comp. E. Della Valle, *La web tax italiana e la proposta di Direttiva sull'Imposta sui servizi digitali...*, p. 1508; D. Avolio – D. Pezzella, *La web tax italiana...*, p. 528.

⁴⁰ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 527; E. Della Valle, *La web tax italiana e la proposta di Direttiva sull'Imposta sui servizi digitali...*, p. 1508, nt. 2, which stresses that it «is interesting to see if the term transaction here is equivalent or less than single service or, in other words, if the 3,000 units, which is the *discrimen* for the purposes of the tax with regard to transactions in be is meant or not as 3,000 services».

⁴¹ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 528.

⁴² Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 528.

⁴³ Comp. E. Della Valle, *La web tax italiana e la proposta di Direttiva sull'Imposta sui servizi digitali...*, p. 1508; D. Avolio – D. Pezzella, *La web tax italiana...*, p. 529.

year than in performing a benefit or, rather, the current calendar year)⁴⁴. The same customers are required to pay the tax within the 16 day of the month following that in which payment of the consideration⁴⁵.

Therefore, are taxable persons of the tax as much residents as non-residents providing services by electronic means in favour of persons residing, designated as withholding agents, ex article 23, decree of the President of the Republic n. 600/1973, and for the benefit of permanent establishments of non-residents in the territory of the State⁴⁶, which are also withholding agents as indicated also by the tax authority⁴⁷. Are excluded from the scope of the digital web tax transactions made against individuals (B2C), the latter cannot be qualified as withholding agents, the “minimum tax payers”⁴⁸, of those using the scheme tax advantage for “young entrepreneurs” and for workers on the move⁴⁹; this exemption operates in one direction, that is only in the case of services rendered for these subjects and not the opposite⁵⁰.

The territoriality of the tax is determined as a function of the subject customer and not of the service provider, irrespective of the place of conclusion of the transaction⁵¹. This configuration, with reference to the non-resident company, raises critical issues, because such persons must comply with the web tax, «new tax, similar in some respects to VAT tribute – with all that could be achieved in terms of any community complaints, such as “duplicate” of VAT – in addition to the ordinary direct taxation, without granting any tax credit»⁵².

The higher tax burden, digital operators residents, could result in a disadvantage, in terms of competitiveness, compared to non-residents; in fact, while revenues produced by the first would be to pay the new tribute, along with other direct taxes, with the rates in force in Italy, for non-resident corporations the web tax could allow to address, once and for all, to tax obligations in Italy, continuing to correspond, privileged taxation countries of residence, a tribute with derisory rates⁵³.

Not to mention that the network giants, being fitted with a market power greater than that of Italian firms, could translate the toll on prices of digital services, while maintaining competitiveness; in this light, even the expectation

⁴⁴ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 529.

⁴⁵ Comp. E. Della Valle, *La web tax italiana e la proposta di Direttiva sull'Imposta sui servizi digitali...*, p. 1508; D. Avolio – D. Pezzella, *La web tax italiana...*, p. 529.

⁴⁶ Comp. E. Della Valle, *La web tax italiana e la proposta di Direttiva sull'Imposta sui servizi digitali...*, p. 1508; D. Avolio – D. Pezzella, *La web tax italiana...*, p. 527.

⁴⁷ Comp. Ministerial Circular, 23 December 1997, n. 326/E, in *www.finanze.it*.

⁴⁸ Comp. article 1, paragraphs 54–89, law 23 December 2014, n. 190.

⁴⁹ Comp. article 27, decree-law 6 July 2011, n. 98, converted by law 15 July 2011, n. 111.

⁵⁰ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 527. In addition, comp. Confindustria, Nota di aggiornamento del 10 gennaio 2018, “Legge di bilancio 2018 – Misure fiscali d’interesse per le imprese – Prime osservazioni aggiornate alla pubblicazione del testo definitivo”, in *www.confindustria.benevento.it/up-content/uploads/2018/01/confindustria-legge-di-bilancio-2018-prime-osservazioni-alle-misure-fiscali-10-gennaio-2018.pdf* p. 103.

⁵¹ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 527.

⁵² D. Avolio – D. Pezzella, *La web tax italiana...*, p. 527.

⁵³ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 528.

of a rate relatively low (3%) is a compromise between two opposing requirements (on the one hand, countering tax avoidance and, secondly, not penalize excessively traders residents)⁵⁴.

Given this configuration, the home web tax does not appear a “equalization levy”, namely a compensatory levy aimed at hitting, at the place of production revenues, companies that don’t discount tax loads, nor in the country of residence, nor in the source, since even non-residents with a permanent establishment in the State, including “non-physical” under article 162, letter f-bis⁵⁵ of the TUIR, are affected by taxation; in addition, the tribute is not the only business to business transactions (B2B), since among the withholding agents, identified in the purchasers of digital services, there are also non-commercial bodies, even where not productive of business income, and condo buildings⁵⁶.

The tribute, as structured by the 2018 fiscal law, assumes the features of sectoral and discriminatory tax, even though transient, although, owing to the difficulties mentioned earlier, to elaborate a global solution is easy to predict transformation into a type of structural withdrawal⁵⁷: its theoretical justification⁵⁸, therefore, raises many concerns, since, as confirmed by the Constitutional Court on a number of occasions⁵⁹, including the previous known “Robin Hood Tax”⁶⁰, such a form of taxation would be legitimate only if not arbitrary or unreasonable, it being necessary that «any diversification of the tax system, economic area or type of contributors», is «supported by adequate justification, without which the differentiation degenerates into arbitrary discrimination»⁶¹.

No shortage more critical profiles: think of the circumstance, assumed by the legislature but unproven, greater ability to earn profits that digital would businesses than traditional ones, when, instead, the only comparison between traditional and web giants enterprises brings out differences negligible both in terms of profitability which characteristics of business⁶²; in addition, the italian web tax as structured, would hit, in the presence of its requirements,

⁵⁴ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 528.

⁵⁵ This is the so called “virtual” permanent establishment, identified in «ongoing and significant economic presence in the State built in such a way as not to do be a physical substance in the territory itself». On the matter, comp. D. Avolio, *La nuova definizione di stabile organizzazione*, in *Corr. trib.* 4(2018), p. 265 ff.

⁵⁶ Comp.E. Della Valle, *La web tax italiana e la proposta di Direttiva sull’Imposta sui servizi digitali...*, p. 1508.

⁵⁷ Comp. E. Della Valle, *La web tax italiana e la proposta di Direttiva sull’Imposta sui servizi digitali...*, p. 1509.

⁵⁸ On the point, comp. F. GALLO, *Regime fiscale dell’economia digitale*, Hearing held at the Chamber of Deputies on 24 February 2015, in www.camera.it/temiap/2015/02/25/OCD177-980.pdf.

⁵⁹ Comp. Constitutional Court n. 111/1997, in <https://www.cortecostituzionale.it>; Constitutional Court n. 223/2012, in <https://www.cortecostituzionale.it>; Constitutional Court n. 116/2013, in <https://www.cortecostituzionale.it>; Constitutional Court n. 201/2014, in <https://www.cortecostituzionale.it>.

⁶⁰ Comp. Constitutional Court n. 10/2015, in <https://www.cortecostituzionale.it>.

⁶¹ E. Della Valle, *La web tax italiana e la proposta di Direttiva sull’Imposta sui servizi digitali...*, p. 1509.

⁶² Comp. E. Della Valle, *La web tax italiana e la proposta di Direttiva sull’Imposta sui servizi digitali...*, p. 1509.

not just the giants of the network (known as “Over the top” – OTT), but also small and medium-sized enterprises operating on the web⁶³; the reference to the overcoming of 3,000 transactions for year, regardless of the value of the transaction, does not warrant «a selection of taxable line with the intention of the legislature that is to hit headers and users of so-called Big data, so the giants of the web»⁶⁴ and is not fully consistent with the principle of ability to pay; for non-resident taxpayers with permanent establishment in Italy taxation revenues will add to the income levy generated in Italy and although its deductibility as production cost, would end up hitting, in a totally unreasonable, loss-making subjects⁶⁵; not to mention that “turnover tax”, its weight will eventually weigh on consumers of digital services⁶⁶.

By express legislative forecast, aspects of the investigation, sanctions, collection and litigation of domestic web tax are governed by provisions concerning the value added tax, to the extent of compatibility⁶⁷.

The entry into force of web tax was fixed at 1 January 2019, but, in fact, this has not happened. In particular, the legislator was referring to 1 January of the year following that of its publication in the official journal of the decree of Minister of economy and finance, which will have to be concretely identified the services subject to the new tribute, together with any exemptions; such *modus operandi* can only leave perplexed, since, refer positive assumption of taxation and any boundary exemptions to a ministerial order, in the absence of any governing policy might violate the principle of legality under article 23 of Constitution⁶⁸; nevertheless, the adoption of the decree by the Mef, laid down by the legislature by 30 April 2018, has not occurred.

6. The second version of the Italian web tax: the “digital services tax”

However, the law 30 December 2018, n. 145 (Budget Bill 2019), in the article 1, paragraphs 35–50, like what has happened previously with the Google tax, repealed, prior to the entry into force, the “digital transactions tax”, introducing a new a version of the web tax, which rises to “digital services tax”. Are subject to this new form of levy – who suffers a rate equal to 3% – the subjects exercising

⁶³ Comp. E. Della Valle, *La web tax italiana e la proposta di Direttiva sull’Imposta sui servizi digitali...*, p. 1509.

⁶⁴ E. Della Valle, *La web tax italiana e la proposta di Direttiva sull’Imposta sui servizi digitali...*, p. 1510.

⁶⁵ Comp. E. Della Valle, *La web tax italiana e la proposta di Direttiva sull’Imposta sui servizi digitali...*, p. 1510.

⁶⁶ Comp. E. Della Valle, *La web tax italiana e la proposta di Direttiva sull’Imposta sui servizi digitali...*, p. 1509.

⁶⁷ Comp. D. Avolio – D. Pezzella, *La web tax italiana...*, p. 529.

⁶⁸ Comp. E. Della Valle, *La web tax italiana e la proposta di Direttiva sull’Imposta sui servizi digitali...*, p. 1510; A. Tomassini, *L’incerta corsa alla tassazione...*, p. 173.

activity of enterprise, residents or not in Italian territory, providing, either individually or in group, digital services and have an amount revenue overall, wherever made, equal to or in excess of 750 million euros, of which at least 5.5 million achieved in the Italian territory, in relation to the provision of digital services.

The legislative amendment, implementing most of the instances of legislative renewal processed in the community, amended the application perimeter of the tax, extending it to a range of digital services: transmits a digital interface of advertising targeted users of the same interface; provision of a multilateral digital interface that allows users to connect and interact with each other, in order to facilitate the direct supply of goods or services; transmission of data collected and generated by the use of a digital interface.

Also this configuration features of a regular tax (in legal tributary language, so called “present case open structure”) is payable during a calendar year: in each tax year is an independent tax liability. In this light, is considered taxable income in a given tax year where the user of the service, subject to taxation, both located in the territory of the State in that time span.

To this end, it is necessary to distinguish the three kinds of digital services which was separated from the legislative amendment. To the extent you are targeted advertising to users of the network, the user is considered located in the State during the tax period in which the advertisement is displayed on your device to access a digital interface.

In case of services provided through digital platforms, the user is deemed to located in Italian territory if the service is provided through a multilateral digital interface that facilitates the supply of goods or digital services directly between users or if the same using a device in the State to access the digital interface and concludes, in that tax period, an operation through the interface; where the service will achieve using a digital multilateral interface including into a different type, it is necessary that the user has an account, opened by using a device in the State, enabling them to access digital interface.

In the case of transmission of data collected from users, generated through the use of a digital interface for the purpose of localization in Italian territory in a given tax year, it is necessary that the data generated by the user, through the use of a device in the State, to access a digital interface, during that tax year or a previous tax period, provided that they are transmitted in that tax year.

With regard to procedural aspects, the tax declaration concerning that tax, is annual and concerns the amount of taxable services rendered; it must be submitted within 4 months after the end of the tax period. The payment of the tribute to be done in the month following each semester.

Also for this version of the web tax, the entry into force is subject to the adoption of an implementing decree. In particular, the “digital services tax” will come into force on the 60th day following its publication in the Official Journal of a decree adopted by the Ministry of economy and finance, in consultation with the Ministry of economic development, feel the Authority for guarantees in communications, the Authority for the protection of personal data and

the Agency for digital Italy, laying down the rules of the implementation of this tribute, which, in the intention of the legislator, will be issued in four months subsequent to 1 January 2019 – date of entry into force of the Budget Bill 2019 – and, therefore, by 1 May 2019.

In reason of the innovative nature and incidence in terms of revenue, it is hoped that new tribute (“digital services tax”), unlike what happened in the past, entry actually into force, especially in order to align our domestic legislation on web tax to that in force in Community level and in other foreign legal systems.

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TAX PROFILES OF THE DIGITAL ECONOMY

SUMMARY

Computer science and technological developments of the last decades has impacted considerably on the forms and methods of production and circulation of wealth, encouraging the spread of new activities completely dematerialized within a social and economic context characterized by frenetic circulation of knowledge and information available than just a “click” and from a production, distribution and consumption of goods increasingly virtual and intangible.

As activities that might acquire economic value, in terms of tax, we wondered if, in order to face emergencies raised by virtual economy, is sufficient to adapt existing fiscal instruments or is necessary, rather, developing new forms of levy, creating a virtual world taxation.

Special emphasis hiring then tax profiles of the activities carried out by large multinational companies, digital society, with subsidiaries in several countries, that can produce very high incomes, hardly taxed in the source State or otherwise frequently taxed to a lesser extent than the ordinary tax regime. The Italian legal system has tried to remedy this widespread phenomenon, with timid actions which seek to establish, first, a Google tax, then a digital tax, before arriving to the web tax, recently adopted in two different subsequent versions (before “digital transactions tax” and after “digital services tax”), but characterized by an uncertain future.

KEY WORDS: digital economy; tax profiles; google tax; digital tax; web tax

