À cet égard, le gouvernement a déjà effectué une partie du chemin à parcourir. En dernier lieu, la loi n° 2018-727 du 10 août 2018, dite « loi Confiance », apporte ainsi une série de réponses bienvenues. Trois exemples méritent d'être cités en particulier :

- Les entreprises qui font l'objet d'une vérification de comptabilité ou d'un examen de comptabilité ont déjà la possibilité, pour les impôts sur lesquels porte cette vérification, de régulariser les erreurs, inexactitudes, omissions ou insuffisances commises dans les déclarations souscrites dans les délais, moyennant le paiement d'un intérêt de retard réduit à 70 % du taux normal (0,20 % par mois), soit 0,14 % par mois[9]. L'article 9 de cette loi étend cette procédure de régularisation aux contrôles sur pièces et examens contradictoires de situation fiscale personnelle, permettant ainsi à l'ensemble des contribuables (entreprises et particuliers) d'en bénéficier ;
- L'article 5 de cette même loi réduit l'intérêt de retard de 50 % (soit 0,10 % par mois au lieu de 0,20 %) en cas de rectification spontanée avant tout contrôle d'une erreur de déclaration ;
- L'amende de 5 % sanctionnant le défaut de production de certains documents, dont l'imprimé n° 2058 SG sur les abandons de créances et subventions en intégration fiscale, devient non applicable si la société concernée répare cette omission soit spontanément, soit à la première demande de l'administration.

En revanche, les actions concernant la sécurité juridique et la visibilité fiscale à long terme pour tous les contribuables, notamment les entreprises, sont moins visibles à ce stade. Pour tenir un tel engagement, il conviendrait d'éviter aussi bien les allers-retours et les modifications en série de certains textes au gré des changements de majorité, que les évolutions soudaines et non concertées des principales règles fiscales dictées par des impératifs budgétaires de court terme, comme l'instauration de la double contribution exceptionnelle à l'impôt sur les sociétés adoptée dans l'urgence dans le cadre de la première loi de finances rectificative pour 2017. Et naturellement de prohiber absolument toute mesure à caractère rétroactif…

Rétablir l'équilibre entre incitation et dissuasion reste un enjeu pour les années à venir

Tant en France qu'au niveau de l'Union, ce subtil équilibre entre dissuasion et incitation ne nous semble pas encore parfaitement assuré. Il est vrai qu'au crépuscule d'une crise financière majeure, apparue il y a maintenant dix ans, la priorité de l'Union a naturellement été, dans un premier temps, de gérer l'urgence et d'assainir une situation financière qui a sévèrement mis à contribution les budgets des Etats, en utilisant pour cela l'ensemble des leviers, dont la politique fiscale bien sûr, dont les membres pouvaient disposer. Mais à l'aube d'une nouvelle révolution technologique, il s'agit de veiller attentivement à ce que les mesures prises, tant au niveau national qu'européen, notamment en termes de lutte contre la fraude et l'évasion fiscale, n'instaurent pas de facto un isolement relatif et un désavantage compétitif significatif pour nos entreprises face à leurs grands concurrents américains et asiatiques, dont les gouvernements avancent très prudemment en la matière pour la plupart. Le volet dissuasif ne doit en effet pas conduire nos fleurons hexagonaux, et plus généralement européens, à s'exiler pour préserver leur position concurrentielle. L'enjeu est donc bien double : il convient tout à la fois de retenir au sein l'Union les recettes fiscales auxquelles les Etats membres peuvent légitimement prétendre, d'une part, mais aussi d'instaurer un environnement fiscal suffisamment incitatif pour que les entreprises européennes ne soient pas pénalisées au-delà de ce qui est strictement nécessaire pour prévenir des pratiques réellement abusives, d'autre part. Si le premier objectif est clairement en cours de consolidation, souhaitons qu'une même attention soit accordée au second pour lequel beaucoup reste à faire. ●

> ***Rétablir un vrai climat de confiance entre administration fiscale et contribuables : un « deal » gagnant-gagnant***

1. Voir à ce sujet l'article de M. Pascal Saint-Amans (Directeur du Centre de politique et d'administration fiscale de l'OCDE) publié au même dossier que le présent article.

2. Directive UE 2016/881 du 25 mai 2016

3. Directive UE 2016/1164 du 12 juillet 2016.

4. Directive UE 2018/822 du 25 mai 2018.

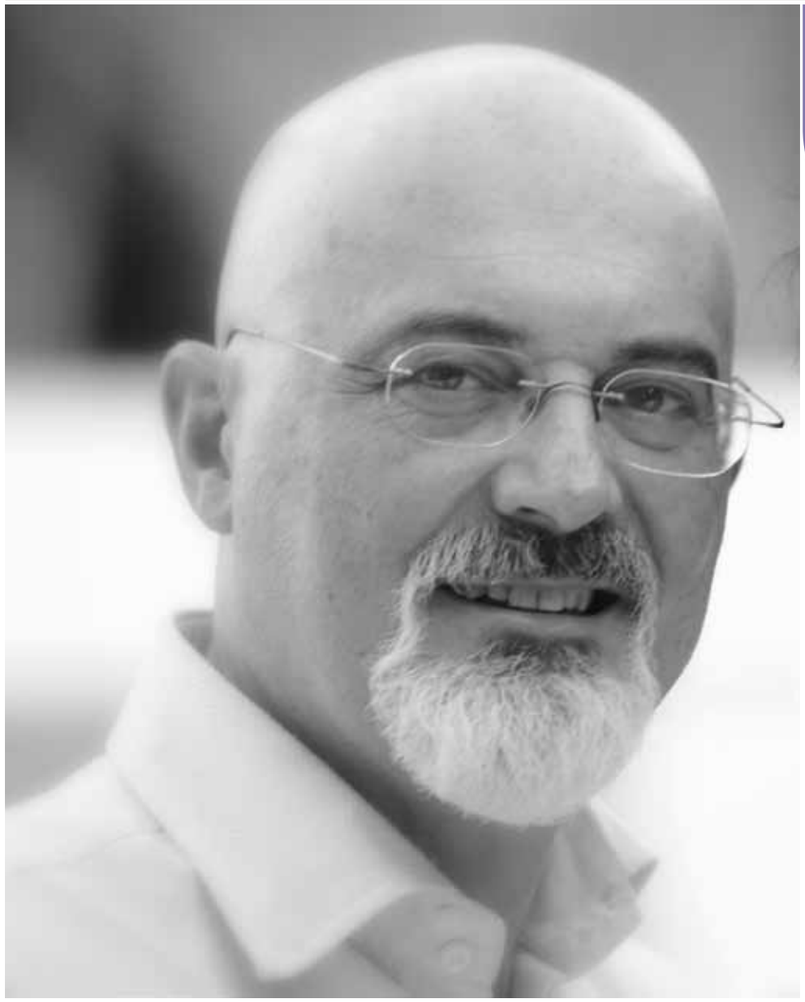
5. Voir l'article de Mme Nathalie Martin-Queulin dans la rubrique Expertises à ce sujet.

6. Voir à ce sujet l'article de M. Alfred de Lassence (Directeur Fiscal d'Air Liquide) publié au même dossier que le présent article.

7. Voir à ce sujet notre article dans le numéro de mai 2017.

8. Les meilleurs exemples étant l'article 121 de la loi de finances pour 2016 créant la déclaration pays par pays, ou encore l'article 107 de la loi de finances pour 2018 venant compléter les obligations documentaires en matière de prix de transfert.

9. Article L 62 du Livre des Procédures Fiscales.



BY
PROF. PIERGIORGIO VALENTE
INTERNATIONAL TAX PARTNER, CROWE VALENTE / VALENTE ASSOCIATI GEB PARTNERS, LINK CAMPUS UNIVERSITY, ROME

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.

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.

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.