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The EU Council calls on the Commission in responding to the challenges of taxation of profits of the digital economy

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The past decades have witnessed an unprecedented globalization and digitalization of national economies, which encouraged not only cross-border investments, establishments, personal and capital movements but also aggressive tax planning largely resulting in a huge amount of untaxed income.

In this framework, the conclusions adopted on 5 December 2017 by the EU Council outline the importance to find a common consensus on the taxation of profits in the 'digital economy'.

The Commission is invited to take into account, in formulating appropriate proposals (expected by early 2018), any relevant developments in ongoing OECD work and following an assessment of the legal and technical feasibility as well as economic impact of the possible responses to the challenges of taxation of profits of the digital economy.

The urgency to take actions in that respect is also highlighted in view of the interest of many Member States - Italy amongst the others - for temporary measures, such as for example an “equalisation levy” based on revenues from digital activities in the EU. The EU Council seems to come to the conclusion that these unilateral measures (such as the Italian 6% web tax) would remain outside the scope of double tax conventions concluded by Member States and could also be assessed by the Commission.

This may also have an impact on the qualification of such tax as income tax as it seems to be the case of the Italian web tax.

In this respect, whilst this qualification should not essentially affect sellers resident in Italy or operating through a permanent establishment therein due to the specific tax credit they are entitled to, it may create double taxation issues for non-resident sellers for which no similar tax credit is granted.

In such a perspective two different critical aspects should be addressed:
1) the actual applicability of the web tax under the current tax treaty network (that seems fully doubtful, especially after the conclusions of the EU Council); if applicable
2) the creditability of the proposed web tax suffered in Italy against any tax covered by the tax treaty.

In such perspective, certain considerations have been raised on the assumption that the digital economy is challenging the agreed concepts of international tax rules, designed for the traditional economy and not immediately applicable to activities that require no physical presence in the country where goods and services are sold.

Embracing the new mantra established by BEPS, the EU Council confirms that companies operating in the EU should pay taxes where the value is created and profit is generated. The Council also held that the digitalization, acting as a facilitator and accelerator of cross-border trade through advanced technological solutions (such as cloud computing, big data, robotics, or high speed broadband)

has lead in certain situations to a misalignment between the place where profits are taxable and that where value is created.

In light of the above the Council takes the view that the response to the tax challenges posed by the digital economy should imply the development of the "virtual permanent establishment" concept at international level. This concept however should be read in conjunction with any necessary corresponding amendments to the rules of transfer pricing and profit attribution, which would take into account where value is created in the different business models of the digital economy.

Greater attention to the conclusions of the EU Council should be paid by the Italian Parliament, currently involved in drafting a new provision of law introducing a web tax in Italy while amending the notion of permanent establishment (sect. 162 TUIR) in order to ensure, inter alia, that the challenges posed by the digital economy in the corporate tax are faced according to the international shared tax principles.