Taxation and Big data: an analysis of the proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services (Proposal of the European Commission COM (2018) 148 final dated March 21, 2018)

SUMMARY: 1. Introduction. – 2. The digital economy and its main tax implication. – 3. The tax policy context. – 4. The Proposal of the European Commission. – 5. Some conclusive considerations.

1. According to one of its possible definition[144], big data are a «*high – volume, high velocity and / or high variety information assets that demand cost – effective innovative forms of information processing for enhanced insight, decision making and process optimization*».
Taking into account the link existing between big data and taxation, two main aspects are worth mentioning. On one hand, big data could represent a strategic asset for tax administrations, who are indeed data rich organizations. The data available to the fiscal authorities are traditionally those filed by the taxpayers themselves (through, for example, the tax returns) or, as an alternative, those collected directly by the tax authorities during their tax audits. In the current context, also thanks to the automated streams of information exchanged under initiative such as the Country – by – Country reporting, the tax authorities have at their disposal additional data, which, together with the traditional ones, are becoming big and thus representing an additional real – time set of information potentially enabling tax authorities to be more effective. The condition for the exploitation of such a potential key asset is the availability for tax administrations of big data processing technologies and the achievement of a high level of digital maturity[145].

On the other hand, the exploitation of big data represents one of the key features of the businesses active in the so called digital economy, about which the majority of the stakeholders take the view that the current international tax system is not able to properly capture the value created and, as a consequence, to tax it. In a nutshell, there is a quite common perception that some income produced by the digital economy is somehow «*stateless*»[146]. On such stateless income many jurisdictions would like to expand their taxing rights; the result is a very intense on – going debate, which is polarizing the interest of the international tax community.

Taking into consideration this second aspect of the big data, the paper focuses on the European Commission's directive proposal for the introduction of an *interim* digital service tax within the European Union[147] (hereinafter referred to as the "Proposal"), with the hope to give a

144 See https://www.gartner.com/it-glossary/big-data.

145 For an in – depth analysis of such an aspect, see OECD, *Technologies for better tax administration. A practical guide for revenue bodies*, Paris, 2016.

146 OECD / G20 BASE EROSION AND PROFIT SHIFTING PROJECT, *Addressing the tax challenges of the Digital Economy – Action 1: 2015 Final Report*, Paris, 2015, p. 12.

147 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) 148 final of 21.03.2018), available at http://eur-lex.europa.eu/.

contribution to the discussions that will take place next October within the first seminar organized by the University of Milan and entitled to «Big data and Law: new challenges beyond data protection».

At this aim, paragraph 2 of the paper gives an overview of the main characteristics of the digital economy – focusing in particular on the importance of big data – and the possible tax implications thereof. While these issues deserve an in – depth *ad hoc* study that is beyond the scope of the present paper, the analysis will limited to that preliminary considerations that are deemed necessary for a better understanding of the following parts. Paragraph 3 describes the current state of the debate, which is now on-going at the international, regional and national level, in order to make a complete reconstruction of the background behind the Proposal. A critical reading of the proposed directive is included in paragraph 4, with the intention of highlighting its significance and detecting possible areas of improvement. In this respect, it appears important to warn as from now the reader that all the available scholars' comments on the Proposal are quite negative[148]. In any case, the proposed directive appears to be of interest, since it represents the first tentative coming from a regional organization to introduce an unilateral interim tax measure to face the challenges posed by the digital economy. Some conclusive remarks are finally articulated in Paragraph 5.

2. As of today, there is no shared definition of digital economy; however, such a lack is quite understandable. On one hand, the digitalization represents indeed an extensive phenomenon, which encompasses all the businesses, with the consequence that «*the digital economy is increasingly becoming the economy itself*»[149]. In light of this aspect, scholarship has articulated the view according to which the term «*digitalization of the economy*» instead of «*digital economy*» would better apply to the current scenario. On the other hand, any tentative definition of the phenomenon under analysis is probably destined to become outdated in a short time, given the rapid development characterizing the digital economy. Having said that, the term «digital economy» is conventionally used in the context of this paper as a collective name making reference to a range of different activities, all of which have the following four salient characteristics in common[150].

148 J. BECKER, J. ENGLISH, *EU Digital Services Tax: a populist and flawed proposal*, in *Kluwer International Tax Blog* (March 2018), available at http://kluwertaxblog.com/2018/03/16/eu-digital-services-tax-populist-flawed-proposal/; CFE FISCAL COMMITTEE, *Opinion Statement FC 1/2018 on the European Commission Proposal of 21 March 2018 for a Council directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services*, in *European Taxation*, 2018, p. 371; A. M. JIMÈNEZ, *BEPS, the Digital(ized) Economy and the Taxation of Services and Royalties*, in *Intertax*, 2018, p. 635; L.A. SHEPPARD, *Digital permanent establishment and digital equalization taxes*, in *Bull. Intl. Taxn*., 2018; D. STEVANATO, *"Digital Tax" all'europea: una creatura deforme* (March 2018), available at https://www.leoniblog.it/2018/03/23/digital-tax-alleuropea-creatura-deforme-dario-stevanato/; A. TURRINA, *Which "Source Taxation" for the Digital Economy?*, in *Intertax*, 2018, p. 495; F. VAN HORZEN – A. VAN ESDONK, *Proposed 3% Digital Services Tax*, in *International Transfer Pricing Journal*, 2018, p. 267.

149 OECD, *Action 1 Final Report* (2015), *supra* n. 3, p. 11.

150 For the description provided in the present Paper, the position of the European Union has been mainly taken into consideration since the Paper focuses on the EU Commission's proposal and also because the position of the European Union is quite aligned to that of the OECD. More specifically, the OEDC lists the following aspects as key features of the digital economy: i) mobility with respect to intangibles, users and business functions, ii) reliance on «big data», iii) network effects, iv) use of multi-sided business models, v) tendency toward monopoly or oligopoly and vi) volatility due to low barriers to entry and rapidly evolving technology (see OECD, *Action 1 Final Report (2015)*, *supra* n. 3, at para. 4.3). In the more recent Interim Report published by the OECD, such aspects have been confirmed as key features

i) Limited physical presence of the businesses active in the digital economy, as a consequence of the decreased need for local personnel to perform business functions and the corresponding increased ability to conduct the business activity remotely (so – called «scale without mass» phenomenon). In other words, digital undertakings are able to manage their global operations on an integrated basis from a jurisdiction, which may differ from that / those jurisdictions in which the operations are carried out and the suppliers and customers are located.

ii) The importance of intangible assets which are crucial contributors of value for digitalized businesses. In this respect, it is worth underlining that the aforementioned feature of «mobility» applies also to the intangible assets on which the digital companies rely on, since the function of managing intangible assets can be assigned and transferred from one location to another (particularly within the same multinational group), with important consequences on where business' profits are subject to tax.

iii) Tendency toward monopoly or oligopoly, especially in case of immature markets where the company acting as first actor is usually able to achieve a dominant position in a very short time;
iv) Reliance on big data which are available to digital business thanks to the user participation. Data has always played an important role for businesses – also the traditional ones –; what characterizes the digital economy is the fact that data represent a component of the value creation process of such a relevance as never before: the use, collection and analysis of data is becoming an integral part of the digitalized business models. In order to better understand such consideration, it is important to further analyse the process – consisting of several phases – through which data become value. First of all, data have to be generated thanks to online activities performed by the digital services users; such data are stored and collected and, after a relatively short period of time, become big data, because of their increasing volumes. Big data are than processed, interpreted and analyzed: such step is essential in order to make the collected big data valuable; only through such analysis indeed, big data become readable and, as such, valuable.

According to a persuasive reconstructive study made by the OECD[151] – and taken into consideration also by the European Commission for the Proposal – , the involvement of the users in the phase of data origination characterizes all the business models of the digital economy. The level of such an involvement can instead vary from one business model to another. On one hand, the user participation is qualified as passive in all those cases in which the user does not perform any activity different to those strictly necessary in order to enjoy the online services (e.g. downloading an app, using a particular device or providing consent for user data to be collected). In all other cases, the user participation is qualified as active, even if with different possible levels. The lower level of user participation is required in case of recommendation mechanisms, involving activities such as bookmarking, tagging and rating, as it is typical for platforms providing for digital contents or IT solutions and e-commerce websites. An intermediary level of user participation characterizes instead activities such as writing comments and reviews (e.g. TripAdvisor) and taking and

of the digital economy, even if partially combined with each other. The result is a final list which includes the following aspects among the salient characteristics of the digital economy: i) cross – jurisdictional scale without mass, ii) reliance upon intangible assets (including intellectual property rights) and iii) data and user participation (see OECD / G20 BASE EROSION AND PROFIT SHIFTING PROJECT, *Tax Challenges Arising from Digitalisation – Interim Report*, Paris, 2018, at para 2.5).

151 OECD, *Interim Report (2018)*, *supra* n. 8, at para 143 – 149.

uploading photos and videos (e.g. Instagram and YouTube). The highest level of user participation is needed in case of social network (e.g. Facebook), in relation to which the user is asked to add friends and actively contribute to the creation of the community.

Moreover, also the way through which value is created from big data can differ from one digital business to another: several companies use directly the customer data collected for improving their own business operations while others monetize them by selling targeted online advertisements or, in any case, by transferring the user data to third parties.

Since the international tax rules currently in place have been established in the Twenties when the digital revolution was still far from happening, they disregard all the key features of the digital economy mentioned above. In very basic term, under the current international tax system, some sort of physical presence is required, being the permanent establishment the threshold for allocating any taxing right on the business profits of a non – resident company[152] to the market jurisdiction. However, as noted above, the business models of the digital economy are characterized by a limited physical presence: hence the major tension between the framework of reference provided by the international tax regime and the essential features of digital business models emerges. The result is the perception of the existence of what the scholarship has defined as a «*(digital) international tax gap*»[153].

3. The debate on how to fill such digital international tax gap dates back at least to 2013, when the OECD launched the 15 – point Action Plan on Base Erosion and Profit Shifting (“BEPS”). As part of such Action Plan, the OECD requested for public comments in relation to the tax challenges raised by digitalization. With the aim to be proactive in response to the OECD initiative, the European Commission set up a group of expert, assigning them the task to develop a comprehensive Union position on tax issues in the digital economy[154]. The outcome of the experts' work was included in a report[155], according to which, among the others, no special tax regime should be introduced for digital companies but any reform should have structured in general terms, with the introduction of simple, stable and predictable tax rules, the need of which has been strengthened by the digitalization.

In these years, the European Commission kept on working on the challenges of the digital economy, setting the creation of a Digital Single Market as one of its ten key priorities, with the aim of making Europe as world leader in the digital economy[156]. Direct taxation was deemed by the

152 The threshold of the permanent establishment is met in case that the non – resident company operates through a fixed place of business in a given jurisdiction or, as an alternative, through a dependent agent (the so called «agency permanent establishment»).

153 A. TURRINA, *Which “Source Taxation” for the Digital Economy?*, *supra* n. 6.

154 EUROPEAN COMMISSION, *Decision of 22.10.2013 setting up the Commission Expert Group on Taxation of the Digital Economy* (C (2013) 7082 final of 22.10.2013), available at http://eur-lex.europa.eu/.

155 COMMISSION EXPERT GROUP ON TAXATION OF THE DIGITAL ECONOMY, *Report*, 28.05.2014, available at http://eur-lex.europa.eu/.

156 EUROPEAN COMMISSION, *Communication to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions – A Digital Single Market Strategy for Europe* (COM (2015) 192 final of 6.5.2015), available at http://eur-lex.europa.eu/. According to the definition provided by the European Commission, a «*digital single market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of*

European Commission to be one of the topics to be addressed – even if, at this stage, not the most important one – in order to make such a Digital Single Market concrete.

After 2 year – long work, the OECD issued in October 2015 a final report (Action 1) acknowledging that the digital economy exacerbates BEPS risks, as well as poses some challenges for the international taxation. The result was the adoption by the OECD of a «wait and see» approach, the main reason of which was the expectation that the anti – BEPS effects of other measures implemented within the BEPS project would have had a substantial impact not only on the BEPS issues, but also on the broader tax challenges posed by the digital economy.

As of today, such a position seems to be unviable: starting from 2017, the debate on digital economy has indeed further intensified both at international, EU and national level, suggesting that there is a quite common political pressure to act quickly. Without pretending to be exhaustive and starting from the international level, it should be mentioned that the G20 Finance Ministers requested the OECD to deliver a follow-up of Action 1. Hence, in September 2017, the OECD opened a public consultation, the outcome of which was an Interim report issued in March 2018[157]. In this occasion, the OECD takes a step forward if compared with the position expressed in BEPS Action 1: it acknowledges indeed that the tax challenges of the digital economy go beyond the boundaries of the BEPS concerns and address the redefinition of the criteria for the allocation of taxing rights on business profits among different jurisdictions. In this respect, the OECD states further that a consensus – based solution is needed for facing the challenges of the digital economy, that such kind of solution is not yet achievable since there are divergent views on how the issue should be approached and that, as a consequence, further work is needed, with the goal of producing an update in 2019 and a final report in 2020[158].

In this context, some countries have either adopted or announced the adoption of unilateral measures for the taxation of the digital activities: some examples are given by the so called diverted profit tax introduced by the United Kingdom, the equalization levy which applies in India and the web tax proposed by the Italian Government[159].

residence».

157 OECD, *Interim Report (2018)*, *supra* n. 8.

158 Just to mention the initiatives taken at the United Nations Level, the Committee of Experts on international cooperation in tax matters has issued a report entitled to the «*Tax Challenges in the Digitalized Economy*», with the aim to take a proactive approach in the on - going debate on the solution required for tackling the challenges of the digital economy, with particular attention to the needs of the developing countries (see UN COMMITTEE OF EXPERTS ON INTERNATIONAL COOPERATION IN TAX MATTERS, *Tax challenges in the digitalized economy. Selected issues for possible Committee Consideration*, 17 – 20.10.2017, available at www.un.org). Further work is expected to be done at the UN level. According to the recently released agenda of the next seventeenth session of the UN Committee of experts in international cooperation in tax matters to be held next October in Geneva, the tax consequences of the digitalized economy will represent one of the substantive issues to be discussed during the session (see UN COMMITTEE OF EXPERTS ON INTERNATIONAL COOPERATION IN TAX MATTERS, *Provisional agenda and organization of work*, 02.08.2018, available at *http://www.un.org/esa/ffd/events/event/seventeenth-session-tax.html*).

159 Italy appears to be at the forefront of the on – going debate on the taxation of the digital companies. A short term solution has been introduced by article 1, paras 1011–1019 of Law N. 205 of 27 December 2017 (Finance Bill 2018), with a deferred planned application starting from 1 January 2019. The objective scope of the proposed tax should be further specified by a decree issued by the Italian Ministry of Finance; such a decree – expected for April 2018 - has not been published yet. It is likely that Italy decide to prevent the entry into force of the measure, preferring to wait for the adoption of an interim tax at the European level. In this respect, see A. TOMASSINI, *L'incerta corsa alla tassazione*

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At the intermediary regional level of the European Union, the importance of setting up a Digital Single Market has been remarked by the European Commission in May 2017[160]. In the following July, a discussion on the challenges of the taxation of profits of the digital economy was launched within the Council of the European Union. On September 2017 in the contest of his State of the Union speech, the President of the European Commission sent a letter of intent to the President of the European Parliament and the President of the European Council, announcing a legislative proposal establishing rules at EU level allowing taxation of profits generated by multinationals through the digital economy[161]. The Finance Ministers of Germany, France, Spain and Italy signed a joint political statement in support of EU law compatible and effective solutions «*based on the concept of establishing a so called equalization tax on the turnover generated in Europe by the digital companies*»[162]. At the informal ECOFIN meeting in Tallinn on 16 September 2017, six more member states expressed their interest and support to the approach suggested in the aforementioned joint political statement. In its communication entitled to «*A Fair and Efficient Tax System in the European Union for the Digital Single Market*» adopted on 21 September 2017[163], the Commission identified the challenges that the digital economy poses for existing tax rules and committed to analyze the policy options available. Following the Digital Summit in Tallinn on 29 September 2017, the European Council adopted on 19 October 2017 conclusion that underlined the «*need for an effective and fair taxation system fit for the digital area*»[164]. The ECOFIN Council conclusions of 5 December 2017 invited the Commission to adopt proposals responding to the challenges of taxing profits in the digital economy, highlighting the interest of many Member States for temporary measures, such as for example an equalization levy based on revenues from digital activities in the EU that would remain outside the scope of double tax conventions[165].

dell'economia digitale, in *Corriere Tributario*, 2018, p. 169. Besides, Italy has introduced a procedure of cooperation and enhanced collaboration that allows large multinational groups to discuss and examine jointly with the Italian tax authorities whether they may be deemed to have a permanent establishment in Italy (see art. 1*bis* of Law Decree No. 50 of 4 April 2017, converted by Law No. 96 of 21 June 2017). According to the intention of the Italian legislator, such measure is mainly targeted to companies active in the digital economy. For an in – depth analysis, see M. CERRATO, *La procedura di cooperazione e collaborazione rafforzata in materia di stabile organizzazione (c.d.* web tax *transitoria)*, in *Rivista di diritto tributario*, 2017, p. 751.

160 EUROPEAN COMMISSION, *Communication to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions on the Mid – Term Review on the implementation of the Digital Single Market Strategy. A connected Digital Single Market for all* (COM (2017) 228 final of 10.05.2017), in http://eur-lex.europa.eu/.

161 PRESIDENT OF THE EUROPEAN COMMISSION, *State of the Union 2017. Letter of intent to President Antonio Tajani and to Prime Minister Jüri Ratas*, 13.09.2017, available at http://www.un.org/esa/ffd/events/event/seventeenth-session-tax.html.

162 FINANCE MINISTERS OF FRANCE, GERMANY, ITALY AND SPAIN, *Political Statement. Joint initiative on the taxation of companies operating in the digital economy*, 07.09.2017, available at www.mef.gov.it.

163 EUROPEAN COMMISSION, *Communication to the European Parliament and the Council. A fair and efficient tax system in the European Union for the digital single market* (COM (2017) 547 final of 21.09.2017), available at http://eur-lex.europa.eu/.

164 EUROPEAN COUNCIL, *European Council meeting (19 October 2017) – Conclusions* (EUCO 14/17 of 19.10.2017), available at http://eur-lex.europa.eu/.

165 COUNCIL OF THE EUROPEAN UNION, *Outcome of the Council meeting. Economic and financial affairs* (15305/17 of 5.12.2017), available at http://eur-lex.europa.eu/.

4. The Proposal under analysis is the answer given by the European Commission to the aforementioned calls from several Member States of reacting quickly to the international tax gap: in this respect, the proposed introduction of a digital indirect service tax represents indeed a short – term solution, in order to face the current challenges of the digital economy. Alongside the Proposal, the European Commission has issued another legislative proposal (outside the scope of the present Paper) which constitutes the Commission's preferred long – term solution since it aims to reform corporate tax rules by introducing the concept of «*significant digital presence*»[166]. The distinction between the long – term and the short – term solution lies in the fact that only the former requires an amendment of the tax treaty framework currently in place (and, as a consequence, needs more time to be effectively implemented)[167].

The objective scope of the digital service tax is defined by article 3 of the Proposal, which qualifies as taxable revenues those resulting from the following services:

i) The placing on a digital interface of advertising targeted at users of that interface as well as the transmission of data collected about users and generated from users' activities on digital interfaces. The word «interface» is broadly interpreted by the Proposal (art. 2.3), in order to include any software, website or application that can be accessed by a user – both individual or business (art. 2.4 of the Proposal). By this way and making reference to the taxonomy included in the Impact Assessment[168], the proposed directive aims to tax all the fees resulting from those business models, in which access to a service (e.g. social network or search engine) is granted to users for free and personal data obtained from such users are than monetized by selling targeted advertisement placements or by selling the data itself to others businesses (e.g. Google and Facebook). In those cases where the supplier of the advertising service and the owner of the digital interface are different entities, only the former should be taxed, in order to prevent cases of double taxation (art. 3.3 of the Proposal).

ii) The making available to users of a multi-sided digital interface which allows users to find other users and to interact whit them, and which may also facilitate the provision of underlying supplies of goods or services directly between users (art. 3.1 b) of the Proposal). With reference to such kind of revenues, the Proposal aims to tax those fees paid by the users to access a platform, where the users offer services or goods among themselves (e.g. Airbnb or Blablacar). The revenues resulting from the supplies of goods and services made directly by the users connected thanks to the digital interface do not fall instead within the definition of taxable income according to the proposed Directive.

As expressly provided for in article 3.4.a of the Proposal, fees paid by users for accessing digital platforms which make available to them digital contents / IT solutions fall outside the scope

166 EUROPEAN COMMISSION, *Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence* (COM (2018) 147 final of 21.3.2018), available at http://eur-lex.europa.eu/. For an analysis, see R. PETRUZZI - V. KOUKOULIOTI, *The European Commission's Proposal on Corporate Taxation and Significant Digital Presence: A Preliminary Assessment*, in Eur. Taxn., 2018, p. 58.

167 In this respect, see A. TURRINA, *supra* n. 6, p. 502.

168 EUROPEAN COMMISSION, *Commission staff working document. Impact Assessment accompanying the documents "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 of 21.3.2018), available at http://eur-lex.europa.eu/, Box 1 at p. 15.

of the Proposal (i.e. digital platforms providing media / content, gaming, electronic communication and payment services, cloud computing services and other digital solutions / software; in order to give some concrete examples, we can mention Netflix or Spotify). Further exemptions are provided for financial trading and crowd funding (art. 3.4.b – c of the Proposal). Also revenues related to distant sales model / e- commerce (Amazon) do not fall within the objective scope of the proposed digital service tax (preamble 13 of the Proposal).

In light of the above, it appears clear that the European Commission has opted for a targeted approach, selecting only some of the revenues resulting from the digital services. The reasoning of the European Commission underlying such selection appears quite articulate, even if it is not so clearly expressed in the Impact Assessment. Trying to build up all the logical steps, it appears correct to describe the reasoning of the European Commission as follows: the user participation contributes significantly to the creation of value for the digital businesses; such value is created in the user's jurisdiction and should be taxed there, according to the common shared «value creation» rationale which is a widely accepted principle pervading the whole BEPS project; however, under the current international tax rules, no taxing right is recognized to the user's jurisdiction because the services are provided remotely by the digital businesses with no physical presence in the market country or, in any case, with a very limited physical presence not meeting the permanent establishment threshold; in order to provide for a «*fair*» taxation – «fairness» is a recurring key word in the Proposal –, the best solution would be to implement a long term measure which would however require a global consensus – based solution and (probably) a coordinated amendment of the double tax treaties (and more time); but since there is a political imperative from some Member States to react quickly, a short term measure to be implementable within a reasonable time span is proposed, by selecting only those services «*where the participation of a user in a digital activity constitutes an essential input for the business carrying out that activity and which enable that business to obtain revenues therefrom*»[169], provided that they «*are responsible for the greatest difference between where profits are taxed and where value is created*»[170]. In other words, «[t]*he interim solution is meant to be a good and simple interim proxy to deal with the most extreme cases of mismatches between the location of taxation and value creation*»[171].

Taxpayers for the purposes of the digital service tax are all those legal entities[172] – irrespective of their tax residence –, which meet both of the following thresholds in a given year: i) a worldwide turnover exceeding Euro 750 million and ii) an amount of revenues subject to the digital service tax obtained within the European Union above Euro 50 million (art. 4 of the Proposal).

The first threshold (based on the total annual worldwide revenues) aims mainly to limit the application of the tax to companies of a certain scale, assuming that, as noted above[173], digital economy is characterized by big players taking the most advantage from the current digital

169 In this respect, see considerations made in paragraph 2 above.

170 EUROPEAN COMMISSION, *Explanatory memorandum of the Proposal*, *supra* n. 4, at para. 5.

171 EUROPEAN COMMISSION, *Impact Assessment*, *supra* n. 26, at para. 9.3.2, where further considerations of the European Commission are available.

172 Meaning any legal person or legal arrangement that carries on business through either a company or a structure transparent for tax purposes (art. 2.1 of the Proposal).

173 In this respect, see considerations made in paragraph 2 above.

international tax gap[174]. In this respect, the choice of the European Commission to set the same threshold as that provided for the country – by – country reporting[175] and for the common corporate tax base[176] appears positive, since it contributes to set up a coherent and easy framework in which market operators are required to take always the same threshold as reference for the applicability of a given tax regime / requirement. The second threshold aims instead, according to the European Commission's intentions[177], to limit the application of the digital service tax to those cases where there is a significant digital footprint at Union Level in relation to the revenues covered by the digital service tax.

The applicability of the digital service tax is extended by the Commission to both EU and non – EU entities, in order to make it compatible with the European Union law as well as with the International Trade Law. More specifically, with reference to the European Union primary law, the freedom to provide services (article 56 of the Treaty on the Functioning of the European Union ("TFEU")) implies the elimination of all discrimination on grounds of nationality, as well as the abolition of any restriction which is liable to prohibit, impede or render less attractive in concrete the activities of a foreign service provider[178]. At the international level, an analogous constraint is provided by article XVII of the General Agreement on Trade in Services, which prohibits a less favorable treatment of foreign service providers compared to the domestic one[179].

In this respect, some authors[180] have taken the view that the proposed digital service tax would in concrete address mainly non – EU (US) digital companies, determining a *de facto* discrimination for the foreign service providers. Such a conclusion seems to be confirmed by the data provided by the European Commission itself[181], according to which only a 7,2% share of the EU digital companies will meet both the thresholds set up by the European Commission.

Moreover, in a broader perspective, such an extension of the subjective scope of the digital service tax does not appear coeherent with the ultimate rationale of the tax under analysis, i.e. to tax fairly those entities who are non – resident within the European Union but create value there thanks to the European Union's users. In other words, because of the aforementioned comprehensive approach, the Proposal seems to go beyond its purposes, providing for the introduction of a new indirect tax also to entities which are assumed to be already fairly taxed, i.e. Member States tax resident entities, as well non – EU entities operating with a permanent establishment within the

174 European Commission, *Explanatory memorandum*, *supra* n. 4, p. 10.

175 European Council, *Directive EU 2016/881 of 25 may 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation*, available at http://eur-lex.europa.eu/.

176 European Commission, *Proposal for a council directive on a common corporate tax base* (COM (2016) 685 final of 25.10.2016), available at http://eur-lex.europa.eu/.

177 European Commission, *Explanatory memorandum*, *supra* n. 4, p. 10.

178 Cjeu, Judgment of 22 October 2014, *Blanco and Fabretti*, joined cases C-344/13 and C-367/13, EU:C:2014:2311, available at http://curia.europa.eu/.

179 For an in – depth analysis (also with reference to the doubts of compatibility with the EU State aid law and VAT law), see N. Bammens, Y. Brauner, V. Chand, R.J. Danon, L. De Broe, P. Pistone, L. Spinosa and A. Turrina, *Request for input on work regarding the tax challenges of the digitalized economy* (October 2017), available at http://www.unil.ch/taxpolicy/.

180 J. Becker, J. English, *EU Digital Services Tax: a populist and flawed proposal*, *supra* n. 6; A. M. Jimènez, *BEPS, the Digital(ized) Economy and the Taxation of Services and Royalties*, *supra* n. 6; L.A. Sheppard, *Digital permanent establishment and digital equalization taxes*, *supra* n. 6, p. 2.

181 European Commission, *Explanatory memorandum*, *supra* n. 4, p. 68.

European Union. This would lead to a situation of double taxation, about which the Proposal provides only for a deductibility of the digital service tax from the corporate tax basis[182].

As far as the place of taxation is concerned, those revenues deemed as taxable according to article 3 of the Proposal shall be treated as obtained in a member state if the user of the corresponding digital service is located in that Member State. In other word, the users create the connection between the taxpayer and the European Union. More in detail:

i) With reference to the placing on a digital interface of targeted advertising, the user shall be deemed to be located in a member state if the advertising in question appears on the user's device when the device is being used in that member state (article 5.2.a). In case of transmission of data collected about users and generated from users' activities on digital interfaces, the territorial condition is met if the data transmitted are those generated from the user while using a device in that member state (article 5.2,c).

ii) With reference to the multi – sided digital interfaces instead, a distinction is made if there is an underlying supply of services or goods between the users of the platform. If this is the case, the territorial requisite is met if the user uses a device in that Member State to access the digital interface and conclude the underlying transaction. Otherwise, the user shall be deemed to be located in a member state only if he has an account opened using a device in that Member State (article 5.2.b).

In this respect, the Proposal further clarifies that the Member state where a user's device is used shall be determined by reference to the Internet Protocol address of the device (art. 5.5 of the Proposal).

The provisions related to the place of taxation are probably the most interesting ones since their wording, as well as their structures appear totally new for the current tax system. Somehow such provisions disclose more than the others the European Commission's tentative (and the corresponding difficulty) to find adequate measures to fill the currently existing international tax gap.

The combined presence of the three aforementioned elements (i.e. taxable revenues obtained by a taxable person in a Member State) would make the proposed digital service tax applicable.
Moreover, from a practical point of view, this means that, in case that a digital business has (as it is quite likely to be) both EU and non – EU users, the share of revenues related to users non located within the European Union (and thus not covered by the digital service tax) should be firstly split from the total taxable revenues and then the remaining share of revenues should be apportioned within the Member States according to the several allocation keys laid down in article 5.3 of the Proposal for each type of taxable service. In case of businesses with users active only within the European Union, only the aforementioned second step should be implemented, in order to define the proportion of taxable revenues obtained in each Member State. Finally, in case of a pure domestic situation in which all the users of a digital business are located in the same member state, all the relevant revenues should be taxed there. Once determined the share of taxable revenues of each Member State in a given tax year, the digital service tax due in that member state shall be calculated applying the single rate of 3%.

182 See Recital 27 of the Proposal, which in any case represents only a recommendation to the Member States and not an obligation.

As far as the administrative aspects are concerned, a One – Stop – Shop simplification mechanism is provided by the Proposal: digital businesses can enjoy a single contact point, through which they can identify themselves for the purposes of the digital service tax, submit the relevant return and provide for the corresponding payments. A system of administrative cooperation should than allow the exchange of information as well as the transfer of the relevant payments between the member state of identification and the others where digital service tax is due (chapter 4 of the Proposal): by this way, a new requirement for administrative cooperation has been introduced within the current EU framework[183]. About such collection system, many doubts arise since it would probably share the same problem of the VAT one – stop – shop.

5. Being at the end of our critical reading of the Proposal, it seems appropriate to go back to the first line of the proposed directive, according to which its legal basis is article 113 of TFEU stating that the European Union is admitted to adopt «*provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition*». This means that, in order to recognize the competence of the European Union with reference to the Proposal, two conditions should be met. First of all, the digital service tax should be qualified as an indirect tax – as the European Commission does[184]. Moreover, the Proposal should be a necessary measure in order to eliminate, as far as possible, factors that may distort conditions of competition or hinder the free movement of goods and services, whether at the national or community level. Moreover, a special legislative procedure should be followed, which requires unanimity of all the Member States for the adoption of the Proposal. As of today, such unanimity appears quite difficult to be reached, also in light of the fact that the EU finance ministers were strongly divided upon the first discussion of the Proposal[185]. One could argue if, in case of absence of unanimity, the Member States in favor of the Commission's proposal (as Italy would be) could decide to introduce the *interim* measure by means of enhanced cooperation; however, also this root does not appear feasible since such a cooperation shall in any case not imply an undermining of the internal market, a barrier to trade between Member States, a distortion of the competition or a violation of the sovereignty of the other member states (see articles 326 – 327 of the TFEU). The result is that the adoption of the Proposal appears far from obvious, calling the European Union to keep on working on a global solution at the OECD level.

As it has been noted, «*in one way or another, it would seem that the existing body of international and supranational rules posing counter-limits on the adoption of unilateral measures are so pervasive that, were they to be eventually implemented, could actually appear as an*

183 For a reconstructive study of the framework currently provided at the European Union level with reference to the administrative cooperation in the field of taxation, see G. MARINO, *International and European measures for de – offshoring: global ambitions and local hypocrisies*, in *Intertax*, 2017, p. 530.
184 EUROPEAN COMMISSION, *Impact assessment*, supra 26. For a critical position of such qualification, see, among the others, A. TURRINA, *Which "Source Taxation" for the Digital Economy?*, *supra* 6.
185 See F. GUARASCIO, *EU digital tax on corporate turnover faces uphill road*, Reuters (28 Apr. 2018), available at https:// www.reuters.com/article/us-eu-ecofin-tax/eu-digital-tax-on-corporateturnover-faces-uphill-road-idUSKBN1HZ0JS.

equalization levy in name only or as a type of levy with fairly concerning distortive effects. Such a conundrum would seem to suggest that the current international legal framework appears more successful than anticipated in making international tax coordination unavoidable, virtually undermining the enactment of unilateral measures that would be in line with the policy objectives that have been outlined above»[186].

A final consideration should be articulated with reference to the item of the data protection, even if the seminar in occasion of which this Paper has been written aims to talk about the challenges arising from the use of the big data «*beyond data protection*». As mentioned above, the place of taxation for the purposes of the proposed digital service tax should be determined on the basis of the Internet Protocol address of the device of the users or, if more accurate, on the basis of other methods of geolocation. In this respect, the Proposal provides in generic terms that data should be collected for the purposes of the Proposal in a way that does not allow for the identification of the users (art. 5.6 of the Proposal). In addition to the above, recital 34 of the proposed Directive (even if not legal binding for the Member States) provides that any processing of personal data should be conducted in accordance with the EU Regulation 2016/679[187], with the further clarification that «[w]henever possible*, personal data should be rendered anonymous*» (emphasis added). The perception is that, at least in the field of taxation, the concerns about the right of the tax payers to protect their data still remain unanswered.

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186 A. TURRINA, *Which "Source Taxation" for the Digital Economy?*, *supra* 6, p. 519.

187 EUROPEAN PARLIAMENT AND COUNCIL, *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC*, available at http://curia.europa.eu/.

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