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Taxing the digital economy: the Italian «*Web-tax*»

L&P

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Italian approaches to tax the digital economy

- In the absence of consensus-based solutions at an international/EU level, certain local jurisdictions have decided not to wait for action enacting domestic unilateral provisions in order to ensure the taxation of the digital economy
- Within this framework, the Italian Parliament has approved the 2018 Budget Law which, among others, has introduced:
 - a new definition of permanent establishment («**PE**») ex art. 162 D.P.R. 917/86 partially in line with the Action 7 of the BEPS Action Plan. This definition is immediately effective; and
 - a new «*Tax on digital transactions*» (or «**Web tax**») in principle effective as of 2019
- Together with the so-called «*procedura di cooperazione e collaborazione rafforzata*» (or «*Transitory Web tax*»), such new provisions constitute the first Italian reactions in the field of taxation of the digital economy. The Transitory Web tax has been introduced by law and envisages an ad hoc institute of communication and reinforced cooperation for non-resident businesses who belong to multinationals that carry out economic activity with permanent establishment in Italy

Amendments to the definition of PE

- The 2018 Budget Law amends the definition of PE in order to make it fully compliant with the OECD BEPS Action 7 Final Report. More specifically, the amendment:
 - extends the agency PE definition to include a person that “*operates for the conclusion of contracts by the foreign enterprise with no material modifications*” and narrows the definition of “*independent*” agent;
 - makes the “negative” list conditional on the taxpayer proving the preparatory or auxiliary nature of the activities;
 - includes the “anti-fragmentation rule”.
- Moreover, the amendment introduces an additional definition of a fixed-place PE: a “*significant and continuous economic presence in the Italian territory that does not give rise to a physical presence in Italy*”.

The Italian «*Web-tax*»

- The *Web tax* consists of a 3% tax rate which is applied to the gross payments due for services provided via electronic means to (business) persons resident or established in the territory of the State, regardless of where the transaction is concluded (Article 1, c.1011, L. 205/2017)
- Effective date: January 1, 2019
- The publication of a ministerial decree aimed at identifying the perimeter of the services subject to tax was expected. The deadline for the approval of this provision was initially established on April 30, 2018

Subjective scope of the Italian «*Web-tax*»

- Both resident and non-resident digital service suppliers are liable to the Web Tax, which is withheld by the customers i.e. the resident enterprises ex Art. 23 (1) of D.P.R. 600/73 and Italian permanent establishments that receive the services
- However, the suppliers are not liable to the Web Tax if they do not exceed the threshold of 3,000 transactions via electronic means during any given calendar year
- No threshold is established with regard to yearly turnover
- All the services provided via electronic means to final customers (*B2C e-commerce*) are excluded from the application of the Web Tax

Objective scope of the Italian «*Web-tax*»

- The Italian tax on digital transactions applies to services rendered “*via electronic means*” and concluded both in Italy and abroad
- For the purposes of the new tax, the services are considered “*provided via electronic means*” if are provided through the internet or an electronic network and:
 - essentially automated,
 - accompanied by minimal human intervention, and
 - impossible to be guaranteed in the absence of information technology
- The most relevant pending feature for the purpose of applying the Italian Web-tax remains as to what type of digital services will be subject to tax and this specification will remain unknown until the issue of the Decree by the Italian Tax Agency. A wide range of services may, in theory, be subject to the new tax e.g. services provided in the context of mobile networks, financial services provided through the Internet cloud, etc.

Technical features

- The tax is applied at a rate of:
 - 3% on the gross payments due for the “digital” transaction
- The tax base is determined in an amount equal to:
 - the consideration due (exclusive of VAT)
- The tax is levied, upon payment of the consideration, by the client as a withholding tax and paid to the Tax Authorities by the 16th day of the following month

Critical aspects

- Considering the current configuration of the “tax on digital transactions”, the risks of double taxation are evident
- Although the new Web-tax applies exclusively to B2B transactions, there is an actual risk of rising the prices to final customers. Service providers, in fact, will have to decide between:
 - increase their service fee, or
 - bear the new cost in order to keep their prices competitive
- No threshold is established (e.g. with regard to yearly turnover)

The way-ahead

- The Web-tax responds more to political than tax revenue collection needs and it is no coincidence that the new tax has been introduced by the Italian Parliament shortly before the elections. Moreover, it seems unlikely that the Web-tax will be effective as the political party promoting the new tax has decided not to join any coalition government after the elections
- Considering the pending features of the Italian Web-tax and the current experiences of the other forms of unilateral measures to tax the digital economy around the world (e.g. Equalization levy, Diverted Profits Tax), it seems desirable to have consensus-based solutions at an international/EU level
- The commitment to work together to seek a shared solution could have in fact a significant impact towards taxing where the value is created
- The arm's length principle could, therefore, be applied in place of implementing fixed ratio rules that do not reflect the value creation within MNE Groups

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Thank you.