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SUSTAINABLE GROWTH AND FAIR COMPETITION: THE DARK SIDE OF THE DIGITAL REVOLUTION

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Abstract

Digitalization has led to a "revolution" over the last few decades: physical distances have been deleted; access to information and services has become easier; communications have become immediate and cost-efficient. Who cannot enjoy the results of the "digital revolution"? Is the use of digital tools a right "per se" or solely where necessary to exercise other rights? Digitalization can simplify life of persons, economic activities and public administration, but it costs and could be an obstacle for people not ready to use it. One way to facilitate the diffusion of digital tools is to invest State resources in infrastructures, but harmful tax competition among States has a distortive effect in terms of fair distribution of revenue and of availability of funds to address the digital progress. The aim of the present work is to foster the analysis of the implications of digital transformation and its links with the distribution of tax rights and the availability of funds. It is crucial for jurisdictions not to lose the momentum and boosting their digital transformation to make themselves competitive, for that it is necessary to reach international agreements on collecting revenue from digital economy, making tax competition between States fairer.

Keywords: digitalization, simplification, tax competition, connectivity

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Networks and connectivity: means, right or both?

The dematerialization of any kind of relations and at any level has led to an authentic "revolution" over the last few decades: physical distances are almost deleted, both on an economic and commercial level and on a personal level; access to information and to many key services has become easier and cheaper; communications have become easy and immediate and essentially cost-efficient.

The Sars Covid2 pandemic has given a really strong accelerating push to a phenomenon already underway and strongly encouraged, not only country by country, but also at international level and firstly at European level. Indeed, due to the isolation, the real potential of digitalization and remote communication emerged as well as the backwardness of certain infrastructures compared to the resources that dematerialization can make available.

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Therefore, considering the high level of simplifying any kind of relations, the facilitation of any form of citizen's partnership in social life and the high possibility of accessing to information, we have been increasingly witnessing a slow transformation of a practical need – namely the possibility of accessing the network – into an authentic true and proper (human?) right[2], during the recent decades.

The Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the Human Rights Council of 16th May 2011, clearly was already going in this direction: "*Given that the Internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress, ensuring universal access to the Internet should be a priority for all States. Each State should thus develop a concrete and effective policy, in consultation with individuals from all sections of society, including the private sector and relevant Government ministries, to make the Internet widely available, accessible and affordable to all segments of population*" (La Rue, 2011, p. 22). In that occasion, the Rapporteur remarked that in some economically developed States, Internet access has been recognized as a right (for example: the Parliament of Estonia passed legislation in 2000 declaring Internet access a basic human right; in 2009, the Constitutional Council of France declared Internet access a fundamental right; during the same year Finland passed a decree stating that every Internet connection needs to have a speed of at least one Megabit per second – broadband level) and took note that, according to a survey by the British Broadcasting Corporation in March 2010, 79% of those interviewed in 26 countries believe that Internet access is a fundamental human right (La Rue, 2011, p. 18).

Moreover, "*the Internet, as a medium by which the right to freedom of expression can be exercised, can only serve its purpose if States assume their commitment to develop effective policies to attain universal access to the Internet. Without concrete policies and plans of action, the Internet will become a technological tool that is accessible only to a certain elite while perpetrating the «digital divide*" (La Rue, 2011, p. 17).

The importance of connectivity was remarked also from the European Parliament Research Service (hereinafter: EPRS) in July 2021, when it was underlined that at European level it could not be necessary nor efficient designing the right to connectivity as an autonomous human (or fundamental[3]) right, considering that Member States are already largely obliged by the EECC and by the many European connectivity policies to ensure that their consumers are really and effectively connected.

[2] However, see the comments by: Pollicino (2020), D'Ippolito (2021).

[3] For the difference between Human and Fundamental rights, see Pollicino (2020, p. 264).

However, at the same time, it could be pointed out, together with the EPRS, that "*a codification on a fundamental level may better reflect the internet's unmatched significance for the individual and effectively contribute to closing the digital divide. As a fundamental right, it trumps the meaning of any sector-specific legislation or action and would extensively raise awareness. Individuals may feel more entitled and claim their right more decisively or even litigate. Incidentally, such a fundamental right may thereby spur internet adoption and future-proof network expansion, i.e. boost next-generation connectivity*" (Milderbrath, 2021, pp. 50-51).

Also the Council of the European Union has recognized the importance of connectivity as a means of equality, stating that "*all people of Europe should be able to participate in and benefit fully from digital opportunities on an unconditional basis and without discrimination. We recognize the need for equal access to an open Internet for all parts of society, including disadvantaged groups and citizens with disabilities, as a cornerstone of diversity of opinion, pluralism, innovation and progress*" (Council of European Union, 2020, p. 4). Recently, also the European Commission took the same stand by its Declaration on digital Rights, aiming at providing a clear reference point for Europe's digital transformation and putting people at the center, where the same rights and values are respected online as well as offline. The Declaration covers key rights and principles for the digital transformation: it promotes inclusion, ensuring freedom of choice online, fostering participation in the digital public space, increasing safety, security and empowerment of individuals, and promoting the sustainability of the digital future. In particular, the European Commission by the before mentioned Declaration enshrines the importance of 'ensuring access to excellent connectivity for everyone, wherever they live and whatever their income'. This means, in the mind of the Commission, that everyone, everywhere in the EU, should have access to affordable and high-speed digital connectivity, including in remote and rural areas (European Commission, 2022a).

The potential growth of this right does not seem to be clear and perhaps not even entirely predictable, at least for the moment. However, as the above mentioned Special Rapporteur Frank La Rue already pointed out, it is important not to underestimate the double value of the use of the Internet: on one hand, indeed, the Internet allows access to a wide range of information and to communicate effectively without substantial costs, on the other hand, access to digital tool becomes essential for the effective use of other fundamental rights or connected services. In essence, therefore, we could say that access to the Internet and, more in general, to digital tools is the object of an autonomous right and, at the same time, an indispensable means for the exercise of other (fundamental) rights?

The technological progress and its expansion across the globe make the latter aspect increasingly evident, without mentioning that digitalization and dematerialization can provide indirect contribution for the protection of other fundamental rights, such as, for example, the environment (UN General Assembly, 2022; UN Human Rights Council, 2021; European Commission, 2020a; United Nations, 1972), health (WHO Regional Office for Europe, 2018; The Lancet, 2021), education (European Commission, 2020b; OECD, 2021; Vincent-Lancrin, Cobo Romani, Reimers, 2022, p. 34), etc.

Indeed, not for nothing, digital literacy is becoming one of the key priorities, and not only at European level, as the dematerialization of processes and procedures can constitute a simplification only insofar as the user is actually able to exploit the digital technologies, otherwise it would constitute a significant impediment and, sometimes, an insurmountable obstacle (European Commission, 2022a; European Commission, 2023a; European Commission, 2023b).

In this general framework, the use of digital tools is becoming increasingly important for the interaction between citizens and public administration. The digital tool therefore becomes, from this point of view, a sort of interface for the exercise of public powers and, on the other hand but also at the same time, for the protection of the citizens against them.

In this respect, the citizen, who is able to access to digital tools, is thus potentially the recipient of wider protection and greater guarantees of transparency, without underestimating the possibility of a direct (Salvini, 2022, p. 231) interaction with the exercise of public powers (Papa, 2008; Carullo, 2022; Natalini, 2022, p. 95; Agostino, Arnaboldi, Lema, 2021, p. 1; Carullo, 2020, pp. 131-163; Cavallo Perin, Galetta, 2020; Cammarota, 2016, p. 113; Masucci, 2019, p. 117; Cardarelli, 2017, 2015, p. 227; Carloni, 2015, p. 148, 2005, p. 23; Mattarella, 2004; Masucci, 2003, p. 991; Cammarota, 2002, p. 45). From this point of view, it is therefore crucial to allocate substantial resources on a strong digital literacy campaign among the population, also with a view to minimize the period of time and the costs of co-existence of different systems, both traditional and digital, but, above all, to ensure that all citizens/users can enjoy the same possibilities of interaction with public administration and the same levels of protection (UN Department Of Economic And Social Affairs, 2023, p. 48).

It must nevertheless be observed that the role of digital "literacy" of public administration is not less important (European Commission, 2016) (and of those who work on behalf of it): this is an essential part of the strategy to make the dematerialized relationship tools really efficient and to allow the citizens to access public services and to exercise their rights, even in a digital ecosystem.

Digitalization and the exercise of public authority

The latest pandemic crisis has undoubtedly constituted a fundamental boost towards an increasing dematerialization of entire sectors of activity, but, *a fortiori*, for the e-Government sector it marked an important test bed and a fundamental turning point.

Dematerializing has meant and means nowadays, from the point of view of administrative action, revolutionizing entire ecosystems, starting from the recording regime of acts, to the registration of requests and provisions, passing through documental management systems: the interaction of public administration with the citizen/user is thus only one of the possible relevant aspects. Dematerializing also means setting up efficient "paperless" ecosystems; dematerializing also means making available the possibility of collecting, holding, organizing, studying and comparing efficiently and relatively very quickly a mass of data until recently unthinkable; dematerializing also means being able to instruct a machine to perform highly automated tasks and thus concentrate administrative action and resources on different activities.

Nonetheless, digitizing, dematerializing, archiving and organizing "virtually" has a heavy cost, both *ex se* and in terms of updating human capital. This cost undoubtedly starts from a cultural point of view, but arrives at the modification and acquisition of completely different procedures and timescales.

Actually, the potential of the digital revolution is without a foreseeable limit and the States that will miss this important momentum – for the EU member states, consisting, above all, of the Recovery Plan for Europe (European Commission, 2023c) – will have to face further difficulties in keeping up with a more and more competitive global system, subject to rapid changes.

Moreover, digitization can provide efficient tools for the public administration to target better its interventions and to avoid the risk of the lack of public governance on the whole amount of data that today is, in any case, available. Precisely the use of those data could be a strong support for public decision-makers in the definition of fairer and more competitive tax and welfare policies.

Consider, for example, that digitization and, therefore, the massive and critical collection of data can provide States with a valid support where there is a high rate of tax evasion. The dematerialization of the relationship between the taxpayer and the tax administration can undoubtedly play an essential role both in terms of facilitating compliance and, at the same time, making the prediction and application of repressive measures of elusive, abusive or evasion behaviour more efficient.

However, regardless of the definition of the term compliance we would use[1], the digitization of data and their consequent organization and management would allow, in the medium-long term, to act on several fronts simultaneously: the prevention and repression of tax evasion, but, potentially, also the efficient and swift recovery of the amount evaded, in order to reduce the tax gap and to acquire useful resources in relatively quick and clear times; on the other hand, the use of integrated databases could lead to a fairer distribution of resources and their efficient allocation on welfare expenses, as well as could allow the tax jurisdictions to calibrate the tax levy more accurately and more consistently, having clear all the information necessary to establish the real ability to pay of the taxpayers.

From the first point of view, for example, the recent and notable progress that has been made in Italy in terms of significant reduction of the tax gap for VAT purposes after the introduction of "digitalization" measures of some fundamental phases of the definition of the tax should be considered: I am referring, in particular, to electronic invoicing and to the introduction of the split payments.

The first measure, indeed, has allowed (and still allows) a considerable impetus towards the dematerialization of the relationship between taxpayers and tax administrations and between taxpayers themselves. In this way, tax authorities may have access to a mass of data which, where used properly, allows for a transparent, immediate and effective dialogue between taxpayers and the revenue authorities. Moreover, tax authorities have, for their part, a tool which ensures that they can identify some forms of tax evasion or of tax avoidance. The second measure even enables tax authorities to prevent a range of behaviours which in the past diverted tax resources, definitively, or even only temporarily, by simply making a direct payment of the tax and thus also avoiding watering down the funds of the taxable person.

The availability of a considerable amount of data, including sensitive data (health, disability, minority group membership, etc.), clearly poses serious problems of protection of data and of data subjects, at least in Italy.

However, dematerialization, in systems such as, for example, the Italian one, characterized by high levels of tax evasion and by sizeable underground economy (Governo Italiano, 2022; ISTAT, 2022), could make a significant contribution to changing not only the behaviour of taxpayers (consequently the reduction of tax evasion, tax avoidance, base erosion and abuse of rights), but also the culture of taxpayers themselves and in that way supporting the prevention of their misconduct.

[1] The term "compliance" has many possible meanings. About those meanings, see the exhaustive and detailed analysis by Melis (2017, p. 751).

In fact, by dematerializing tax authorities can monitor more accurately the income produced and, consequently, the taxes due and, at the same time, jurisdictions can allocate more efficiently their resources and design better their welfare measures. By the promotion of a widespread use of digital technology for tax purposes, tax authorities can also, at the same time, interact effectively with taxpayers and make their fulfilment of tax obligations easier and safer.

A tax system designed as described above, may actually contribute to legitimating the tax and justifying it to taxpayers (Melis, 2017, p. 752; and also Cullen, Turner, Washington, 2021; Alm, 2019, p. 370), taking into account those systems, such as, for example, the Italian one, where taxpayers are culturally not inclined to realize that the fulfillment of the tax duty represents a fundamental expression of popular sovereignty, qualifies a responsible participation in the organized Community, and at the same time constitutes its core prerequisite (Bergonzini, 2019, p. 239, 2011, p. 38).

It should not be underestimated, indeed, how much the dematerialization can simplify administrative procedures and interactions between citizens and public authorities: this simplification is widely regarded as one of most important "drivers" in preventing diversions of tax revenue. A research conducted in Belgium (De Neve, et al., 2021; also OECD, 2014, in particular p. 49), based on a series of population-wide experiments, shows that the simplification is highly cost-effective, notwithstanding the costs and benefits of simplification as compared with traditional enforcement actions. According to this analysis, the positive effects of simplification persist in the following fiscal year and are sustained when simplification is repeated, so that *"making it as easy as possible to comply, therefore, deserves greater attention from tax administrations around the world",* because simplifying communication by the tax administration consistently improves tax compliance; Simplification allows taxpayers to pay taxes on time and makes both late filers and late payers comply more swiftly than they would otherwise.

The fairness of the tax in itself is given exclusively by the consistency and rationality of the legislative choices (distributive as well as redistributive) of allocation, aimed at defining different situations. These legislative choices link functionally the tax to the public expenditure also in order to pursue possible (re) distributional aims: the consequent solidaristic aspect is highlighted when this expenditure and the achievement of these objectives constitute a guarantee of social rights and contribute to reducing social inequalities (Gallo, 2009, p. 104).

In addition, account shall be taken of the fact that the tax simplification itself, from both a regulatory and an implementing perspective, and the improvement of administrative procedures, which request the active participation of taxpayers (Melis, 2022, p. 201), are useful tools to prevent mistakes or unintentional failure

to fulfil tax obligations, as well as being an incentive to voluntary compliance (Melis, 2017, p. 755).

On the subject, it should be actually noted that the doctrinal interpretation, which has nowadays been settled, and that the case-law orientation, which is currently being consolidated, recognize the possibility of a link between tax system and fundamental rights. For this reason, it is imperative to focus particularly on tax law taking into account its importance in order to allow or facilitate the exercise of fundamental rights[2].

The possibility to have access to digital ecosystems could therefore be regarded as a right in itself, or as an essential tool for exercising other rights fully and more effectively, but also a tool for identifying and implementing welfare measures and, accordingly, a means for granting even fundamental rights (Melis, 2017, p. 754, in particular fn. 7).

Indeed, it is important to draw the attention to the link between the rights that the citizens/taxpayers can claim and the digital economy in its different connotations: the digital sector, which is characterized by the provision of information technology and telecommunications services; the digital economy itself, which includes all economic activities that have emerged thanks to the technological developments of the last few decades; the digitized economy, i.e. the set of those traditional economic activities which, thanks to digitization processes, have been dematerialized in whole or in part[3]. Actually, each of these meanings of digital economy is somehow connected to the considerations set out above about the relevance of digital technology for the purposes of exercising rights.

On the other hand, and more generally compared with the above, it is also necessary to bear in mind the fact that the dematerialization of the citizen-government relationship is able to remove any barriers to new forms of citizens' involvement in political decisions, achieving a more capillary distribution of tools of the so-called direct democracy[4].

Digitalization, simplification and tax competition: advantage or damage?

As mentioned above, the dematerialization could significantly help citizens/taxpayers in exercising their own rights and in their relations with public administration. However, this simplification intuitively reinforces the pre-existing

[2] It could be here enough referring to Persiani, Melis (2013, p. 282), even if their observations essentially concern the freedom of religion and the right not to be compelled to incriminate itself.

[3] Extremely clear on this point Pepe (2020, p. 1), in particular fn. 1. See also the Author's references.

[4] In relation of this issue, see Bergonzini (2019, p. 237), and the Author's references.

problems related to the so-called tax competition. Taxpayers can, indeed, choose their registered office wherever they want, also, eventually, in order to benefit from more favourable tax arrangements. Moreover, at European level, according to recital 11 of the Council Directive (EU) 2016/1164[5], "*the taxpayer should have* [not only the freedom] *but the right to choose the most tax efficient structure for its commercial affairs*". This is even more true when the taxpayer conducts an economic activity which is strongly dematerialized.

In this context, the opportunity of having any place practically available to site the registered office of a business, irrespective of the location of the effective economic activity, can create tax competition among jurisdictions. The phenomenon of the (harmful) tax competition raises not only ethical considerations, first of all connected with the principle of the ability to pay, but clearly creates also serious political tensions in the countries based on a ordinary taxation system, which fund the expenditure on public services increasingly harder[6].

It is easy to understand that the resulting unfavorable impact of the harmful tax competition falls, first of all, on citizens: cuts in welfare and in investments in infrastructure and, in general, in public works and significant reductions in the quality of public services have a negative impact on the quality of life and on the whole community, which, on the contrary, should expect higher collective well-being from the contribution of tax payments (Carbone, Mancazzo, 2021, p. 16).

It is therefore clear that the digital revolution we are witnessing is marked by a series of profound and important contradictions.

Actually, on one hand, the digital tool is becoming increasingly important as a means of enjoying some fundamental rights and as a means of improving the exercise of other rights. The digitalization is therefore the subject of high public investments, in terms of infrastructures as well as in terms of digital or information literacy. On the other hand, however, the dematerialization of a large part of the "economic" relationships has allowed, as mentioned several times above, an opportunity for a rapid relocation of many economic activities, with the aim of exploiting jurisdictions characterized by favourable tax systems: this is notably a phenomenon which can steal significant resources and therefore jurisdictions endeavour to intercept and to tackle the resulting profit shifting (Jacobs, 2017, p. 27).

We find ourselves faced with a sort of contemporary paradox: while huge investments are directed to the development and diffusion of technology and

[5] Council Directive (EU) 2016/1164 of 12nd July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

[6] About the issues linked to the *tax competition* at European Union level, see what observed by Persiani, Melis (2013, p. 315) and their references, in particular: Schon, (2000, p. 104).

digitalization[7], at the same time the use of highly technological and digital tools are "chased" by jurisdictions and the tax authorities to tackle the profit shifting (Pepe, 2022) phenomena and, consequently, to prevent or avoid unfair inequalities between countries.

The tax competition between States was known for some time and is not easy to be defined in an comprehensive manner (Peperrone, 2019, p. 8)[8], but it is, precisely, configured as a phenomenon that also has an impact on the field of welfare and social rights: it moves huge amount of resources; consequently, it can increase the already existing economic inequalities and have the effect of erosion of the tax base, in this way, inevitably, with repercussions in the field of social policies, commonly referred to as welfare policies (Perrone, 2019, p. 9).

When one jurisdiction puts in place harmful tax competition policies, in fact, it judges that the socio-economic benefits deriving from this location are capable of leading to an increased general well-being, higher than that which may be generated as a result of the application of ordinary level of taxation. These advantages could be attributable to the increase in employment levels, to the demand of production of goods or the supply of services by national operators, to the deposits in the domestic banking system, etc. (Boria, 2017, p. 268).

However, the harmful tax competition also represents something more, because the given jurisdiction prefers the use of a market instrument, opting for reaping the benefits generated by multinationals present in the country, rather than resorting to taxation. Tax competition is accordingly defined as unfair because it is regarded as related to a politically regrettable calculation, as it is not bound by generalized economic benefits in favour of an entire nation, but rather exploited by a limited number of beneficiaries, in particular by multinationals and by main international economic operators (Boria, 2017, p. 269).

Conclusion

Having in mind that the protection and the exercise of social rights, as well as public policies aiming at their full recognition, lead to high expenditure and that the fair distribution of tax rights between jurisdictions could contribute to meeting those expenses, it is clear the link between the issues arising from the international dialogue about the taxation of digital economy and the full enjoyment

[7] See, for all, the amount of investments for the digital transformation (Pillar 2) allocated by Recovery Plan for Europe (European Commission, 2023c): European Commission (2023d), European Commission (2022b, p. 21), European Commission (2021).

[8] For the analysis of all possible definitions of "tax competition" and of "aggressive tax planning", "tax arbitrage", "abuse of rights", "tax avoidance", "tax base erosion" and "tax base relocation", see Pepe, (2020, p. 4), in particular fn. 11 and references mentioned therein.

of social rights in those jurisdictions where there is a high value creation with no tax revenue for the corresponding amount of that value.

Consequently, at the international level, but certainly more at the European level, jurisdictions need urgently to reach an agreement that could allow them to face the digital revolution for tax purposes. European Institutions should indeed ask themselves whether the moment has not come for them to provide the Union a common taxation system[9] and a Union budget which should be able to support common welfare and (re)distributive common politics, in order to tackle and to reduce inequalities (Bilancia, 2018, p. 14). Accordingly, in the European Union it is necessary to avoid intolerable drifts towards social and fiscal dumping, otherwise the European process towards a common taxation should face the risk to attribute merely to economic rights the dignity of full protection and exercise in the EU, even to the detriment of social rights and related policies (Patroni Griffi, 2018, p. 43).

Furthermore, the United Nations Organization itself has placed the reduction of inequalities, within and between nations, among the objectives of the 2030 Agenda for sustainable development, through the adoption of policies, in particular for the purposes of taxation, wage and social protection, in order to progressively achieve higher levels of equality (United Nations. (2015)[10].

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[9] See for this point of view Gallo (2022), Selicato (2022), Marino (2022).

[10] The 17 Sustainable Development Goals (SDGs) provided for in the 2030 Agenda constitute all together a common plan to improve the world for people and the planet by 2030. Adopted by all United Nations Member States in 2015 (Resolution adopted by the General Assembly on 25th September 2015 – A/RES/70/1 of 21st October 2015), the SDGs are a call for action by all countries – poor, rich and middle-income – to promote prosperity while protecting the environment.

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