

# Data pricing for VAT purposes

*(Free as in 'Speech' and not free as in 'Beer')*

# Outline of the presentation

- The Development of VAT application on digital services;
- Latest from the news: charging VAT on digital **free** services;
- Understanding of 'Free' according to VAT and domestic law;
- The case for **Data trading** (or sharing ?);
- Implication for the Maltese business system;
- Concluding remarks.

# VAT on digital Services

- Challenges to aspects concerning the application of the tax, including:
  - Nature of the performance of the business:
    - Sale of goods ?
    - Delivery of services ?
  - Territoriality principle:
    - Place where the service is delivered, where the recipient is placed.

# What about the compliance ?

- One Stop Shop (OSS) as from July 1<sup>st</sup> 2021;
  - OSS allows taxable persons to declare (and pay) VAT in States in which these taxable persons are not established via a web-portal in the Member State in which they are identified (aka “**Member State of identification**”);
  - Legal basis: Council Directive 2006/112/EC on the common system of value added tax (as amended by Council Directives (EU) 2017/2455, Council Directive (EU) 2019/1995 and Council Decision (EU) 2020/1109;
  - ...

# Latest steps: the DAC7

- Council Directive (EU) 2021/514 of March 22<sup>nd</sup> 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation;
- Implemented in Italy on March 25<sup>th</sup> 2023, legislative decree 32/2023;
- New duties of disclosure on digital platforms including (for instance):
  - Vinted, Ebay, Amazon, Airbnb, Booking, ...;
- Threshold effect: 30 transactions, € 2.000 revenue.

# Latest from the press (Crackdown on *Meta*)

## Meta indagata per evasione fiscale a Milano, l'accusa della procura: «Iva non versata per 870 milioni»

di **Valentina Iorio** 22 feb 2023



**M**eta è indagata dalla Procura di Milano per evasione fiscale. Secondo l'accusa il colosso che controlla Facebook, Instagram e WhatsApp non avrebbe versato 870 milioni di euro di Iva, fra il 2015 e il 2021. La cifra è emersa in seguito agli accertamenti della Guardia di Finanza in base alla mancata presentazione della dichiarazione dell'imposta sul valore aggiunto da parte del colosso che controlla Facebook, Instagram e WhatsApp, per gli anni che vanno dal 2015 al 2021.



Assegno unico, superbonus, spese sanitarie: le nostre risposte sulla dichiarazione dei redditi



Le ville e le proprietà di Silvio Berlusconi

di M. Jattoni Dall'Asén

# The legal arguments used by Public Prosecutors

- Facebook is not free “as in beer”, it is free “as in speech” (yet moderation applies);
- Users pay with their personal data, used for profiling and subsequent advertising purposes;
- The swap between the data and the digital services offered by the platform could be subject to VAT (a sort of barter);
- Taxable amount ? Ratio of advertising revenue from Italian sources to Meta Ireland’s total advertising revenue (considering costs).

# Language matters !

- Data provider is, for VAT purposes, a service due to the intangible nature;
- Technically, **it's not a barter between goods**, but some sort of swap between two different services made one in consideration of the other;
- In case of swaps / barter of this kind both the transactions should be targeted with VAT (if the other conditions are met).



# Can (personal) data be traded ?

- **No specific and precise answer by VAT law** (or tax law in general);
- Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods opens the floor to such a possibility:
  - In Italy “*contracts for the provision of digital content and digital services*” are applicable where “*the trader provides or undertakes to provide digital content or a digital service to the consumer and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are processed exclusively by the trader for the purpose of providing the digital content or digital service under this chapter or to enable the performance of legal obligations to which the trader is subject, and the trader does not process such data for purposes other than those intended*”;
  - Yet this is **applicable to consumers law only** (Council of State decision n. 2631/2021).

## Argument *a contrario*

- Directive 2019/770, *consideranda* § 24:
  - *Digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader.*
  - *Such business models are used in different forms in a considerable part of the market.*
  - *While fully recognising that the **protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity**, this Directive should ensure that consumers are, in the context of such business models, entitled to contractual remedies.*
- Literal interpretation by mainstream doctrine: data can not be traded.

# Data Trading

- Argument in favour:
- The directive provide for the right to repent, or more precisely, rules that the individual should never be compelled or bound to that performance (sale of data);
  - Uncertainty and risk is no the purchaser;
  - Is it possible to trade data, but with higher uncertainty;
- The discipline has been introduced for the protection of the consumer, it hasn't got a broad reach;
- For VAT purposes data is a service: a legal transplant is not possible as a consequence.

# Foundations of a "Service Swap"

- An **exchange in kind** is relevant for VAT purposes only when:
  1. One party is legally obliged to provide certain services
  2. The other party is legally obliged to provide goods/and services as a consideration for the former (see Article 9(1)(2) of EC Directive 112 of 2006).
- In other words, a sort of "interconnection"/"mutual reciprocity" between the two services is required.

# How much relevant is the Civil law background ?

- Not so much actually;
- See the very recent case C-114/22 decided on May 25<sup>th</sup> 2023 "*Dyrektor Izby (...) vs W. sp. Z.o.o.*"
  - Legal invalidity of a contract under Civil law may not necessarily deprive it of its impact or VAT purposes, as **substance must be considered**;
  - In the case decided by the Court a contract (allegedly) null allowed anyway the purchaser of an asset to deduct input VAT it has been charged of;
- **Primacy of substance of the economic effect over the civil law discipline.**

# The VAT Committee

- Opinion released on October 30<sup>th</sup> 2018 taxud.c.1(2018)6248826 on the possibility to charge VAT on the delivery of services in consideration of data;
- Article 2(1)(c) of the VAT Directive (2006/112/EC) establishes that the supply of services for consideration within the territory of a Member State by a taxable person acting as such shall be subject to VAT;
- What are the conditions to be met to this purpose ?

## The case law used

- The fact that the data received in exchange for the service has **economic value is not enough** to conclude that the services are supplied for consideration;
- What is **needed** ? A **legal relationship** between the provider of the service and the recipient pursuant to which there is reciprocal performance (Judgment of March 3<sup>rd</sup>, 1994, *Tolsma*, C-16/93);
- In another case (Judgment of October 29<sup>th</sup> 2009, *Commission vs Finland*, C-246/08) The CJEU reached that conclusion taking into account that the payments did not cover all the costs of the activity and **were not related to the activity** deployed by the supplier;
- If there is no **quantitative consideration** then the “*quid pro quo*” condition is not met.

# The Conclusions reached

- The provision of an IT service **without a monetary consideration**, which allows the supplier to use the personal data of his customer, does not constitute a taxable transaction for VAT purposes as **there is no direct link** between the service provided and the consideration received.
- The data for which use is granted varies in quantity and quality from one user to the other, it being even possible that the user only provides false data to the supplier;
- It is not possible to establish such a direct link, which is a condition for the transaction to be regarded as taxable.
  - Opinion: this is not entirely accurate.



... or not ?

- If a **sufficient direct link** exists between the IT services provided and the customer's data received without a monetary consideration being requested, there would then be a taxable transaction.
- In such case, the taxable amount would be **the cost for the supplier of providing the service to the customer.**

# A very Personal View

- What would be the reach of such an interpretation ?
- What about the “free as in beer” business model ?
- What about the possible remedies ?

# What about Malta ?

- Island's model of business deeply involved in data management;
- Necessity to monitor the development of the possible litigation in Italy;
- Conclusion of the VAT Committee might constitute a good line of defence, yet time has passed, and 5 years in digital economy is an eternity.
  - ID of the user;
  - Raw data management;
  - ...

Thanks for  
your attention

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