

Chapter I

THE DIGI-GLOBAL ECONOMY AND ITS EFFECTS ON THE LAW

SUMMARY: 1. New business “models” and new “places” in the digi-global era. – 2. Business, “places” and the law. – 2.1. The change of the ways and the places of law formation. – 2.2. The change in phenomena and places relevant to the law. – 3. Digi-global economy and taxation.

1. New business “models” and new “places” in the digi-global era

Technological progress and the globalization of markets have revolutionized the way to do business and the concept of “place” in the world of economic matters.

Technological progress and digitalization have profoundly changed the processes of the production of goods, the provision of services, marketing and the adoption of strategic decisions by companies.¹ Moreover, it has created “places” that do not constitute physical spaces, in which goods and

¹The literature on the subject is very wide. See among the many, without pretension of completeness, HASKEL J., WESTLAKE S., *Capitalism without Capital: The rise of the intangible economy*, Princeton 2018; GALLOWAY S., *The four: The Hidden DNA of Amazon, Apple, Facebook, and Google*, London 2018; SIXT M., *Ein Überblick über aktuelle digitale Trends und deren Anwendung in den Geschäftsmodellen von Unternehmen*, München 2018; WEIL P., WOENER S.L., *What's Your Digital Business Model? Six Questions to Help You Build the Next-Generation Enterprise*, Boston 2018; VENKATRAMAN V., *The Digital Matrix: New Rules for Business Transformation Through Technology*, Vancouver 2017; HERBERT L., *Digital Transformation: Build Your Organization's Future for the Innovation Age*, London 2017; PARKER G.G., VAN ALSTYNE M.W., CHOUDARY S.P., *Platform Revolution: How Networked Markets Are Transforming the Economy and How to Make Them Work for You*, New York 2017; KOTLER P., KARTAJAYA H., SETIAWAN I., *Marketing 4.0: Moving from Traditional to Digital*, Hoboken USA 2017; MCAFEE A., BRYNJOLFSSON E., *Machine, Platform, Crowd: Harnessing Our Digital Future*, New York 2017; LOUCKS J., MACAULAY J., NORONHA A., WADE M., *Digital vortex*, Lausanne 2016; ROGERS D.L., *The digital transformation playbook. Rethink your business for the digital age*, New York 2016; Id., *The Network Is Your Customer: Five Strategies to Thrive in a Digital Age*, New Haven 2011; PORTER M.E., HEPPELMANN J.E., *How smart, connected products are transforming companies*, in 93 Harv. Bus. Rev., 2015, 96-114; MANYKA J., WOETZEL J., DOBBS R., *No Ordinary Disruption: The Four Global Forces Breaking All the Trends*, New York 2015; LOEBBECKE C., PICOT A., *Reflections on societal and business model transformation arising from digitization and big data analytics: A research agenda*, in 24 J. Strateg. Inf. Syst., 2015, 149-157; IANSITI M., LAKHANI K., *Digital ubiquity: How connections, sensors, and data are revolutionizing business*, in 92 Harv. Bus. Rev., 2014, 90-99; WESTERMAN G., BONNET D., MCAFEE A., *Leading Digital: Turning Technology into Business Transformation*, Boston 2014; WESTERMAN G., HUNTER R., *IT Risk: Turning Business Threats into Competitive Advantage*, Boston 2007.

services can circulate and carry out their function in relation to tangible realities, but rather virtual spaces, in which de-materialized goods and services move and act. Consequently, assuming that the physical space is an ontological characteristic of the concept of “space” relevant to society and law,² virtual reality is now also a “non-place”.³

On another level, the signing by a large part of the world’s countries of the Marrakesh Treaty, which is at the basis of the World Trade Organization (WTO) and the implementation of numerous forms of common markets at the supranational level⁴ have multiplied the transnational and supranational dimension of economic matters having to do with traditional goods and services. In this way, the transnational vocation of the business has become natural and essential for companies wishing to become established in the market (or even just to remain there, resisting competition from others), and the relocation of production processes has taken on a structural nature for businesses.⁵ This has widened greatly the coordinates of the extension of economic “places” so that they became progressively segregated from human community settlements as we have known till today.⁶

²See, *ex pluribus*, BAUMAN Z., *Globalization: the human consequences*, New York 1998, 12; ORTINO S., *Il nuovo nomos della Terra. Profili storici e sistematici dei nessi tra innovazioni tecnologiche, ordinamento spaziale, forma politica*, Bologna 1999; BALDASSARRE A., *Globalizzazione contro democrazia*, Roma-Bari 2002, 10 and 59; IRTI N., *Norma e luoghi. Problemi di geo-diritto*, Roma-Bari 2006; recently, ANTONINI L., *Alla ricerca del territorio perduto: anticorpi nel deserto che avanza*, in *Rivista AIC*, n. 3/2017, SCACCIA G., *Il territorio fra sovranità statale e globalizzazione dello spazio economico*, *ibid.*, par. 1., SALAZAR C., *Territorio, confini, “spazio”: coordinate per una mappatura essenziale*, *ibid.*

³According to FERRARESE M.R., *Le istituzioni della globalizzazione*, Bologna 2000, 46, cited among others by BALDASSARRE A., *op. cit.*, 17 and SCACCIA G., *op. cit.*, parr. 3.3. and 5.1. and today, in tax matters, by CARPENTIERI L., *La crisi del binomio diritto-territorio e la tassazione delle imprese multinazionali*, in *Riv. dir. trib.*, 2018, I, 356 and FARRI F., *Sovranità tributaria e nuovi “luoghi” dell’economia globale*, in *Dir. pubbl.*, 2019, 153 ff., essay, the contents and conclusions of which have been partly recalled, reworked and deepened on this work.

⁴More institutionalized, such as the European Union or the Eurasian Union, or how the African Union could be in perspective following the implementation of the Continental Free Trade Area (CFTA), or less institutionalized, such as NAFTA and Mercosur and how they might have been, and, where ratified, TTIP and TPP.

⁵However, this process should not at all be considered irreversible: see on the subject LIVESSEY F., *From Global To Local: The making of things and the end of globalisation*, London 2017; Id., *Unpacking the possibilities of deglobalisation*, in 11 *Cambridge Journal of Regions, Economy and Society*, 2018, 177-187; on a more general level see also TREMONTI G., *Le tre profezie*, Milano 2019, 49 ff., who notices that, in relationships among States, the so-called bilateral method is gradually replacing the old multilateral method and that we are witnessing the return from free trade, typical of the age of total globalization, to the old fair trade.

⁶The matter was already predicted and clearly explained by GALGANO F., CASSESE

Therefore, the importance assumed by digitalization and the global vocation of economic affairs undoubtedly allow us to speak, with a unified term, of a digital-global era.

2. Business, “places” and the law

The aforementioned mutation of the way of doing business and of the “places” of the post-modern economy causes a corresponding mutation of the way law is formed and of the “places” relevant to the law. Since economic matters hold intrinsically a juridical interest, the variation of the characteristics of the economic reality turns necessarily into variation, or the necessity of variation, of the juridical phenomenon linked to it. In particular, the mutation of the ways and of the “places” of the economy causes both (2.1.) a mutation of the ways and of the “places” of the creation of the law linked to economic matters and (2.2.) a more radical change of the phenomena and of the “places” relevant to the law itself.

2.1. The change of the ways and the places of law formation

The digital economy and the globalization of traditional economic exchanges imply, on the one hand, the formation of juridical phenomena within the virtual reality itself and, on the other hand, the multiplication of intergovernmental and supranational law.

It can be assumed that the second aspect does not modify, if not quantitatively, an ever-existing phenomenon. On the contrary, the first aspect is undoubtedly innovative. In fact, it produces juridical experiences that are mostly independent of the traditional sources of the production of law that generally presuppose a spatial reality and regulate the phenomena related to it (think, in particular, to the State systems). Therefore, this aspect appears to be of great interest to jurists, because it implies the liberation of the juridical phenomenon from the limits of State organization.⁷

Such a perspective, however, cannot lead to too much enthusiasm, since the overall desirability of such a phenomenon requires to be evaluated in relation with all of the values which are at the foundation of juridical experience, and not only in relation with some of them such as economic effi-

S., TREMONTI G., TREU T., *Nazioni senza ricchezza, ricchezze senza nazione*, Bologna 1993 and, especially, by CASSESE S., *Oltre lo Stato: i limiti dei governi nazionali nel controllo dell'economia*, *ibid.*, 35 and TREMONTI G., *Il futuro del fisco*, *ibid.*, 49.

⁷ The aspect is masterfully described by GROSSI P., *Mitologie giuridiche della modernità*, Milano 2007.

ciency and productivity. In particular, if the founding values of democratic legal experience are considered desirable, the evaluation needs to be performed, above all, with the values of equity, consensus and the dignity of the individual. In this perspective, the evaluation of such a phenomenon can hardly be positive, considering that the market law, on which it is founded, tends to reward the strongest over the weakest and risks replacing the representation balance that the democratic communities individuated to ensure binding effects on legal decisions with an imbalanced situation in which the binding effect of law is given by the conduct and impositions of the strongest.⁸

2.2. The change in phenomena and places relevant to the law

Virtual economy and the globalization of the traditional economic relations require the law⁹ to consider the presence of “phenomena” and “places” which are different and additional to those to which it is traditionally referred. The economization of human existence, and even of the anthropology, that globalization has determined¹⁰ could lead to the conclusion that the change in the paradigm of the subjective, objective, temporal and spatial dimensions of law produced by a globalized economy should be shifted alongside radically new concepts relevant for the fundamental structure of the juridical phenomenon in itself.¹¹

⁸BALDASSARRE A., op. cit., 174-179, 315, 316, 367. The increase of inequalities caused by the market and the unsuitability of the market to act as a political regulator are described, *ibid.*, 176, 329-330, 340, 342, 347. On the point see, also, SASSEN S., *Expulsions: brutality and complexity in the global economy*, Cambridge USA 2014; STIGLITZ J., *Globalization and its discontents*, New York 2002, followed by the more optimistic study *Making globalization work*, New York 2006, as well as *The price of inequality: how today's divided society endangers our future*, New York 2012; RODRIK D., *The globalization paradox: democracy and the future of the world economy*, New York 2011; BAUMAN Z., *In search of politics*, Cambridge 1999, 176; GALLINO L., *Globalizzazione e disuguaglianze*, Roma-Bari 2000; TREMONTI G., JEAN C., *Guerre stellari*, Milano 2000, 80.

⁹*Rectius*, they require also the law external to that self-produced by the economic phenomenon itself in the sense mentioned above.

¹⁰BALDASSARRE A., op. cit., 153; TREMONTI G., *La paura e la speranza*, Milano 2009.

¹¹Consider, for example, the relevance that is given, also by jurisprudence, and not only by comparative scholars, to decisions on events related to individual rights taken by foreign courts and, as such, lacking legal importance for the traditional “place” of operations of the courts of other countries. For some considerations on the subject, specifically pertaining to tax-related matters, see AVI-YONAH R.S., *What Can the U.S. Supreme Court and the European Court of Justice Learn from Each Other's Tax Jurisprudence?*, in Avi-Yonah R.S., Lang M. (eds.), *Comparative fiscal federalism*, Alphen aan

However, this possible all-encompassing result of globalization appears only as an indirect result of the globalization of the economy and does not constitute its proper element. Therefore, it is undoubtedly separable from the phenomenon of economic globalization without denying the relevance of the latter. Under these conditions, however, some branches of the legal system need to provide relevance to the changes to which the new frontiers of the post-modern economy give life. These are, in particular, those juridical branches that are more directly connected to the economic reality, so much so as to assume that it is the object of the juridical relations regulated by them. Among these juridical branches, the tax system is undoubtedly one important part, in that it is the law that regulates the ways in which the members of a community of people share the costs necessary to meet the common expenses of the community itself, including the ways consisting of taxes, i.e., in mandatory payments independent from a synallagmatic link with a specific service rendered to the member of the community on which the payment is imposed.¹²

3. Digi-global economy and taxation

Considering the above, the issue that arises is whether the two main characteristics of the digi-global era, which are the multiplication of the transactional and supranational dimension of traditional economic events and the surfacing of a digital world in which a new virtual economy is expressed, may be relevant to taxation systems. The following Chapter 2 is dedicated to the analysis of this matter and will conclude that both the first (Chapter 2, § 2) and the second (Chapter 2, § 3) characteristics of the digi-global context may well – even though not necessarily should (Chapter 2, § 4) – assume tax relevance. At this juncture, the question moves towards the identification of the most appropriate ways through which organized communities, that so wish, may confer tributary relevance to these developments and towards the identification of the most appropriate level at which the digi-global phenomena should be taxed.

der Rijn 2016, chap. 10, and MARTÍN JIMÉNEZ A.J., *El impacto de la jurisprudencia tributaria del Tjue en los tribunales latinoamericanos (o acerca del nacimiento de un nuevo “diálogo judicial global” en materia tributaria)*, in Civitas. Rev. esp. der. fin., 2013, 35. Recently, consider the worldwide resonance that the ruling of the Supreme Court of the United States had in the case of *South Dakota v. Wayfair, Inc.* decided on June 21, 2018, which will be discussed later (Chapter 2, note 18).

¹² Regarding the relationships between the new places of global economy and tax law, see the general framework provided by CIPOLLINA S., *I confini giuridici nel tempo presente. Il caso del diritto fiscale*, Milano 2003.

Chapter 3 is dedicated to this question, which will be analyzed both under the perspective of traditional organized communities characterized by their placement in a physically defined space-time horizon (whether it has characteristics of the State, Chapter 3, § 2, or supra-state characteristics, Chapter 3, § 3), and under the possible perspective of an information technology-based community (Chapter 3, § 4). Subsequently, the tributary mechanisms, which are appointed in Chapter 3 as useful to enhance in tax systems the novelties of the digi-global economy, will be analyzed in Chapter 4 under the profile of the criticalities that they manifest with respect to the fundamental principles that characterize legal taxation in democratic systems. In particular, problems will be individuated in the compatibility of some of those mechanisms with the principle of the certainty of law (Chapter 4, § 3) and with the principle of consent to taxation (Chapter 4, § 4). These issues will also be specifically analyzed with reference to the fiscal system of the European Union (Chapter 4, § 5).

Finally, Chapter 5 will analyze the issue of the perspectives of the role of States in the future fiscal governance of the digi-global economy. Chapter 5 will conclude that, more than the relative territorial dimension, it is the general character of the purposes of State legal systems, to which the greater appropriateness of a form of personal imposition is related, that represents an indispensable element for the realization of a tax system that is fair and equitable. Therefore, it is this very aspect that must be seen as the *proprium* of the State experience and that deserves to be safeguarded in the third millennium, though with renewed methods and tools adapted to modern times.