

Subject 2: Big data and tax – domestic and international taxation of data driven business

During the panel held on the 6th of September, the panelists addressed the main legal and tax implications of business models using big data in the context of the global economy.

The panelists started the discussion by pointing out how relevant big data is in the current economy, not only for pure internet companies but also for traditional companies looking to boost their financial performance or enlarging their customer portfolio.

The presence and influence of big data in new and common business models has led to a misalignment between the current economy and the current tax framework that still heavily relies on physical presence for the allocation of taxing rights. In order to avoid unilateral and uncoordinated domestic law rules to tackle this problematic such as digital services taxes, expanded withholding tax or the creation of a substantial economic presence PE, countries agreed to resolve such issues through the rules set by Pillars I and II. In addition, the panelists also entered into the more “traditional” international tax questions raised by big data, such as the tax characterization of income paid for the use or right to use raw data or a set of organized and structured data, the value creation of data within the supply chain for transfer pricing purposes, as well as the indirect tax implications of big data in particular with respect to the location rules.

The panelists, together with the reporters, addressed the matter through four different case studies involving big data in different stages. The main conclusions are as follows:

- An initial assessment of domestic IP law related to raw data and organized and structured data may be useful to proceed with the tax analysis of any income. However, despite this initial assessment, IP law may diverge – significantly – from tax law (e.g. the definition of license may have a different meaning in both areas of law);
- There are four possible main tax characterization categories of income from data: income from the provision of service (business income); income from the sale of property (gain/business income); income from the lease of property (business income/royalty); and license of rights to use intangible property (royalty). The outcome of the tax characterization may in particular depend on: (i) the status of the data (raw vs. organized/structured); and (ii) the type of transaction/services on the data (e.g. customized analysis of data, delivery of analyzed and structured data, access to data bases collecting the data, etc.);
- There seems to be a common international understanding that (i) raw data has no value, such data becoming valuable when it has been analyzed, organized and structured; and (ii) payments for structured data should not qualify as royalty since said data is not acquired as an intangible, therefore, the access to said data should rather be seen as a service.

The key take-away messages may hence be that big data create “traditional” international tax issues, which are currently generally tackled by analogy due to the lack of specific rules addressing the matter. Proper and detailed tax policy works in particular on an international level are hence needed in order to avoid unilateral and uncoordinated domestic law measures to properly address the issues raised by big data and help mitigating tax implications for

taxpayers that would be inconsistent with key tax principles, such as the ability-to-pay principle and the realization principle.