Tax Policy Update

15 – 26 October

HIGHLIGHTS

- European Commission publishes Work Programme for 2019
- New tax scandal, the CumEx Files, emerges as European Parliament Plenary holds first discussion on it
- Bruno Le Maire lobbies for digital tax as US pressure against the DST increases

European Commission

European Commission unveils Work Programme 2019 – 23 October

The European Commission has published its Work Programme (WP) 2019. It sets out in detail the Commission's main legislative priorities for the next 12 months to come, and consists of new initiatives as well as prioritisation of initiatives that are currently on the table.

As the current Commission enters its final year, the WP focuses on delivery with only a limited number of actual new priorities. This means that on tax as well, there is nothing new or surprising in the prioritisations, and the items correspond to what was already announced in the context of **President Juncker's** State of the Union (SOTEU) speech back in September. For further details on the SOTEU, see Accountancy Europe's Tax Policy Update from 14 September.

Worth re-iterating is the Commission's intention to publish in January-February 2019 a non-legislative initiative to identify areas on tax to move to qualified majority voting – rather than the current unanimity decision making on all tax files. Such a move is in theory permitted under the Lisbon Treaty (using the so-called 'passerelle clause'), but it would require an unanimity of member state parliaments to pass. Needless to say, at this stage it appears unlikely.

European Parliament

TAX3 hearing on golden visas, warehouses and shell companies – 15/18 October

The TAX3 Committee of the European Parliament has held two public hearings to pursue its investigation into dubious tax practices and financial crimes. The new set of hearings focused on golden visas, free ports, customs warehouses and shell companies.

First hearing – golden visas and other national schemes providing tax privileges

The first hearing brought together two panels of experts to discuss money laundering risks linked to golden visa schemes, as well as free ports and special economic zones.

The first panel dealt with member states' practices of granting golden visas mainly to non-EU citizens in exchange for direct payment or investment. The second panel covered the AML and tax evasion risks posed by free ports and special economic zones.

Overall, the discussion broadly focused on different practices and money laundering risks associated to golden visas and special economic zones, naming and shaming some member states "leading" in this area, such as Malta, Cyprus, Portugal and Luxembourg.

Although the accountancy profession and accountancy firms have not been directly linked to such practices, there were a few instances in which such references were made, including:

- **Ana Gomes (S&D/POR)** naming the Big Four and including them amongst the enablers that are awarded contracts by EU member states to set up golden visa schemes
- **Charles Carr** (financial crime expert) who spoke about free ports and other special economic zones. He suggested going after the "gatekeepers" such as banks, accountants and lawyers. He continued with suggestions for improvements to be made to the banking supervision system and named prosecution as having a particularly powerful deterrent effect. He specifically explained that if the authorities threw into jail the heads of PwC or EY, that would in his view change the behaviour of intermediaries somewhat

Overall, the participants agreed that the EU needs to be empowered with properly vetting golden visa programmes and overseeing free ports and special economic zones to ensure conformity with anti-money laundering rules.

Second hearing – presentation of three studies

The second hearing consisted of three presentations from the European Parliament's research services, each presenting a new study on golden visas, free ports and customs warehouses, and shell companies.

The first study, presented by **Amandine Scherrer** and **Elodie Thirion** of the European Parliament's Research Service (EPRS), focuses on citizenship and residency by investment schemes in the EU – i.e. golden visa systems. During the presentation, Ms. Scherrer highlighted that the overall macro-economic benefits from golden passport and visa schemes had been negligible for the EU countries granting them. Moreover, there have been adverse effects such as increased property prices in certain member states such as Portugal.

The second study on free ports and customs warehouses was presented by EPRS's **Ron Korver**. During his presentation, Mr. Korver noted that both free ports and customs warehouses had been linked with money laundering practices given their secretive nature. In this regard he called for ensuring that customs warehouses will also be covered by the 5th AML Directive, and not to limit it only to free ports.

And finally, the third study focusing on shell companies was presented by **Ivana Kiendl Krišto** and **Elodie Thirion** of the EPRS. According to the study, there are primarily three forms of shell companies operating in the EU: anonymous shell companies, letterbox companies and special purpose entities. In this regard, Ms. Krišto and Ms. Thirion maintained that recently passed legislation and proposed legislation may already constitute an adequate response to shell companies. However, time will be needed to ensure the desired effect is attained and they stressed that implementation of already enacted legislation is and will continue to be the key to tackling shell companies.

ECON Committee discusses generalised reverse charge mechanism – 22 October

ECON Committee of the European Parliament has held a brief exchange of views on the generalised reverse charge mechanism (GRCM), on the basis of the draft report prepared by the MEP **Gabriel Mato (EPP/SPA)**. See Accountancy Europe's Tax Policy Update from 12 October for further details on the draft report.

At the meeting, Mr. Mato presented the main proposals in his draft report and called for support from the other political Groups, some of which are opposed to the GRCM overall. **Pervenche Beres (S&D/FRA)** was not able to confirm what would be the position of her centre-Left Group, but emphasized that moving to a definitive VAT system would be the most effective means of fighting against VAT fraud.

Bernd Lucke (ECR/GER) called for greater flexibility for member states to choose whether or not they use the GRCM. **Petr Jezek (ALDE/CZE)** welcomed the progress reached in the Council, and called for the European Parliament to finalise its opinion by December. And finally, **Molly Scott Cato (Greens-EFA/UK)** provided an overview of reasons for which her Group opposes the GRCM altogether.

In terms of next steps, ECON Committee will vote on the draft report probably some time in November or December. This will be followed by a final vote in Plenary, after which the Parliament's opinion is finalized.

Worth reminding again that the Parliament only provides its non-binding opinion, but this opinion is nonetheless needed before the Commission proposal can become EU law. As a reminder, member states already reached a political agreement on GRCM earlier in October, but will now have to wait for the Parliament to finish its own work.

ECON and TAX3 hold joint hearing with French Finance Minister – 23 October

The French Finance Minister **Bruno Le Maire** has attended a joint hearing of the ECON and TAX3 Committees to discuss the digital taxation proposals and other tax priorities. One of Le Maire's key objectives is to accumulate further political support in particular for the digital services tax (DST), which France is very keen to advance.

The debate itself centred around the DST, and Mr. Le Maire shed some light on the scope of the proposal. He also emphasized that the proposal is important in laying down the ground for the adoption of other key initiatives such as the CCCTB. He also believes that an EU agreement is essential for reaching an agreement on digital tax at international level.

The MEPs for their part expressed broad support for the DST proposal and asked Mr. Le Maire about the CumEx Files scandal. Mr Le Maire reassured that France will use all the tools at its disposal to ensure that those who are found responsible will be brought to justice.

Amassing support for DST

In his opening statement at the hearing, Mr. Le Maire insisted that it is time to stop wasting time and take a final decision on DST. He called on the MEPs' support in helping to convince hesitating EU member states – probably Germany amongst them.

Le Maire believes that the Council is very close to an agreement. He insisted that France has the support of Germany, Italy, Spain and the UK, followed by an additional 14 member states and most recently the Visegrád countries. Moreover, Le Maire stated that after his proposal for a sunset clause, France won over the Baltic states, the Netherlands and Luxembourg. As for Germany, the minister claimed to be confident that Germany will be supportive, in light of its previous commitments to a European solution on digital taxation in the past.

Jeppe Kofod (S&D/DEN) asked the minister which countries remain opposed. Le Maire did not name any specific country, but contended with saying that southern countries tend to be warmer, northern ones colder towards the proposal. He denied that the tax is directed against the US, would violate double-tax treaties or be against the principle of taxing at the place of production.

Eva Joly (Greens-EFA/FRA) told the minister that the chances of reaching a compromise on DST are low, and instead focus should be on expanding qualified majority voting to tax. In response, the minister stated that he would rather fight political than procedural battles.

Finally, Le Maire promised that CCCTB would be amongst his priorities when France takes up the G7 Presidency, on top of a recent German proposal for a global minimum tax rate.

Plenary holds hearing on CumEx Files – 23 October

The European Parliament Plenary has held a public hearing on the CumEx Files scandal – a topic that was added to the agenda at a last minute after the CumEx scandal emerged (see article below for further information on the scandal).

MEPs across all political Groups expressed their outrage, and put forward several proposals ranging from a special investigation by the TAX3 Committee to the establishment of a 'European FBI' for financial matters.

Commissioner Moscovici said that the Commission is ready to look for solutions such as extending the automatic exchange of information between tax authorities to dividends, but also a new proposal for early-2019 to extend qualified majority voting to tax. He also accused wealthiest taxpayers for mocking solidarity, ethics and sometimes even laws themselves.

The Commissioner also warned against false impressions, reminding that often when such scandals happen, the revealed facts are already lagging behind most recent legislative changes. He thus insisted that many of the already agreed new rules, such as transparency for tax intermediaries, will show their effectiveness in due course. He did insist, however, on the need for the Council to reach an agreement on public CBCR.

Karoline Edtstadler, who represented the Austrian Presidency at the hearing, confirmed that several investigations are ongoing in member states but for the time being, there are no indications that any EU legislation would have been breached. However, she insisted that the Council will take the matter seriously and look into it.

Finally, in their respective remarks **Jeppe Kofod (S&D/DEN)** accused banks, lawyers and accountants for helping to steal taxpayers' money. **Evelyn Regner (S&D/AUT)**, for her part, called for more auditors to be involved in checking tax compliance.

Council

Americans criticise digital services tax – 18 October

The Chair of the US Senate's finance Committee **Orrin Hatch** and a Democrat Ranking Member **Ron Wyden** have sent a letter to the Commission President **Jean-Claude Juncker** and the Council President **Donald Tusk** on the proposed digital services tax (DST).

In their letter, the Senators accuse the DST of being tailored against US digitalised companies, and potentially constituting a new transatlantic trade barrier. They call on the EU to abandon the DST plan, lest face the risk of complications in "other areas of transatlantic cooperation".

Although the letter comes from the Senate rather than the Trump administration, its influence should not be underplayed. Especially, since it appears to have bi-partisan support within the influential finance Committee. Moreover, the letter will play into the hands of those EU member states and stakeholders who insist that the DST could deal a serious blow to EU-US relations.

Finally, the letter is probably indicative of the perceived progress in ongoing Council discussions in past months, as the letter's circulation coincides with very recent signals of great progress in the EU negotiations. On a more speculative note, it is possible that Germany will also show its true colours on the DST soon, now that the resistance of countries such as Ireland appears to be crumbling.

In the meantime, the US Treasury Secretary **Steven Mnuchin** has warned against unilateral digital tax measures – whether the Commission's proposed DST or the UK's national plans.

Court of Justice of the EU – Rulings

C-504/17: Energy taxation – 17 October

The Eighth Chamber of the CJEU has ruled that by not ensuring that the minimum levels of taxation applicable to motor fuels laid down by Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity were applied to gas oil used as fuel for propelling private pleasure craft, and by permitting the use of marked fuel for propelling private pleasure craft, even where that fuel is not subject to any exemption from, or reduction in, excise duty, Ireland has failed to fulfil its obligations under Articles 4 and 7 of Directive 2003/96 and Council Directive 95/60/EC of 27 November 1995 on fiscal marking of gas oils and kerosene respectively.

C-249/17: VAT on consultancy services – 17 October

The First Chamber of the CJEU has ruled that a company which intends to acquire all the shares of another company in order to pursue an economic activity consisting in the provision of management services subject to VAT to that other company, the right to deduct, in full, input VAT paid on expenditure relating to consultancy services provided in the context of a takeover bid, even if ultimately that economic activity was not carried out, provided that the exclusive reason for that expenditure is to be found in the intended economic activity.

C-153/17: Origin and scope of the right to deduct VAT – 18 October

The Sixth Chamber of CJEU has ruled that even where the general costs relating to supplies of moveable goods by hire purchase are passed on not in the amount due by the customer in respect of the supply of the goods concerned, that is to say the taxable part of the transaction, but in the amount of the interest due in respect of the 'finance' part of the transaction, that is to say the exempt part thereof, those general costs must nonetheless be considered, for the purposes of VAT, to be a component of the price of that supply and, second, member states may not apply a method of apportionment which does not take account of the initial value of the goods concerned when they are supplied, since that method is not capable of ensuring a more precise apportionment than that which would arise from the application of the turnover-based allocation key.

International

CumExFiles: a new tax scandal emerges – 18 October

According to an investigation conducted by 19 major media outlets from across Europe, schemes that take advantage of tax credits for dividend payments have cost several European countries a total of EUR 55 billion in past years. Such practice of "dividend arbitrage" does not necessarily involve the use of offshore tax havens.

The investigation consists of more than 180,000 pages, put together from a large number of sources including internal studies done by banks, tax firms and auditors.

It is as of yet unclear how many of the revealed schemes are formally legal, thus indicating a potential need to change legislation, and how much of it is plain fraud. Either way, national authorities of the concerned EU member states are already conducting investigations into the revelations.

First reactions emerge amongst EU policy-makers

The European Parliament already held a first major hearing on the CumEx Files, at the request of the Greens-EFA and GUE-NGL Groups. See article above for a description of the hearing.

The European Commission will consider whether there is a need to expand the scope of the automatic exchange of tax information, under the Directive on Administrative Cooperation on tax (DAC). The Austrian Presidency, for its part, committed to taking the matter seriously, but made no further tangible commitments yet.

Moreover, the S&D Group has reacted with a separate statement in which it calls for more transparency and better financial supervision. Moreover, S&D calls for a "thorough investigation into all intermediaries", listing lawyers, banks as well as accountants. The GUE-NGL Group states that the CumEx Files "epitomises [the] scale of white collar crime".

The CumEx Files are likely to be further discussed in the TAX3 Committee of the European Parliament.

Germany's Scholz calls for a global minimum tax rate – 21 October

The German Finance Minister **Olaf Scholz** has called for a global minimum corporate tax rate in an interview for the German newspaper Welt am Sonntag. He sees this as a solution for taxing digitalised businesses.

The key question remains whether this would exclude a prospective digital services tax (DST), or complementary to it. Germany has yet to come out with a firm position on the DST, but given recent apparent progress in Council negotiations it might have to come forward with one sooner rather than later.

Either way, reportedly France and Germany will jointly push for a minimum tax rate at the OECD.

Tax discussions advance at UN Committee of Experts – 19 October

The UN Committee of Experts on International Cooperation in Tax Matters has held a meeting in Geneva which saw meaningful progress and major updates on a number of tax matters. This includes the following:

- The digital economy subcommittee discussed a draft questionnaire for tax administrations and the business sector designed to gather information on tax issues related to the digitalization of the economy. The subcommittee aims to address the allocation of taxing rights in the digital economy. The questionnaire is under review by the subcommittee and will be released soon
- An update on the work of a sub-committee working on the UN Model Double Taxation Convention between Developed and Developing Countries
- A subcommittee working on tax dispute resolution presented the Committee with a preliminary draft of Chapter 5 (Mutual Agreement Procedure) of the proposed UN Handbook on Dispute Avoidance and Resolution
- A subcommittee on environmental taxation presented the Committee with a summary outline of a paper it was developing on carbon taxation
- Finally, a document on the Sustainable Development Goals (SDGs) and taxation was also published

The Committee's next meeting will take place in New York on 22-25 April 2019. This will be followed by a preliminary meeting in Geneva on 15-18 October 2019.

OECD

OECD provides digital tax update – 16 October

The OECD's tax Director **Pascal Saint-Amans** and his colleagues have provided an update on the state of play of tax work within the organisation – and most notably on digital taxation. The highlights of the update include the following:

- **Digital taxation:** disagreements persist on how to update the international tax rules to digitalisation. German and French officials have expressed interest in the use of a minimum tax to address the taxation of digital firms, whilst the US argues favor of a broader reform of the international rules for allocating taxing rights. The UK and a number of other countries, for their part, favour changing the tax rules only for highly digitalized businesses so as to take into account value creation through user participation
    - In terms of next steps, the next meeting of the OECD's Task Force for the Digital Economy (TFDE) will take place on 4-5 December. The TFDE recommendations will then be taken up by the Inclusive Framework on BEPS at its 19 January meeting. The OECD plans to deliver its second update on the taxation of the digital economy to the G20 at the Osaka Summit in June 2019. The goal is to reach global consensus by 2020
- **Transfer pricing:** countries are still having difficulties to reach consensus on fundamental issues needed to advance the OECD's planned update to the transfer pricing rules for financial transactions. Even very basic issues, such as the role of the arm's length principle in evaluating capital structures, remain unresolved
- **CBCR:** the BEPS agreements include a provision for reviewing CBCR rules in 2020. Assessment of CBCR for this review will begin in 2018 and stakeholder input will be sought

OECD clamps down on CRS avoidance through residence and citizenship by investment schemes – 16 October

As part of its work to preserve the integrity of the CRS, the OECD has published the results of its analysis of over 100 CBI/RBI schemes offered by CRS-committed jurisdictions, identifying those schemes that potentially pose a high-risk to the integrity of CRS.

According to the OECD, potentially high-risk CBI/RBI schemes are those that give access to a low personal tax rate on income from foreign financial assets and do not require an individual to spend a significant amount of time in the jurisdiction offering the scheme. Such schemes are currently operated by Antigua and Barbuda, The Bahamas, Bahrain, Barbados, Colombia, Cyprus, Dominica, Grenada, Malaysia, Malta, Mauritius, Monaco, Montserrat, Panama, Qatar, Saint Kitts and Nevis, Saint Lucia, Seychelles, Turks and Caicos Islands, United Arab Emirates and Vanuatu.

OECD and World Bank call for whole-of-government approach to combating tax evasion and corruption in new report – 22 October

OECD and the World Bank have published a new report which calls on countries to step up work to ensure that tax authorities and anti-corruption authorities can effectively co-operate in the fight against tax evasion, bribery, and other forms of corruption.

Drawing on the experiences of 67 countries, the study focuses on the legal, strategic, operational, and cultural aspects of co-operation between tax authorities and anti-corruption authorities. Improving Co-operation between Tax Authorities and Anti-Corruption Authorities in Combating Tax Crime and Corruption calls on countries to enhance co-operation by:

- Making available the broadest range of legal gateways for reporting and information sharing permitted by law
- Implementing streamlined and efficient operational procedures to ensure that reporting and information sharing is effective in practice
- Utilising enhanced co-operation mechanisms such as joint operations and taskforces
- Promoting a culture of co-operation at all levels of an organisation, starting with political leaders and agency head

State Aid

Commission withdraws court challenge over Ireland's failure to recover EUR 13 billion from Apple – 18 October

The Commission has decided to withdraw its Court of Justice of EU action against Ireland, following the confirmation by Ireland that the full recovery of the illegal State aid granted to Apple has been finalised.

Other News

Opinion piece: Europe needs tax system overhaul for digital age – 24 October

Nicolas Colin, a former French civil servant, argues in his opinion piece published in Politico that taxing corporations should be scrapped altogether, in order to ensure that the tax system is better suited for an increasingly digitalising economy.

Instead, the focus should be in taxing personal income on one hand (personal income tax and payroll tax, for example), and individual transactions on the other (such as with VAT or sales taxes). However, Mr. Colin acknowledges that this is an unlikely reform to take place due to a variety of economic and political reasons.

Events

- 20/11/2018, ***Will digitalisation make taxation easier?*** ETAF, Brussels. Source