Tax Policy Update

29 October – 9 NOvember

HIGHLIGHTS

- European Commission Working Party discussed tax intermediaries Directive implementation
- ECOFIN discusses digital taxation, ambiguity in country positions clarifies ahead of December ECOFIN
- Germany's finance minister in favour of digital taxation and minimum tax rates from early-2021 onward
- UK to introduce domestic digital tax

European Commission

Commission Working Party discusses implementation of tax intermediaries Directive – 3 October

The European Commission's Working Party IV meeting earlier in October was fully dedicated to discuss practical challenges and questions of member state implementation of the tax intermediaries Directive (DAC 6).

At the meeting, the Commission representatives provided clarifications and interpretations on several areas of DAC 6's provisions. However, the same representatives also emphasised that their clarifications should not be seen as legally binding.

For example:

- The representatives confirmed that the scope of DAC 6 covers all taxes levied by member states except VAT, and thus cannot be limited to corporate taxation only
- The Commission consciously chose not to provide a precise definition of an "arrangement" – as such, even a verbal act could count as a reportable arrangement, the representatives explained
- The 'value' of a reportable arrangement depends on the arrangement itself and could be an amount of the consideration, registered capital, etc. The value cannot be directly linked to the tax benefit
- If an intermediary is employed by the taxpayer, works in its premises and devises a tax optimisation scheme for the taxpayer, the scheme would qualify as in-house and the taxpayer will have to report the scheme

Reportedly, the European Commission will provide more formal and additional clarifications at Tax Advisers Europe's 11th Annual Conference taking place in Madrid, on 21 November.

Paradise Papers: Commission follows up on illegal tax breaks for yachts and aircraft – 8 November

The European Commission has implemented infringement proceedings on tax breaks being applied in the pleasure craft industries of **Italy** and the **Isle of Man**.

In particular, the Commission has sent a letter of formal notice to Italy for not levying the correct amount of VAT on the leasing of yachts. The Commission also decided to send a reasoned opinion to Italy because of its illegal system of exemptions for fuel used to power charted yachts in EU waters. Finally, a letter of formal notice was sent to the **UK** concerning the Isle of Man's abusive VAT practices with regard to supplies and leasing of aircraft.

Commission publishes latest monthly infringements package – 8 November

The European Commission has published its November infringements package, including several tax related decisions.

On top of the proceedings initiated against **Italy** and **Isle of Man** on tax breaks for yachts and aircraft (see article above), the package also includes the Commission sending a letter of formal notice to **Romania** for applying a split payment mechanism for VAT which the Commission believes breaches the VAT Directive and the freedom to provide services.

Moreover, the Commission has closed infringement proceedings against **Luxembourg** and **Cyprus** for their earlier failure to properly implement provisions on automatic exchange of AML information (DAC 5). Both countries have now successfully transposed the Directive.

European Parliament

European Parliament publishes draft report on detailed definitive regime measures – 5 November

The European Parliament has taken a first step towards forming its position on the Commission's detailed provisions for moving to a definitive regime, with the publication of the draft report prepared by the MEP **Fulvio Martusciello (EPP/ITA)**.

Overall, the draft report proposes very few changes of substance to the original Commission proposal. It recognises the vitality of a single EU VAT system and notes the benefits of a destination-based VAT system. He also emphasises the importance of cooperation and trust between member states' tax administrations in order to make the system work.

In terms of next steps, the ECON Committee will vote on the draft report in the weeks to come, whilst the European Parliament Plenary is forecasted to give a final seal of approval on 12 February 2019.

As always on tax, member states decide by unanimity whilst the European Parliament is merely consulted. Currently, there has been little progress on the definitive regime files.

Council

ECOFIN discusses way forward on digital tax, Namibia removed from tax haven list – 6 November

EU finance ministers have discussed at a high level the digital services tax (DST) at the ECOFIN meeting in November.

The biggest take-away: the previous ambiguity concerning countries' positions are clarifying, with **Germany** putting forward its conditions for agreeing and three member states (**Ireland**, **Denmark**, **Sweden**) still firmly against.

The other countries are either strictly and unconditionally in favour (**France**, **Spain**, **Italy**, **Poland**, **Greece** etc.) or in favour under certain conditions (**Luxembourg**, **Czechia**, **Finland**, **Luxembourg** etc.).

Along these "battle lines", member states' tax attaches will next engage on a spree of last technical meetings in order to forge a version of the text that is acceptable to all. In the meantime, diplomatic efforts to convince (or bully) the opposing countries into line will continue.

Germany publicly sceptical, France attempts to build bridges

The prognosis looks increasingly pessimistic though, as Germany continues to show little signs of enthusiasm towards the DST.

Indeed, at the ECOFIN meeting the country's finance minister **Olaf Scholz** stated that a European solution should only be introduced in case OECD-level discussions fail, and would rather like to limit to a high-level political statement in the December 2018.

In response, the French finance minister **Bruno Le Maire** made a major concession, insisting that the Directive should be adopted in December but with a caveat indicating that the DST would only be introduced at the end of 2020 if OECD fails to deliver. Le Maire emphasised that this would be the final concession from France, and is reportedly ready to denounce Germany in public should it fail to back the tax. France feels that Germany is violating its previous political commitments to achieving a European solution to digital taxation by the end of 2018.

It remains to be seen whether or not Germany will take up Le Maire's compromise offer, although his recent comments seem to indicate that he might (see article below for further details).

Thus all bets are still open ahead of the December ECOFIN, although slightly in favour of DST being rejected. Without Germany's backing of a DST, smaller member states will find it easier to veto the DST altogether. Le Maire certainly remains confident that the smaller member states are not a problem, and that he would simply need to "buy a beer in a Dublin pub" to the Irish finance minister to convince him.

Outstanding issues of substance

On top of the political disagreements, a number of technical issues still remain on the table and need to be resolved if there is to be even a glimpse of hope for a DST agreement in December. These include:

- **Sunset clause:** all member states underlined the need for a global approach on digital taxation, particularly through the OECD process. This is why all agreed on introducing a sunset clause but with disagreement on its modalities. Some would prefer a fixed expiration date in order to avoid the DST becoming a permanent tax, whilst others urged that the DST's repealing be tied to reaching an agreement at international level
- **Scope:** some governments insist that the sale of user data should be excluded. But those who want to keep sale of user data, however, pointed out that this could create a new loophole for avoiding the DST

- **Legal base:** readers may recall that some member states (and the Council's own Legal Service) argued that DST is a direct rather than an indirect tax. This would also imply that DST is in breach of countries' double-tax treaties. However, both the Austrian Presidency and the European Commission have refuted these arguments. Although the ECOFIN saw little mentioning of the legal base question, it is still likely to return to haunt diplomats in the next weeks leading up to the December ECOFIN

Finally, EU industry remains opposed or otherwise sceptical to DST, fearing in particular that it will set a dangerous precedent for future taxes and open the door for a wider discussion on moving to a destination-based tax system.

Most recently, a group of European capital market associations published a joint letter asking for re-assurances that "activities linked to capital markets" would not fall into the scope of a prospective DST.

Changes to EU list of non-cooperative jurisdictions

The member states also agreed to remove Namibia from the EU's list of non-cooperative tax jurisdictions. They deemed that Namibia has made sufficient commitments at a high political level to address EU concerns.

As a result, the list is now down to a mere five non-cooperative jurisdictions: American Samoa, Guam, Samoa, Trinidad and Tobago and the US Virgin Islands. At the same time, a total of 65 jurisdictions are now actively cooperating with the EU in implementing tax good governance standards. These "grey list" countries will have to deliver results or risk ending up in the black list.

Germany's SCHOLZ: DST and minimum tax in place in January 2021 if OECD fails, and supports 'French model' FTT – 12 November

In a recent interview, **Germany's** finance minister **Olaf Scholz** stated that he would support for the introduction of a EU digital services tax (DST) as well as a minimum tax rate from January 2021 if there is no agreement on digital taxation at the OECD level by then.

In the same interview, he claims that Germany is already in talks with **France** to find common ground on such a two-step approach. He is in favour of "binding specifications" on such a future DST to be established by the end of this year – but the article does not specify whether this means agreeing on the Directive with a 2021 implementation date, or some other form of strong political commitment. Only the December ECOFIN will show.

On FTT, the minister confirms to be in favour of a so-called 'French model' for the EU, based on taxing transactions with certain shares, rather than bonds or derivatives. Moreover, he mentions the possibility of such a FTT's yields going to the EU's coffers.

Court of Justice of the EU – Rulings

C-602/17: taxing rights and double taxation – 24 October

The Sixth Chamber of the CJEU has ruled that EU Treaties do not preclude a tax scheme of a member state under a tax convention for the avoidance of double taxation which makes the exemption of the income of a resident which arises in another member state and relates to employment in that State subject to the condition that the activity in respect of which the income is paid is actually performed in that State.

C-528/17: exemption from import VAT – 25 October

The Ninth Chamber of the CJEU has ruled that in circumstances where the taxable importer and supplier benefitted from an exemption from import VAT on the basis of an authorisation issued after a prior examination by the competent customs authorities in the light of the evidence provided by that taxable person, the latter is not required to pay VAT after the event where it is revealed, during a subsequent examination, that the substantive conditions for the exemption had not been met, except where it is established, in the light of objective evidence, that that taxable person knew, or should have known, that the supplies subsequent to the imports at issue were involved in fraud committed by the customer and that he did not take all reasonable steps in his power to avoid that fraud, which is a matter for the referring court to determine.

International

Philip Hammond proposes UK digital services tax – 29 October

The **UK** Chancellor **Philip Hammond** has announced plans for a unilateral digital services tax (DST), in the absence of agreement at either EU or OECD level.

The tax would be applicable from April 2020 onwards, and impose a 2% tax on digital activities of profitable companies whose turnover exceeds GBP 500 million. The UK Treasury estimated that the tax would raise GBP 1,5 billion over a period of four years. The plans will also be subject to a national public consultation.

The British plans are inevitably impacting EU-level discussions on a European DST as well. Indeed, **Ireland** has insisted for a while now that a DST would hinder EU competitiveness in the UK's favour after Brexit; but now the UK itself is moving ahead with a similar system. Moreover, whilst Germany has questioned the DST due (at least in part) to fears of **US** retaliation, **France** has been keen to remind that even the UK – one of the US' closest traditional partners in Europe – has dared to go down that path.

Whether or not this will have any tangible impact whatsoever on EU's efforts to find an agreement on its own DST (see article above) remains to be seen.

OECD

Three additional jurisdictions join Inclusive Framework on BEPS – 22/29 October

Grenada, Antigua and Barbuda, and Saint Vincent and the Grenadines have joined the Inclusive Framework on BEPS. The total number of participating jurisdictions has thus increased to 123.

Ecuador joins international efforts against tax evasion and avoidance – 29 October

Ecuador has signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Convention). It thus became the 126th jurisdiction to join the Convention.

The Convention provides all forms of administrative assistance in tax matters: exchange of information on request, spontaneous exchange, automatic exchange, tax examinations abroad, simultaneous tax examinations and assistance in tax collection. It guarantees extensive safeguards for the protection of taxpayers' rights.

State Aid

Vestager considering tax case against Facebook – 8 November

According to rumours in town, **Commissioner Vestager** is considering whether she has enough of a case to proceed with a tax state aid case against Facebook. However, one anonymous source close to the investigation expressed doubt to whether the Commissioner would find enough evidence to open a case.

There are no indications as to when the probe would be publicly launched, if enough initial evidence is discovered.

MEP Questions & Answers

Code of Conduct for business taxation, asset holding companies and Gibraltar's Income Tax Act 2010 – 1 October

The European Commission has replied to a question asked by the MEP **Enrique Calvet Chambon (ALDE/SPA)** with regard to Gibraltar's Income Tax Act 2010.

In his question, Mr. Chambon asks the Commission whether Gibraltar has informed the Commission about any intentions to reform its Income Tax Act 2010 in order to align it with EU rules, and whether the Commission will ensure that Gibraltar complies before the UK's departure from the EU.

In his reply, **Commissioner Moscovici** states that the Income Tax Act was discussed at a meeting of the Council's Code of Conduct Group on 24 July, but that the Commission cannot elaborate on the details of that meeting as work is still ongoing. As long as the UK is in the EU, Gibraltar will have to comply with EU provisions, the Commissioner helpfully elaborates.

EU list of non-cooperative jurisdictions – 8 October

The Council has replied to a question asked by the MEP **Barbara Kappel (ENF/AUT)** with regard to the EU list of non-cooperative jurisdictions.

In her question, Ms. Kappel criticizes the removal of several Caribbean islands from the EU list and asks the Council on what grounds they have been removed and what reform commitments the jurisdictions made.

In its reply, the Council provides an overview of the publicly available information on the commitments undertaken by each of the jurisdictions, and invites Ms. Kappel to consult the Council's relevant website for further details. Moreover, the Council re-iterates that it will monitor that the jurisdictions comply with their political commitments by the end of 2018.

RELATIONS BETWEEN THE TAX AVOIDANCE 'BIG FOUR' AND THE EU INSTITUTIONS – 9 October

The European Commission has replied to a question asked by the MEP **Kostadinka Kuneva (GUE-NGL/GRE)** with regard to the EU's relations with the Big Four (B4) audit firms.

In her question, Ms. Kuneva refers to a report by the NGO Corporate Europe Observatory which describes the B4's lobbying activities in Brussels – include alleged links to Accountancy Europe. She asks the Commission what public contracts have been awarded recently to the B4, and what measures it will take to exclude tax intermediaries from contributing to policy-making on anti-tax avoidance issues.

In his reply, **Commissioner Oettinger** (EU budget) provides the MEP a full list of all public contracts awarded to the B4 in 2017, amounting to a grand total of EUR 71 609 555. Most of the contracts relate to audit or IT consulting services. The Commissioner then insists that the Commission's public procurement process must be impartial and award the best bidders. The Commission does have at its disposal the possibility of rejecting bidders in case of conflicts of interest – thus implying that no such conflicts were assessed to exist when awarding contracts to the B4.

Cross-border VAT fraud – 19 October

The European Commission has replied to a question asked by the MEP **Maria Grapini (S&D/ITA)** with regard to cross-border VAT fraud.

In her question, Ms. Grapini asks the Commission what measures it is undertaking to combat VAT fraud. In his reply, **Commissioner Moscovici** provides an overview of its recently proposed VAT reforms as announced in its VAT Action Plan. He points to proposals to improve administrative cooperation between tax authorities, as well as more comprehensive overhauls of the EU VAT system that should render fraud more difficult. He also applauds that following the adoption of the Regulation 2017/1939(5), the European Public Prosecutor's Office will be able to investigate and prosecute serious cases of cross border VAT fraud.

Alleged bias towards the big four companies – 22 October

The European Commission has replied to a question asked by the MEP **Barbara Kappel (ENF/AUT)** with regard to alleged EU bias towards the Big Four (B4) audit firms.

In her question, Ms. Kappel refers to a report by the NGO Corporate Europe Observatory which describes the B4's lobbying activities in Brussels – include alleged links to Accountancy Europe. She asks the Commission how much it spends on public procurement by the B4, how many contracts that the B4 were bidding on ended up with non-B4 candidates, and how it responds to the Corporate Europe Observatory report's allegations.

In his reply, **Commissioner Oettinger** (EU budget) provides the MEP with the same overview of public contracts awarded to the B4 as he gave to MEP **Kostadinka Kuneva (GUE-NGL/GRE)** in her question on the same topic (see MEP question above). He also re-iterates the same points; that the Commission's public procurement process must be neutral, and that the Commission already has stringent mechanisms in place to deal with cases where conflicts of interest might arise. He does not answer the question on how many public tenders with B4 applying were granted to non-B4 bidders.

Differences in the taxation of insurance benefits – 29 October

The European Commission has replied to a question asked by the MEP **Pascal Arimont (EPP/BEL)** with regard to differences in the taxation of insurance benefits.

In his question, Mr. Arimont points to inconsistencies between German and Belgian insurance benefit tax regimes, and the implications that these mismatches have on persons commuting between Belgium and Germany. He asks the Commission whether Belgian tax offices are obliged to recognise the legal definition employed in the country of residence and apply Belgian tax law on that basis, and whether Belgium's tax provisions are in breach of the freedom to choose their place of residence.

In his reply, **Commissioner Moscovici** insists that EU law does not oblige member states to harmonise their laws on the taxation of insurance benefits, as long as the member states do not discriminate on the basis of nationality. Thus even a different tax treatment of disability insurance benefits received from German sources by Belgian and German residents is not contrary to EU law as long as it is based on objective criteria and does not discriminate on the basis of the nationality of the recipients.

Moreover, the Commissioner insists that there is no obligation for Belgium to adapt its tax system to the German system to guarantee that Belgium's residents receiving the benefits are taxed at national level in the same way as persons residing in Germany.

Events

- 15/11/2018, ***A US View on the EU Digital Services Tax***, CEPS, Brussels. Source
- 20/11/2018, Will digitalisation make taxation easier? ETAF, Brussels. Source
- 21/11/2018, ***11th European Tax Advisers' Professional Affairs Conference***, Tax Advisers Europe, Madrid. Source