Policy update

Tax Policy Update

10 December – 4 January

Happy New Year 2019!

HIGHLIGHTS

- GRI publishes draft standard on tax disclosures, stakeholders have until 15 March to give feedback
- European Commission launches public consultation to evaluate administrative cooperation on tax
- European Commission publishes further proposals to improve VAT for e-commerce
- European Commission publishes Roadmap on abandoning unanimity rule on tax
- European Parliament adopts position on digital taxation
- France, Austria and others to move ahead with unilateral national digital tax measures
- France and Germany unveil further details on new financial transaction tax (FTT)

European Commission

Commission launches public consultation to evaluate administrative cooperation on tax – 10 December

The European Commission has launched a public consultation to inform its ongoing evaluation of administrative cooperation in the field of direct taxation (Council Directive 2011/16/EU).

The consultation aims to gather views from stakeholders on their experience with the current rules governing administrative cooperation in direct taxation and the effects of that cooperation. Stakeholders have until 4 March 2019 to submit their feedback.

Commission proposes legislative amendments to improve VAT for e-commerce and anti-fraud measures – 11/12 December

The European Commission has published new legislative amendments to provide technical details and clarifications to facilitate the EU framework for VAT on e-commerce.

In total four legislative texts were published, details of which are outlined below. For the proposed texts, the usual rules apply – member states in the Council will have to approve them by unanimity, whilst the European Parliament provides its non-binding opinion.

Measures to facilitate VAT obligations for e-commerce

Firstly, on 11 December the Commission proposed new implementing measures aiming to facilitate e-commerce and better combat VAT fraud. These come in the form of an amending Directive and Implementing Regulation.

According to these proposals, starting from 2021 companies selling goods online will be able to fulfil their VAT obligations via an online portal – the one-stop shop (OSS) mechanism – instead of having to register for VAT in each member state where they sell goods.

Also from 2021 onwards, major online marketplaces will be required to collect the correct amount of VAT when they facilitate the sale of goods by third country companies to consumers in the EU. This will ensure that tax authorities can claim the tax due when sellers established outside the EU have not complied with the relevant obligations.

The new legislative texts provide clarifications on these matters.

Additional measures to combat VAT fraud in the e-commerce sector

In addition, the Commission published on 12 December legislative proposals to better combat VAT fraud in the e-commerce sector. These come in the form of an amending Regulation and Directive.

These measures aim to harness payment service providers to improve VAT compliance. The Commission emphasises that payment intermediaries such as credit card and direct debit providers have immense data about online transactions that could help EU tax administrations to enforce VAT obligations in cross-border sales of goods and services.

The new rules also establish quarterly information exchange obligations for payment service providers that will allow the EUROFISC network to exchange and analyse certain payment data on cross-border sales. To this end, the Commission plans to develop a new Central Electronic Payment Information System (CESOP), which is expected to be launched in three years' time.

Information on incoming payments will enable EU member states to identify domestic suppliers who sell goods and services abroad without fulfilling their VAT obligations, while information on outgoing payments would help identify suppliers established abroad who should pay VAT in a given member state.

Commission proposes tax changes that benefit French outermost regions – 13 December

The European Commission has proposed new rules that would allow more local products to benefit from tax exemptions or reductions in the EU outermost regions of Guadeloupe, French Guiana, Martinique and La Réunion.

These measures aim to encourage economic activity and safeguard the competitiveness of local products on these French outermost regions, according to the Commission. The Commission emphasises that increased foreign competition can threaten the existence of local companies. Therefore, offering a wider range of exemptions and reduced rates for a specific, locally applied tax known as octroi de mer (or ‘dock dues') will allow local businesses to compete more effectively.

Under the proposals, new products such as certain fruits and vegetables in Guadeloupe and Martinique, and certain wooden furniture in French Guiana would become exempt from the tax. For certain products, such as some fertilisers in Guadeloupe and certain paints and varnishes in La Réunion, the authorised difference in taxation levels between locally produced goods and their foreign produced equivalents would increase to the benefit of the local economy.

Commission publishes first report on Administrative Cooperation on tax – 17 December

According to a new report on administrative cooperation on tax published by the European Commission, EU's tax transparency rules have led to member states compiling and sharing data from 8.7 million financial accounts with a total value of EUR 2,900 billion in 2017.

Similarly, between 2015 and 2017 EU member states shared information on over EUR 120 million in income and capital belonging to nearly 16 million taxpayers resident in one country but receiving income from another. The report also shows that some countries have been able to use this data to increase their tax base due to a new awareness of potentially taxable foreign income and capital of their tax residents.

The first rules governing the automatic exchange of tax information came into force in 2015 with member states being obliged to inform each other of the financial account information of individuals who are tax resident in another member state. From 2017, EU member states also began to provide each other automatically with information on financial accounts held by private individuals and certain entities. The system was given another boost in 2017 when member states began exchanging information on certain tax rulings and pricing arrangements with multinational companies: 18,000 such rulings have already been shared, compared with about 100 such rulings in 2015.

That said, the Commission acknowledges that a lot of work remains to make sure information exchanged is of the highest quality possible and put to full use. In particular, the Commission believes that member states have to improve the way they collect and exploit the data they exchange. Work should also continue on assessing the full benefits of exchange of information. To this end, the Commission has begun work on evaluating the current toolbox to see how it can be improved (see article above on the Commission's public consultation).

Commission publishes latest survey on Tax Policies in the EU – 19 December

According to a new report on taxation trends published by the European Commission, EU member states' taxation systems saw continued stability in terms of their design in 2018.

The new survey examines how EU member states' tax systems help to promote investment and employment, reduce tax fraud, evasion and avoidance, address income inequalities, and ensure social fairness. It also analyses taxation as an environmental policy instrument, the implications of new forms of work for labour taxation and the influence of the overall tax mix on progressivity in the EU. In addition, the report presents the main indicators used by the European Commission to analyse tax policies in the context of the European Semester and the case for the priorities outlined in the Commission's Annual Growth Survey.

Finally, a summary of notable business taxation reforms in non-EU countries and an overview of recent EU tax initiatives in the fight against tax avoidance and tax evasion are included. The report also includes a set of reform options to improve efficiency and fairness in tax systems.

Commission publishes Roadmap for moving to QMV on tax decision making – 20 December

The European Commission has published a Roadmap on a prospective move to Qualified Majority Voting (QMV) on taxation. This would mean that member states would abandon the unanimity rule and co-legislate with the European Parliament on an equal footing.

The Commission is planning to publish on 15 January 2019 a Communication proposing to abandon unanimity on (all or parts of) tax files. This Roadmap provides the background and rationale for the Commission's upcoming Communication. The upcoming Communication would be legally non-binding, and its sole objective will be to spark discussion in the Council and in the EU more broadly on a prospective move to QMV on taxation.

Any subsequent legislative proposals (effectively, making use of the Passerelle Clause to unanimously decide to expand QMV to tax) would have to come during the next Commission's term.

In the Roadmap, the Commission puts forward a number of reasons for why it considers moving to QMV on tax as a necessary and desirable step, including:

- In today's interconnected economy and especially in the EU, the tax decisions of one member state will inevitably impact all the others. Therefore, to continue to defend tax unanimity on the basis of national sovereignty is flawed
- Unanimity is an obstacle to meaningful and strategic tax reforms, rather than legislating ad hoc due to unexpected crises and scandals
- Unanimity may have worked on tax when ether were fewer member states (such as when common VAT base rules were established), but it is more difficult now with 28 (soon-to-be 27) member states
    - This argument might appear odd on the surface, given that the countries that appear to drag their heels on tax the most are "older" member states such as Germany, Ireland, Luxembourg and the Scandinavians

ATAD enters into force – 1 January

As of 1 January 2019, all EU member states will need to apply new legally binding anti-abuse measures that were introduced as part of the Anti-Tax Avoidance Directive (ATAD).

ATAD sets out five key anti-avoidance measures to counter-act some of the most common types of tax avoidance by large multinationals, as identified in the discussions at the OECD, in Council discussions on tax avoidance and by the Commission itself. Three of these agreed measures come into force on 1 January 2019: the Controlled Foreign Company (CFC) rule, interest limitation rule and the General Anti-Abuse Rule (GAAR).

As a reminder, ATAD was first proposed by the Commission in 2016. It was swiftly adopted in the Council, demonstrating the Directive's importance to the member states. The EU agreement followed the agreement among OECD countries on recommendations to limit BEPS, and according to the Commission made the EU a global leader in terms of the political and economic approach to corporate taxation.

European Parliament

Plenary votes on generalised reverse charge mechanism – 11 December

The European Parliament Plenary has adopted its final position on the generalised reverse charge mechanism (GRCM) with 337 votes in favour, 100 votes against and 222 abstentions. The file in the Parliament was led by the MEP **Gabriel Mato (EPP/SPA)**.

S&D Group abstained from voting due to their disagreement with certain specificities of the position as adopted.

As always on tax files, the European Parliament only provides its non-binding opinion. However, its opinion is nonetheless needed for the proposal to become EU law – even if member states have already adopted it.

Overall, the MEPs are in favour of applying the mechanism until 30 June 2022 for supplies exceeding an invoicing threshold of EUR 25,000 – instead of the EUR 10,000 proposed by the Commission – in member states where carousel fraud represents at least 25% of the VAT gap.

However, they objected to the possibility for a member state sharing a border with another member state that applies GRCM to also apply it under certain conditions.

European Parliament adopts position on digital tax, laments lack of progress in Council – 12/13 December

The European Parliament has adopted its final positions in Plenary on the two digital tax proposals: the digital services tax (DST) which was adopted with 451 votes in favour, 69 against and 64 abstentions, as well as the comprehensive solution on a significant digital presence which was adopted by 439 votes in favour, 58 against and 81 abstentions. The files were led by the MEPs **Paul Tang (S&D/NLD)** and **Dariusz Rosati (EPP/POL)**, respectively.

On DST, the MEPs recommend extending the scope of taxable services by adding the provision of video, audio or text content using a digital interface, which would also allow companies such as Netflix to be covered.

Amendments supported by several S&D, Green and GUE-NGL MEPs to raise the tax rate to 5% were rejected, as well as an amendment from the GUE-NGL Group proposing that each member state could define its own DST rate.

On both files, the European Parliament only provides its non-binding opinion. However, the MEPs are hoping that they are able to amass political pressure on the Council to progress on the digital tax files.

Prior to the votes, the MEPs held a Plenary debate on the state of the digital tax proposals, as well as more broadly the need to move to Qualified Majority Voting (QMV) on tax files, rather than the current unanimity in Council.

MEPs outraged about lack of progress in the Council on digital tax

On digital taxation, the MEPs that spoke out emphasized the need to ensure the proper taxation of the digital economy and a level playing field between digital companies and traditional companies. Moreover, the MEPs believe that reaching a long-term solution at the international level ought to be the final goal. And finally, that unless an EU-level agreement is reached on the interim DST, there is a risk of national taxes with different rates and scope that can endanger the cohesion of the Single Market and undermine growth of the European economy.

Indeed, signs of this have been visible for months now and the move towards national unilateral measures in the EU seems to be gaining pace. See article in the Council-section below for further details.

Alain Lamassoure (EPP/FRA) did not hide his frustration about the lack of progress on DST in the Council (see Accountancy Europe's Tax Policy Update from 7 December for further details on the Council's state of play). **Evelyn Regner (S&D/AUT)** agreed, and criticized the watered-down version proposed by France and Germany that will form the basis for further negotiations in the Council. Disagreeing with both, **Bernd Lucke (ECR/GER)** for his part criticized the very concept of a separate tax on digital companies, arguing that this is not the right way to go.

MEPs discuss possibility of abandoning unanimity in tax decision making, Commissioner hints at sustainable taxation as next priorities

The discussion on QMV, in turn, was opened by **Commissioner Oettinger** (budget) who noted that the DST file has showed how difficult it is to agree on taxation when using unanimity in the Council. He re-iterated that the Commission will present a Communication in early 2019 (most likely on 15 January). The Commissioner believes that QMV is particularly justifiable for files such as the C(C)CTB, digital taxation and VAT definitive regime.

Hinting at sustainable taxes being high on the Commission's future agenda, Commissioner Oettinger also stressed that QMV in taxation would have a broader scope and as such can help achieve tax policy objectives in environmental protection or in energy policy. He explicitly cited energy and environmental taxes as examples.

Juliane Bogner-Strauss, a representative of the Austrian Presidency present at the hearing, recalled that as the EU Treaties currently stand, taxation rules are subject to unanimity. She did however emphasise that the so-called Passerelle Clause in the Treaties could be an option.

Passerelle Clause enables EU member states to expand QMV to new areas of decision-making without the need to re-open EU Treaties, but this would require an unanimity of all member states and national parliaments. Not many would bet in the likelihood of that happening any time soon.

Needless to say, the MEPs in the room were enthusiastic about the prospect of abandoning unanimity. Using QMV instead would on the one hand prevent a tiny minority of member states from vetoing tax proposals, and on the other would grant the European Parliament co-legislative powers on taxation.

Eva Joly (Greens-EFA/FRA) and **Sven Giegold (Greens-EFA/GER)** argued that EU Treaties already allow the use of QMV when distortions to competition are likely (Article 116 of TFEU). She believes that the tax gap between digitalized and traditional businesses would justify such a move.

Council

Next Council Presidencies seek progress on digital tax and definitive VAT regime – 30 November

The next three 6-month Presidencies of the Council will be held by Romania, Finland and Croatia, respectively. The three countries have prepared a joint programme outlining their coordinated priorities for the next 18 months ahead.

On taxation, the document stresses that "fair and effective taxation" will remain a key priority. In this respect, the three countries commit to prioritizing digital taxation – most likely meaning both the Commission's digital tax proposals as well as work at the OECD-level. Moreover, the three Presidencies will attempt to "achieve results" on the Commission's definitive VAT regime proposals.

Romania began its 6-month Presidency in January 2019. Finland will succeed in July 2019, and Croatia will in turn take over in January 2020.

France, Austria and others to go it alone on digital tax – 18/29 December

With the Commission's proposed digital services tax (DST) staunchly questioned by Ireland, Denmark, Sweden, Finland with tacit support from Germany (see last Tax Policy Update for details), a number of EU member states now plan to move ahead unilaterally with national digital tax measures.

Indeed, France intends to apply a broadly scoped digital tax from January 2019, and Austria is also proceeding with a separate national regime. Similar plans are already in motion in the UK and Spain as well. Reportedly, also Belgium, Croatia, Czech Republic, Hungary, Italy, Portugal, Romania, and Slovakia intend to explore the possibility of national measures.

Whether or not these national initiatives will facilitate an EU-agreement currently aimed for at the March 2019 ECOFIN remains to be seen.

France and Germany unveil further details on financial transaction tax – 13 December

As was already reported in past Tax Policy Updates, the Financial Transaction Tax (FTT) is re-gaining momentum as France and Germany intend to put forward a blueprint for a reformed FTT. The ongoing negotiations between 10 EU member states are stalling, so the intention is now to re-launch a new form of FTT with an altered scope and possibly to include more EU member states in the negotiations.

A document prepared by France and Germany provides some further details as to what is to be expected from the re-launched FTT:

- Expand the FTT's negotiation scope so that as many member states as possible (not only the previous 10) are included
- Propose a FTT based on the model used nationally in France, which has the following features:
    - Levied on acquisitions of shares of listed companies whose head offices are located in the member state and whose market capitalisation exceeds a certain threshold (e.g. currently this threshold is EUR 1 billion in France)
    - Tax would apply to all categories of shares of a company, e.g. ordinary as well as preferred shares
    - The taxable event will be defined as an acquisition which results in a transfer of ownership of the equity share, resulting from the registration of the securities acquired in the securities account of the purchaser
        - This is separate from the record of the security in the purchaser's securities account made by the custodian upon execution of the buy order, which is a simple accounting entry. This means that security acquisitions not materialised by a book entry, to the extent that they are preceded or followed by sales of that security in the course of the same day, are not covered by the tax (and thus intraday taxation is not included in the scope)
    - The tax will be imposed irrespective of the location of the transaction, and will thus include transactions of European securities in non-European stock exchanges as well
        - This would greatly limit the tax avoidance risk of the FTT, as the only way to avoid it would be for the issuing companies to move their head office outside of a EU member state. Indeed, for the same reason the current French national FTT has seen very little tax avoidance in past years, the document notes
    - Market making activities are exempted from the payment of the tax
    - The tax rate should be at least 0,2% of a security's purchase price at the time of acquisition

- Discuss the use of proceeds from this new EU FTT as EU own resources or for the Eurozone budget specifically
    - If it is introduced as a new own resource for the EU budget as a whole, the tax yield going to the EU budget would reduce member states' Gross National Income (GNI) adjusted contributions to the EU budget. This might make the FTT more appealing for smaller member states in particular

COUNCIL'S LEGAL SERVICE CLAIMS TAX SHOULD BE REMOVED FROM Whistleblower Directive – 14 December

The Council's Legal Service argues in an internal document that whistleblowers in the EU should not be granted protection for exposing tax avoidance and evasion under the Commission's whistleblower protection Directive, published on 23 April 2018.

The Legal Service maintains that the Commission proposal on whistleblower protection has too broad a scope and should therefore be split into up to five separate proposals – including a standalone proposal on whistleblower protection on tax matters. Such a proposal would, however, probably be subject to the unanimity rule in the Council and thus likely to be watered down or rejected altogether.

The other four stand-alone proposals would cover weapons security, nuclear-related aspects, competition and state aid, and a fourth one with a bit more horizontal scope. Although the Council Legal Service's opinions are non-binding, its views have some weight in political debates and, at the very least, will provide further political arguments to the opponents of the whistleblower Directive. Reportedly, at least Sweden, the UK and (unexpectedly) Ireland are among EU member states opposed to a horizontal proposal that also covers taxation.

As a reminder, on 23 April 2018 the European Commission proposed a Directive to protect whistleblowers as a follow-up to scandals such as LuxLeaks and the Panama Papers. The Romanian Presidency will continue negotiations on the Directive in subsequent weeks and months.

Finally, one cannot but draw similarities with the public country by country reporting (CBCR) file, where similarly the Council Legal Service argued that it is a tax file and should be subject to unanimity in the Council. The public CBCR Directive is now in a limbo in the Council, blocked by a minority of opposing member states led by Germany.

Updated list of countries that have made tax good governance commitments – 20 December

The Council has published the latest version of the list of third countries that have made tax good governance reform commitments, in order to avoid being included on the EU list of non-cooperative jurisdictions. The list provides a list of all relevant countries with a break-down of the types of commitments undertaken by each.

Court of Justice of the EU – Rulings

C-17/18: VAT for immovable property used for commercial purposes – 19 December

CJEU has ruled that:

- The concept of 'transfer of a totality of assets or part thereof', within the meaning of Article 19 of the VAT Directive, does not covering the transaction by which an immovable property which was used for commercial purposes is let with all capital equipment and inventory items necessary for that use, even if the lessee pursues the activity of the lessor under the same name
- Article 135(1)(l) of the VAT Directive mean that a lease contract for an immovable property which was used for commercial purposes and for all capital equipment and inventory items necessary for that use constitutes a single supply in which the letting of the immovable property is the principal supply

C-422/17: travel agents and VAT special scheme – 19 December

CJEU has ruled that:

- Articles 65 and 306 to 310 of the VAT Directive mean that when a travel agent who is subject to the special scheme laid down in Articles 306 to 310 of that Directive, receives a payment on account for tourist services which it will provide to the traveller, the VAT is chargeable on receipt of that payment on account, provided that, at that time, the tourist services to be supplied are precisely designated.
- Article 308 of the VAT Directive means that the margin of the travel agent, and, consequently, its taxable amount, corresponds to the difference between the total amount, exclusive of VAT, to be paid by the traveller and the actual input cost incurred by the travel agent in respect of supplies of goods and services provided by other taxable persons, in so far as those transactions are for the direct benefit of the traveller. When the amount of the payment on account corresponds to the total price of the tourist service or to a significant part of that price, and the travel agent has not yet incurred any actual cost, or has incurred only a limited part of the individual total cost of that service, or even when the individual actual cost of the trip incurred by the travel agent cannot be determined at the time when the payment on account is made, the profit margin can be determined on the basis of an estimate of the total actual cost which it will ultimately have to incur. For the purpose of such an estimate, the travel agent must take into account, where relevant, the costs which it has already actually incurred at the time of receipt of the payment on account. For the purpose of the calculation of the margin, the estimated total actual cost is deducted from the total price of the trip and the taxable amount for VAT to be paid at the time of receipt of the payment on account is obtained by multiplying the amount of that payment on account by the percentage corresponding to the part of the total cost of the trip that the estimated profit margin, thus determined, represents.

C-552/17: VAT for supply of holiday accommodation – 19 December

CJEU has ruled that Articles 306 to 310 of the VAT Directive establish that the mere supply by a travel agent of holiday accommodation rented from other taxable persons or such a supply of a holiday residence combined with the supply of additional ancillary services, regardless of the importance of those ancillary services, each amount to a single service covered by the special scheme for travel agents. Moreover, Article 98(2) means that the supply of travel agent services consisting of the supply of holiday accommodation, covered by Article 307 of that Directive, cannot be subject to a reduced tax rate or one of the reduced rates set out in Article 98(2).

C-51/18: VAT on the royalty payable to an author of an original work of art – 19 December

CJEU has ordered Austria violated the VAT Directive by providing that the royalty payable to an author of an original work of art on the basis of the resale right is subject to VAT. It thus orders Austria to pay the costs instead.

C-414/17: VAT for intra-Community acquisitions of excise goods – 19 December

CJEU has ruled that:

- Article 2(1)(b)(iii) of the VAT Directive applies to intra-Community acquisitions of excise goods, in respect of which the excise duty is chargeable in the member state of destination of the dispatch or transport of those goods, carried out by a taxable person whose other acquisitions are not subject to value added tax pursuant to Article 3(1) of that directive
- Article 2(1)(b)(iii) of the VAT Directive means that, in a chain of successive transactions which gave rise only to a single intra-Community transport of excise goods under an excise duty suspension arrangement, the acquisition carried out by the trader liable for payment of the excise duty in the member state of destination of the dispatch or transport of those goods cannot be classified as an intra-Community acquisition subject to value added tax under that provision, where that transport cannot be ascribed to that acquisition
- Article 2(1)(b)(i) of the VAT Directive establishes that where there is a chain of successive acquisitions concerning the same excise goods and which gave rise only to a single intra-Community transport of those goods under an excise duty suspension arrangement, the fact that those goods are transported under that arrangement does not constitute a decisive factor in determining to which acquisition the transport is to be ascribed for the purposes of applying value added tax under that provision

C-374/17: tax exemption from real property transfer tax – 19 December

CJEU has ruled that a tax advantage which consists in exempting from real property transfer tax the transfer of ownership of a property which occurred because of a restructuring procedure involving only companies of the same group, linked by a shareholding of at least 95% during a minimum, uninterrupted period of five years prior to that procedure and of five years thereafter, does not fulfil the condition relating to the selectivity of the advantage concerned, laid down in Article 107(1) of TFEU.

International

WTO sides with the EU in appeal on Brazil's industrial tax measures – 14 December

Ruling on a trade dispute involving the EU and Brazil, World Trade Organisation (WTO) has sided with the EU's arguments concerning Brazil's industrial tax measures that disadvantage EU companies.

The WTO has confirmed the initial ruling of August 2017 that numerous Brazilian tax programmes are not in line with WTO rules as they favour domestic products. The programmes disadvantage EU automotive, and Information and Communications Technology (ICT) products by granting tax advantages based on the local content embedded in products. According to the ruling such measures are incompatible with WTO law.

As a consequence of the ruling, Brazil will now have to bring its tax programmes in compliance with WTO rules and remove the prohibited measures without delay.

US pushing for global adoption of minimum tax, revised profit allocation rules – 17 December

The US is reportedly seeking worldwide agreement on proposals that would significantly alter the international tax system. One of the main aims of these proposals would be to prevent a EU digital services tax (DST) as well as avoiding national unilateral tax measures more broadly.

More specifically, the US seeks to obtain a mandate from the OECD's Inclusive Framework (consisting of non-OECD jurisdictions too) to enable an OECD working group to develop and approve a package of international tax reform measures that would include a global uptake of minimum tax rules similar to the US global intangible low-taxed income (GILTI) regime.

The US will also propose modest adjustments to the amount of income that can be allocated to taxing jurisdictions. These rules would not be limited to just digital business models. Several options are apparently on the table, but one of these would be to consider where activities with respect to marketing intangibles occur or add value. Marketing intangibles could be associated with a particular jurisdiction and more income could then be attributed to that jurisdiction.

OECD

OECD: Transparency on tax rulings significantly increased – 13 December

The Inclusive Framework on BEPS has assessed 92 individual jurisdictions' progress in spontaneously exchanging information on tax rulings, in accordance with Action 5 of the OECD BEPS package.

The 2017 Peer Review Reports on the Exchange of Information on Tax Rulings show that one key aim of the BEPS Project – increasing transparency on tax rulings - is well on its way to being achieved, with more than 16 000 tax rulings being identified and almost 21 000 exchanges of information having taken place to date.

At the same time, the OECD acknowledges that work remains to be done. The report contains 60 jurisdiction-specific recommendations on issues such as improving the timeliness of the exchange of information and ensuring that exchanges of information are made with respect to preferential tax regimes that apply to income from intellectual property.

State Aid

Commission publishes decision concluding that Luxembourg did not give selective tax treatment to McDonald's – 17 December

The European Commission has published the non-confidential version of the final state aid decision adopted on 19 September 2018 concluding that Luxembourg did not give selective tax treatment to McDonald's.

The Commission found that the non-taxation of certain McDonald's profits in Luxembourg did not lead to illegal State aid, as it is in line with national tax laws and the Luxembourg-US Double Taxation Treaty.

Gibraltar interest and royalties tax regime, tax rulings are illegal state aid, EU Commission concludes – 19 December

The European Commission has found that Gibraltar's corporate tax exemption regime for interest and royalties, as well as five tax rulings, are illegal under EU state aid rules. The beneficiaries now have to return unpaid taxes of around EUR 100 million to Gibraltar.

EU State aid rules prevent Member States from giving unfair tax benefits only to selected companies. Member States cannot treat certain companies better than others. This distorts competition and is illegal under EU State aid rules.

Other News

GRI launches public consultation on new tax transparency standard – 13 December

The Global Reporting Initiative (GRI) has published a new draft standard on Tax and Payments to Governments. The standard covers, amongst other elements, public country by country reporting (CBCR) as well as disclosure of tax planning strategies. The scope of the standard transcends mere corporate taxation, and instead attempts to give a broader picture of a taxpayer's overall tax contributions in jurisdictions.

The draft standard is intended as a voluntary disclosure standard, and not for regulation or legal requirements. It aims to address the current fragmentation of different voluntary disclosure regimes.

All interested stakeholders have until 15 March 2019 to provide feedback on the draft standard. Moreover, Accountancy Europe is currently planning together with GRI a workshop in Brussels for 31 January, to discuss and gather further stakeholder feedback on the draft standard.

background

GRI argues that greater disclosure on tax and payments will allow for more informed public debate on taxation, creating an environment for better policy development and investment decisions. At the same time, improved transparency could promote trust and credibility in the taxation system while discouraging organizations from engaging in aggressive tax avoidance practices, GRI continues.

To develop the standard, GRI appointed a multi-stakeholder Technical Committee of experts to develop the draft disclosures. The Committee began its work to develop a draft GRI Standard on Tax and Payments to Governments in January 2018.

Eelco Van Der Enden, the Chair of Accountancy Europe's Tax Policy Group, is a member of the GRI's Technical Committee and helped create the new draft standard together with other members of the Committee from industry, civil society, academia and more.

MEP Questions & Answers

Notification of possible illicit state aid – 26 November

The European Commission has replied to a question asked by the MEP **Richard Sulík (ECR/SVK)** with regard to illicit state aid and tax.

In his question, Mr. Sulik asks the Commission whether EU member states have to notify the Commission prior to introducing a "special levy" or tax that could constitute illicit state aid, and what are the consequences for failing to do so.

In her reply, **Commissioner Vestager** emphasises that except under exceptional circumstances, a member state must notify the Commission prior to introducing a state aid measure. The Commission will have two months after the notification to form a first view. Should a member state fail to follow this procedure, the state aid will be deemed unlawful by the Commission, with the consequence of the aid's recipients having to return it.

Fair tax clauses in public procurement – 10 December

The European Commission has replied to a question asked by the MEP **Jeppe Kofod (S&D/DEN)** with regard to fair tax clauses in public procurement.

In his question, Mr. Kofod asks the Commission whether EU law provides public authorities with the right to introduce fair tax clauses into public procurement contracts, and whether it is for example possible to include public country by country reporting (CBCR) or the provision of simple tax documentation as requirements.

In her reply, **Commissioner Bienkowska** (internal market, entrepreneurship, SMEs) underlines that relevant EU legislation requires contracting authorities to exclude from public tenders all operators in breach of their obligations relating to the payment of taxes and social security contributions.

Having said that, any additional requirements for documentation or disclosures would have to be related to the specific subject matter of that contract. Public CBCR, by contrast, relates to the broader corporate practices of an entity and, as such, it is most probably in breach of EU law to introduce it as a public procurement criterion. However, the Commissioner maintains that the applying entity can of course agree voluntarily to such disclosures throughout the contract's lifespan.

Preventing terrorism financing through tax fraud – 11 December

The European Commission has replied to a question by the MEP **Dubravka Šuica (EPP/CRO)** with regard to the prevention of terrorist financing through tax fraud.

In her question, Ms. Šuica asks the Commission what it is doing to prevent the financing of terrorism through activities such as VAT fraud and carousel fraud in particular.

In his reply, **Commissioner Moscovici** provides an overview of VAT measures take by the Commission from the 2016 VAT Action Plan and beyond and that bolster the EU's ability to effectively tackle VAT fraud. He does not mention or hint to potential new measures.

Concerns about digital taxation – 11 December

The European Commission has replied to a question asked by the MEP **Alfred Sant (S&D/MAL)** with regard to concerns about the digital services tax (DST).

In his question, Mr. Sant points out that the OECD concluded that there is no consensus on the benefits of such a digital tax. Moreover, he expresses concerns that the DST tries to ringfence the digital economy but might still impact other sectors too. He therefore asks the Commission why it decided to proceed with the DST, beyond the political desires of "certain" member states.

In his reply, **Commissioner Moscovici** re-iterates the well-known Commission line on DST. That is, that the Commission prefers a globally coordinated and comprehensive solution at the OECD-level, but that progress in international negotiations are slow. Therefore, in the meantime the Commission wants to protect the unity of the Single Market and pre-empt national unilateral measures on digital taxation, by proposing a common and coordinated EU-wide DST.

The Commissioner believes that the DST is carefully targeted, easy to implement and will improve the level-playing-field with non-digitalised businesses until a more comprehensive solution has been agreed upon.

CumEx Files investigation into the massive tax fraud by Banco Santander and other European financial institutions – 12 December

The European Commission has replied to a question asked by the MEP **Ernest Urtasun (Greens-EFA/SPA)** with regard to European financial institutions, including Banco Santander, and the CumEx Files.

In his question, Mr. Urtasun asks the Commission whether it will conduct its own investigation on the CumEx scandal, whether it agrees with the fact that Spanish authorities are yet to open any investigations on the CumEx revelations, and whether it deems it necessary to close the loophole currently rendering such CumEx practices possible.

In his reply, **Commissioner Moscovici** does not give any indications of possible EU-level investigations or measures.

Instead, he merely highlights that the Commission does not have the competences to investigate cross-border tax fraud. It is up to member states to undertake such investigations, but the Commission's role is to at least facilitate cooperation between member states in their investigations. He believes that existing anti-money laundering legislation provides a robust protection against tax crimes. He also highlights that the Commission is in constant dialogue with stakeholders including civil society organisations, notably in the Platform for Tax Good Governance where such issues are regularly discussed.

Tax fraud network – 12 December

The European Commission has replied to a question asked by the MEP **Maite Pagazaurtundúa Ruiz (ALDE/SPA)** with regard to tax fraud networks and, in particular, the CumEx scandal.

In her question, Ms. Pagazaurtundúa Ruiz asks the Commission whether it believes that the current anti-money laundering rules are robust enough to deal with such fraudulent practices, ad whether a formal EU-level investigation should be conducted.

In his reply, **Commissioner Moscovici** does not give any indications of possible EU-level investigations or measures. The reply is exactly the same as to the question asked by the MEP **Ernest Urtasun (Greens-EFA/SPA)** – see above.

Instead, Commissioner Moscovici merely highlights that the Commission does not have the competences to investigate cross-border tax fraud. It is up to member states to undertake such investigations, but the Commission's role is to at least facilitate cooperation between member states in their investigations. He believes that existing anti-money laundering legislation provides a robust protection against tax crimes. He also highlights that the Commission is in constant dialogue with stakeholders including civil society organisations, notably in the Platform for Tax Good Governance where such issues are regularly discussed.

Tax practices at Airbnb – 13 December

The European Commission has replied to a question asked by the MEP **Patrick Le Hyaric (GUE-NGL/FRA)** with regard to ta practices of Airbnb.

In his question, Mr. Le Hyaric laments the low level of taxes paid by Airbnb in France, despite having an annual turnover of at least EUR 120 million in the country. He emphasizes that harmonizing tax rates across the EU might help with "tax evasion" conducted by companies such as Airbnb, Google and Apple. He therefore asks the Commission whether it will take "strong action" to address the issue, what it will do about "tax havens" inside the EU, and whether the Commission intends to organize a global summit on tax avoidance.

In his reply, **Commissioner Moscovici** points to the myriad of anti-tax avoidance legislation introduced by the Commission in past years, as well as the digital tax proposals. Moreover, he underlines the number of tax related state aid investigations also conducted by the Commission. The Commissioner also highlights that EU member states' tax regimes are already scrutinized by the Council's Code of Conduct Group.

Finally, the Commissioner does not give any indications of possible Commission intentions to organize a global anti-avoidance summit. However, he underlines the Commission's existing efforts at international cooperation in the fight against tax avoidance.

VAT rates on medicaments – 17 December

The European Commission has replied to a question asked by the MEPs **Roberto Gualtieri (S&D/ITA)** and **Giovanni La Via (EPP/ITA)** with regard to VAT on medicaments.

In their question, the MEPs argue that in some member states, products that fall under the customs code heading 3004 ('medicaments'), meet the same consumer needs and are in direct competition with one another are subject to different VAT rates. They ask the Commission whether the principle of fiscal neutrality should prevent different VAT rates being applied to the same or comparable medicament products.

In his reply, **Commissioner Moscovici** acknowledges that the VAT Directive renders such a situation possible undert certain conditions, which he describes at length in the reply. He also points to the existence of Court of Justice of the EU case law on the matter, but highlights that ultimately the assessment of whether certain products are similar and whether they are in competition with each other is up to national courts to determine.

Empirical evidence contradicts the Commission proposal for a digital services tax – 19 December

The European Commission has replied to a question asked by the MEP **Wolf Klinz (ALDE/GER)** with regard to empirical evidence and the Commission's proposed digital services tax (DST).

In his question, Mr. Klinz criticises the Commission's figures claiming to demonstrate the supposedly lower effective tax rates paid by digitalised businesses in comparison to conventional ones. Mr. Klinz argues that the Commission's figures are mere estimates based on a hypothetical investment project and a number of theoretical assumptions about the pre-tax rate of return of a hypothetical investment, real interest rates and different depreciation rates for a limited number of asset classes. But not rooted in the reality of any actual corporation operating in the EU.

He therefore asks the Commission how it can justify its DST proposal on the basis of such data, and whether it is aware that an academic who authored one of the main studies used by the Commission to justify its proposal has distanced himself from the proposal.

In his reply, **Commissioner Moscovici** describes the relevant sections of its Impact Assessment to the DST, and acknowledges that the difference in effective tax rates paid by digitalised and "traditional" businesses is partly driven by current tax policy that incentivises R&D. The difference in effective tax rates indicates that countries compete for a mobile tax base, and this is the point made in the Impact Assessment, the Commissioner explains.

The Commissioner also highlights that the DST is necessary to fight against a possible fragmentation of the Single Market stemming from member states introducing different national approaches to taxing digitalised businesses. Finally, he confirms that the Commission is aware of the opinions of the academic mentioned by Mr. Klinz.

Abandonment of the principle of unanimity in fiscal matters – 19 December

The European Commission has replied to a question asked by the MEP **Gilles Lebreton (ENF/FRA)** with regard to a prospective abandoning of the unanimity rule in tax decision-making.

In his question, Mr. Lebreton refers to Commission plans to publish in early-2019 "proposals" for a transition to qualified majority voting (QMV) on taxation. He asks the Commission what types of proposals it intends to publish, what would be the legal basis of the proposals and whether the proposals would cover tax files broadly or only specific files such as the C(C)CTB.

In his reply, **Commissioner Moscovici** confirms that the Commission is working on such an initiative but that it is too early yet to elaborate on its precise details or nature.

As a side note, it appears on the basis of information notably presented in this edition of the Tax Policy Update, that the initiative will be a legally non-binding Communication with which the Commission hopes to open the debate on QMV for taxation. Based on Accountancy Europe's information, this Communication would be published on 15 January. Any actual legislative initiatives, including the prospective use of the Passerelle Clause, would most likely be presented during the next Commission's term only.

Irregularities in implementing the ATAD Directive regarding the taxation of income from unrealised profits (exit tax) – 19 December

The European Commission has replied to a question asked by the MEP **Adam Szejnfeld (EPP/POL)** with regard to difficulties in the implementation of the Anti-Tax Avoidance Directive (ATAD) and the exit tax in particular.

In his question, Mr. Szejnfeld laments that in their national transposition, certain member states are going further beyond the common requirements in ATAD to also cover smaller businesses and even individual taxpayers. In particular, the exit tax may be burdensome on small companies. All of this might hinder the Single Market and pose a threat to the fundamental freedoms, Mr. Szejnfeld fears.

He therefore asks the Commission whether it will revisit the "desirability and accuracy" of ATAD's provisions, and how it will counteract some of the "harmful" transposition plans of certain member states, and especially potential dire impacts on small businesses.

In his reply, **Commissioner Moscovici** reminds that ATAD only provides for minimum harmonisation, and member states are free to introduce additional national legislation. He also emphasises that the exit tax is fully in line with the freedom of establishment and relevant case law, and reminds that under ATAD taxpayers have the option to defer the payment of the tax over five years and settling through staggered payments if the assets or the taxpayers move to another member state.

Events

- 29/01/2019, ***Taxation in the digitalised economy – which way forward?*** EESC, Brussels. Source
- 31/01/2019, ***Paving the way for increased tax transparency***, Accountancy Europe & GRI, Brussels. Source