Policy update

Tax Policy Update

7 – 18 January

HIGHLIGHTS

- European Commission publishes Communication on QMV for tax decision making
- TAX3 Committee amendments published ahead of vote on 27 February
- Agreement on digital services tax (DST) looking increasingly unlikely
- Romanian Presidency brings public CBCR back to the table
- Commission investigates Nike Netherlands for potential breach of State Aid rules

European Commission

Commission launches evaluation of state aid rules – 7 January

The European Commission plans to prolong for two years seven sets of State aid rules, otherwise expiring in 2020. The Commission also launched an evaluation ("fitness check") of those rules and of other State aid rules to assess whether to further prolong them or possibly update them in the future.

The review of the rules does not contain an explicit tax section, but many of the sectoral reviews contain tax elements. For example, the state aid frameworks for environmental protection and risk finance both contain elaborate tax provisions.

Public consultations will follow at a later stage of the fitness check exercise.

European Commission publishes Communication proposing to use qualified majority for tax – 15 January

The European Commission has published its long-awaited Communication proposing to move to qualified majority voting (QMV) on tax files, thus replacing the current practice of Member States deciding by unanimity.

In the Communication, the Commission proposes The Commission proposes a gradual 4-step approach for introducing QMV on tax:

1. Measures that have no direct impact on Member States' taxing rights, but critical for combatting tax fraud and avoidance, e.g. administrative cooperation and international agreement; harmonized reporting obligations and such

2. Tax rules designed to support other policy goals, e.g. climate change and environmental taxes
3. Tax measures already largely harmonized, e.g. excise duties, VAT
4. Initiatives to complete the Single Market from a tax perspective, e.g. CCCTB and digital taxation

The Communication is legally non-binding, and functions as a call for discussions and eventual action by EU Member States. Any move to QMV on tax would involve using the so-called Passerelle Clause, which allows to expand QMV to new areas without having to re-open EU Treaties.

The catch is that Passerelle Clause will require unanimous agreement of all EU Member State parliaments. Saying that this is very difficult would be a dramatic under-statement.

Commission's aimed timeline

- Next coming months: the Commission will draft a more detailed Communication on the use of the specific Passerelle Clause for step 2 and the fight against climate change. Article 192 (2) TFEU and the specific Passerelle Clause for measures in the environmental field will open the door to taking actions in step 2
- By the end of 2019: the Commission expects EU leaders to decide on the use of the general Passerelle Clause for steps 1 and 2, after the European Parliament's consent and the notification to the national parliaments
- By the end of 2025: the Commission expects EU leaders to decide on the use of the general Passerelle Clause for steps 3 and 4

First Member State reactions

Needless to say, the initial reactions from a majority of Member States have not been very enthusiastic. Many Member States see a prospective move to QMV on tax as a breach of national sovereignty on fiscal matters, whereas the Commission insists that it is globalisation and inter-dependence that challenge the scope for national tax measures.

Either way, at a lunch organised by **Commissioner Moscovici** on 9 January, only **France** and one other Member State (possible **Spain** or **Portugal**) expressed their support. The others were either silent or sceptical to varying degrees. Some of the sceptics turned Moscovici's recent tax reform successes against him, asking why the EU should abandon unanimity when there has been so much progress on tax files in past years despite unanimity.

Ireland has, expectedly, already indicated that it would not support any move towards QMV on tax. According to the Government of **Lithuania**, smaller 'peripheral' Member States (Lithuania included) are also against the proposal, maintaining that smaller taxes allow them to preserve their competitive edge over stronger Western European economies. The deputy Finance Minister of Lithuania refers to the Commission proposal as a 'Trojan Horse'.

The Netherlands, for its part, sees the proposals as unrealistic and considers taxation to be a responsibility of Member States "par excellence". And finally, **Malta** does not believe that the current veto is damaging any decision, and would oppose any attempt to erode tax sovereignty.

First reactions from the European Parliament

A few first reactions have also emerged from within the European Parliament, given the political intrigue around the Commission proposal. Below a few examples.

The S&D Group has expressed its support for the proposal. The Group leader **Udo Bullman (S&D/GER)** argues that cooperation "pays off and must be beefed up".

The influential Green MEP **Sven Giegold (Greens-EFA/GER)**, for his part, supports in principle the abandoning of unanimity on tax decision-making. However, he criticises the Commission's chosen tool for it (Passerelle Clause) instead of invoking Article 116 of the Treaty on the Functioning of the EU (TFEU). This Article allows for the use of QMV when there is a risk of competitive distortions in the Single Market.

And finally, the MEP **Roberta Metsola (EPP/MAL)** has declared her commitment to keep fighting for national competence on taxation and against tax harmonization. She argues that tax harmonisation will place a disproportionate burden on the financial systems of smaller EU Member States like Malta.

First reactions from civil society and business

The first reactions from the civil society and business communities suggest an emerging dividing line.

On the one hand, NGOs such as Eurodad, the European Confederation of Independent Trade Unions (CESI) and the Independent Commission for the Reform of International Corporate Taxation (ICRICT) all support QMV for taxation.

On the other end of the spectrum, Business Europe emphasises the importance of Member States' national competence on tax, and for example the association of Finnish technology industries are vehemently opposed to it.

Finally, other organisations such as the European Tax Adviser Federation (ETAF) have not yet decided on their final position. ETAF states that the QMV for tax discussion "should not be refused", but also "the objections raised by national governments shall neither be ignored".

European Parliament

ECON discusses definitive VAT regime, wide support for CTP – 10 January

Ahead of its vote on the file on 22 January, ECON Committee has held a discussion on its VAT definitive regime position. The draft report of the Committee has been prepared by the MEP **Fulvio Martusciello (EPP/ITA)**.

As a reminder and as always on tax files, the European Parliament only provides its non-binding opinion whilst the Member States make the actual decisions by unanimity.

Most of the discussion revolved around the concept of a certified taxable person (CTP) – a concept that Member States are reluctant to introduce but that several European Parliament political Groups appear supportive of.

During the ECON discussion, a number of MEP expressed their views on the Commission proposal and Mr. Martusciello's draft report. At the beginning of the hearing, **Tom Vandenkendelaere (EPP/BEL)** – speaking on behalf of Mr. Martusciello – stated that he will support amendments proposed by ALDE to the draft report. These amendments call, notably, for a multilingual VAT portal, the concept of a certified taxable person (CTP) and improved transparency.

Pervenche Beres (S&D/FRA) stated that the S&D Group is also happy with the proposed more transparent criteria for CTP. She also called on the Commission to brief the European Parliament on the state of the Council negotiations on the definitive regime.

Kay Swinburne (ECR/UK) highlighted that the ECR Group is afraid that the CTP concept will label non-CTP taxpayers as unreliable businesses, especially SMEs. Therefore, ECR is proposing specific CTP criteria for smaller companies. Ms. Swinburne also fears that the CTP concept will open new fraud opportunities, and that Member States will interpret the criteria differently unless they are made more specific.

Resonating with Ms. Swinburne's concerns, **Molly Scott Cato (Greens-EFA/UK)** highlighted that while also the Greens support the CTP in principle, they would like to see more specific criteria in order to minimise the risk of the CTP status being used for fraud.

Speaking at the end of the hearing, a Commission representative stated that already six Council Working Party meetings have taken place to discuss the proposals, but since they include around 200 changes to VAT legislation, these technical discussions will take time. The representative could not, therefore, provide any estimations on timelines.

TAX3 Committee publishes amendments ahead of vote in February – 14 January

The TAX3 Committee of the European Parliament has published all the amendments tabled by MEPs ahead of the Committee vote on 27 February.

Not all of the amendments are public yet, but the currently available ones are accessible here, here and here.

A number of amendments are of direct relevance to the accountancy profession, including amendments calling for:

- Ensuring that EU audit legislation is properly applied
- An audit rotation of seven years
- A separation of accounting firms and financial, advisory and tax service providers
- Banning accountancy firms from advising both tax authorities and taxpayers
- Calling for blocking firms that "promote tax avoidance" from public tendering and contracts

The report is legally non-binding and, as such, does not commit either the European Commission or the Council to any particular course of action.

European Parliament adopts report on gender equality and taxation – 15 January

The European Parliament has adopted a non-binding report on gender equality and tax policies. The report, prepared by the MEPs **Marisa Matias (GUE-NGL/POR)** and **Ernest Urtasun (Greens-EFA/SPA)** – passed the Plenary vote by 313 votes in favour, 276 votes against and 88 abstentions.

In the report, the MEPs call on the Commission to support gender equality in all taxation policies and to issue specific guidelines and recommendations to Member States. They also ask the Commission to ensure that no new initiatives that increase market or after-tax income gender gaps or that reinforce the "male breadwinner model" are introduced.

More specifically, the MEPs want the Commission to be mandated to cooperate with the European Institute for Gender Equality (EIGE) to monitor and regularly report on the impact of Member States' taxation policies on gender equality and to increase the EIGE's resources for this purpose.

The adopted report makes a number of policy recommendations both on direct and indirect taxation, and amongst other suggestions it calls for the introduction of public country by country reporting (CBCR).

This is a legally non-binding report that commits neither the European Commission or the Member States to any particular course of action.

European Parliament adopts Fiscalis position – 17 January

The European Parliament Plenary has adopted its position on Fiscalis reform by a wide margin of 530 votes in favour, 32 against and 68 abstentions.

The file was led by the MEP **Sven Giegold (Greens-EFA/GER).** The original Commission's objective is to grant funding for the Fiscalis programme for the period of 2021-2027, which aims to encourage cooperation between EU tax administrations.

Expectedly, the MEPs adopted a number of changes to the report:

- The European Commission proposed allocating EUR 270 million, but the MEPs are asking for EUR 300 million instead at 2018 prices or EUR 339 million at current prices
- A joint amendment of the S&D and Greens-EFA Groups to include joint audits in the actions eligible for funding under the Fiscalis programme was adopted by 359 votes in favour
- The report emphasises that Fiscalis should strengthen the capacity of Member States to combat tax fraud, corruption, tax evasion and aggressive tax planning, including through provision of technical assistance for human resources training and improvement of administrative structures
- The MEPs propose encouraging the introduction of specific actions that include the involvement of the least developed third countries, focusing on achieving international tax targets, such as the automatic exchange of tax information.

In terms of next steps, the Council will develop its own position on the Fiscalis programme and subsequently negotiate with the European Parliament to find a mutually agreeable compromise.

Council

Agreement on digital tax appears increasingly less likely – 15 January

It appears that an agreement on the digital services tax (DST) is less likely. The Romanian Presidency is aiming for an agreement at the March ECOFIN on a DST with a reduced scope, only covering advertising revenue.

But at a 15 January technical meeting between EU Member States' tax experts it became apparent that the prospects of an agreement are weakening fast. Ireland and Denmark continued to criticise the DST, whilst Sweden and Finland expressed reservations.

However, also Spain and Estonia – both previously on board with the DST – criticised the tax at the meeting, on the grounds that its narrowed scope barely makes it worth the effort.

Romanian Presidency to check whether country positions on public CBCR have moved – 17 January

The Romanian Presidency has published a new compromise text on public country by country reporting (CBCR). The text has only minor changes compared to an earlier version from mid-2018.

According to a source, the Romanians only seek to check the temperature in the room and see whether country positions have budged. Progress is "not impossible but highly unlikely".

The Council's Company Law Working Party has public CBCR on its agenda on 24 January. Until then, all bets are open.

It seems standard now for each Presidency to sound out the state of play with the file, which remains stuck in the Council due to a minority of Member States led by Germany blocking it. These Member States maintain that the file should be processed under the tax-umbrella rather than accounting, and thus be subject to Council unanimity and no involvement of the European Parliament.

Court of Justice of the EU – Rulings

C-679/17: Inheritance tax – 22 November

CJEU has ruled that Article 63 TFEU precludes legislation of a Member State which grants a tax advantage for inherited woodland on condition that it is the subject of sustainable management as defined by national law, but restricts that advantage to woodland situated in the territory of that Member State.

C-480/17: Tax deductions on occupational pension scheme contributions – 6 December

CJEU has ruled that:

- Article 49 TFEU precludes legislation of a Member State under which a non-resident taxable person, subject, in that Member State, to income tax in the framework of limited tax liability, cannot deduct from the income tax basis of assessment the amount of compulsory contributions paid into an occupational pension scheme in due proportion to the share of the income taxable in that Member State if directly linked to the activity which generated that income, whereas a resident taxable person, subject to income tax in the framework of unlimited tax liability, can deduct such contributions from the income tax basis of assessment to the extent laid down by national law
- Article 49 TFEU precludes legislation of a Member State under which a non-resident taxable person, subject, in that Member State, to income tax in the framework of limited tax liability, cannot deduct from the income tax basis of assessment the amount of additional contributions paid into an occupational pension scheme or the amount of contributions paid into a private pension scheme, whereas a resident taxable person, subject to income tax in the framework of unlimited tax liability, can deduct such contributions from the income tax basis of assessment to the extent laid down by national law

C-310/16: Criminal proceedings concerning VAT offences – 17 January

CJEU has ruled that in the light of the principle of effectiveness of the prosecution of VAT offences, they do not preclude a national court from applying a national provision excluding, from a prosecution, evidence such as the interception of telecommunications requiring prior judicial authorisation, where that authorisation was given by a court that lacked jurisdiction, in a situation in which that evidence alone is capable of proving that the offences in question were committed.

International

The Netherlands publishes its own list of low-tax jurisdictions – 28 December

The Dutch Government has published its own list of low-tax jurisdictions, including all five jurisdictions that are on the EU list of non-cooperative jurisdictions as well as 16 others.

The Dutch government plans to use the list for at least three purposes:

- Additional measures on controlled foreign companies (CFCs) that came into effect on 1 January 2019
- Implement a conditional withholding tax on interest and royalties from 1 January 2021
- The Dutch Tax and Customs Administration will no longer issue rulings on transactions with companies headquartered in jurisdictions on the list

Austria plans to use digital tax to Help Finance Tax Cuts – 10 January

Austria plans to introduce a new 3% tax on internet advertising revenue, as well as additional measures that will target global online giants like Google, Facebook and Amazon. These plans were announced after EU Finance Minister failed to reach an agreement on the Commission's proposed digital services tax (DST) in December.

The tax plans also include a EUR 700 million cut in social-security contributions, and will benefit mostly low-income citizens. Moreover, by 2022 the government plans to simplify tax declarations for companies. Online retailers outside the EU will have to pay VAT for low-value goods and sharing platforms will be subject to stricter reporting rules to prevent tax evasion, as well as becoming liable for tax payments.

OECD

The Cook Islands joined the Inclusive Framework on BEPS – 3 January

The Cook Islands have joined the Inclusive Framework on BEPS. This brings the total number of jurisdictions belonging to the Inclusive Framework to 125.

A full and updated list of all these jurisdictions is available here.

Belize signs Multilateral BEPS Convention – 11 January

Belize has signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS. It thus became the 86th jurisdiction to join the Convention which now covers almost 1,500 bilateral tax treaties.

OECD report: Corporate tax remains a key revenue source despite falling rates worldwide – 15 January

Taxes paid by companies remain a key source of government revenues, especially in developing countries, despite the worldwide trend of falling corporate tax rates over the past two decades, according to a new report from the OECD.

The new OECD report and database, Corporate Tax Statistics, provides internationally comparable statistics and analysis from around 100 countries worldwide on four main categories of data: corporate tax revenues, statutory corporate income tax (CIT) rates, corporate effective tax rates and tax incentives related to innovation.

The new OECD analysis shows that corporate income tax remains a significant source of tax revenues for governments across the globe. In 2016, corporate tax revenues accounted for 13.3% of total tax revenues on average across the 88 jurisdictions for which data is available. This figure has increased from 12% in 2000.

State Aid

Commission adopts two decisions recommending taxation of ports in Italy and Spain – 8 January

The European Commission has proposed, in two separate decisions, that Italy and Spain align their taxation of ports with EU State aid rules.

The Commission takes the preliminary view that, in both Italy and Spain, the existing tax regimes provide the ports with a selective advantage that may breach EU State aid rules. The Commission has therefore invited Italy and Spain to adapt their legislation in order to ensure that ports, as from 1 January 2020, will pay corporate tax in the same way as other companies in Italy and Spain.

The Commission explains that ports carry out both non-economic (e.g. maritime traffic control) which typically fall within the competence of public authorities and are outside the scope of EU State aid control, and economic activities to which EU State aid rules apply. The commercial operation of port infrastructure may include providing paid access to the port constitutes an economic activity.

A corporate tax exemption for ports that earn profits from economic activities can provide them with a competitive advantage when they operate on the internal market and therefore involves State aid, which may not be compatible with EU rules, the Commission fears.

According to the Commission, in Italy ports are fully exempt from corporate income tax. In Spain, ports are exempt from corporate income tax on their main sources of revenue, such as port fees or income from rental or concession contracts. In the Basque Country, ports are fully exempt from corporate tax.

Commission opens in-depth investigation into tax treatment of Nike in the Netherlands – 10 January

The European Commission has opened an in-depth investigation to examine whether tax rulings granted by the Netherlands to Nike may have given the company an unfair advantage over its competitors, in breach of EU State aid rules.

The Commission's formal investigation concerns the tax treatment in the Netherlands of two Nike group companies based in the Netherlands, Nike European Operations Netherlands BV and Converse Netherlands BV. These two operating companies develop, market and record the sales of Nike and Converse products in Europe, the Middle East and Africa (the EMEA region).

A Commission decision will follow in a few months' time. In the meantime, the Netherlands and interested third parties will have an opportunity to submit comments.

Other News

ICRICT publishes report on BEPS – 17 January

The Independent Commission for the Reform of International Corporate Taxation (ICRICT) has published a new report that provides a helpful overview of progress achieved by the OECD BEPS project so far, and speculating on what the BEPS project could and should have been.

ICRICT believes that the BEPS project was the best that could have been achieved under the current political constraints and influence of "big corporations". It recognises the achievements achieved until now, but laments that companies are still allowed to engage in profit shifting.

Instead, ICRICT calls for a BEPS 2.0 and further measures, including a common consolidated tax base for multinationals at a global level, and a minimum global effective tax rate of 20-25%.

MEP Questions & Answers

Legality of Shell tax arrangements under state aid rules – 8 January

The European Parliament has replied to a question asked by the MEP **Paul Tang (S&D/NLD)** with regard to the legality of Shell's tax arrangements under EU's State Aid rules.

In his question, Mr. Tang criticises a tax ruling granted by the Dutch Government to Shell. He states that the ruling did not contain an end-date, and that Shell has paid zero taxes in the Netherlands despite making profits there. He asks the Commission whether Shell's tax ruling is aligned with EU's State Aid rules.

In her reply, **Commissioner Vestager** states that the Commission is not in a position to comment on a specific ruling, but it is aware of the facts of the case. She reminds that an open-ended tax ruling and a zero rate are not automatically against the EU's State Aid rules. The decision on whether or not unlawful State Aid has been granted is based purely on whether the same advantages are also available to other companies.

The Regulatory Scrutiny Board's review of the Commission proposal for a digital services tax – 8 January

The European Commission has replied to a question asked by the MEP **Wolf Klinz (ALDE/GER)** with regard to the Commission's Regulatory Scrutiny Board's (RSB) views on the digital services tax (DST) proposal.

In his question, Mr. Klinz refers to an opinion from the Commission's in-house RSB, which found that the Commission's impact assessment to the DST had several flaws. These included, for example, a lack of economic impact data such as tax incidence or proper assessment of potential impact on SMEs. He asks the Commission what is its views on the RSB's review.

In his reply, **Commissioner Moscovici** maintains that the Commission addressed the reservations expressed by the Board, and the Board as a result gave a positive assessment of a subsequent version of the impact assessment. He also reminds that the Commission continues to be involved in OECD-level discussions.

Empirical evidence contradicts the Commission proposal for a digital services tax – 17 January

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

In his question, Mr. Klinz argues that several studies argue that the DST is not justified on empirical grounds. For example, a study from the European Centre for International Political Economy (ECIPE) claims that the effective tax rate of digitalised businesses is on the same scale than for traditional business models, and that the differences in tax rates between large digital and smaller digital businesses are also small. He asks the Commission how it defends its proposals in face of such criticism.

In his reply, **Commissioner Moscovici** claims that the ECIPE study's claims about tax rates is based on looking at global tax rates of companies based on financial account information, as opposed to using tax reporting information. He reminds the differences between financial and tax accounting, and that using one or the other will inevitably produce different figures.

The Commissioner also claims that there is in general no sufficient break-down by jurisdiction of financial account data, and therefore re-iterates the importance of introducing public country by country reporting (CBCR). And finally, the Commissioner maintains that none of the critical studies consider the risk of Member States introducing their own unilateral measures in the absence of a EU DST, and the negative impacts that this would have on the Single Market.

Events

- 22/01/2019, ***Brexit and the future of tax havens***, Greens Group, Brussels. Source
- 24/01/2019, ***Towards a new social contract***, Bruegel, Brussels. Source
- 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
- 02/04/2019, ***Digital taxation***, EPFSF, Brussels. Source