Tax Policy Update

4 – 15 February

HIGHLIGHTS

- European Parliament not unanimous in supporting QMV for taxation
- EU Finance Ministers discuss QMV for taxation and possible EU flight tax
- OECD launches public consultation on major overhaul of tax system for digitalising economy
- EU General Court rules that Belgium did not breach state aid rules with tax rulings to 35 MNEs

European Commission

Commission publishes mid-term evaluation of Fiscalis 2020 Programme – 7 February

The European Commission (EC) has published a mid-term evaluation of the Fiscalis 2020 programme. This report assesses the multiannual action programme that aims to improve taxation systems in the EU since its launch in 2014.

The programme has provided a framework for implementing EU tax law and fighting tax evasion, fraud and "aggressive tax planning". In concrete terms, the Fiscalis 2020 programme offers added value, coordination and assistance to the work of national tax administrations and economic operators. This is done for example by ensuring the exchange of information, by supporting administrative cooperation and by enhancing the administrative capacity of participating countries to help reduce the administrative burden on tax authorities and the compliance costs for taxpayers.

European Parliament

European Parliament Plenary adopts definitive regime opinion – 12 February

the European Parliament has adopted its position on the introduction of detailed technical measures for the operation of the definitive VAT system for the taxation of trade between Member States. The report, prepared by the MEP **Fulvio Martusciello (EPP/ITA)**, was approved with 493 votes in favour, 48 against and 137 abstentions.

In the adopted report, the MEPs support the transition to the destination principle. The MEPs also proposed that stricter and more harmonised criteria should be put in place to determine which companies can benefit from the status of a certified taxable person, and that fines and penalties for abusers should be established.

As always on tax matters, the European Parliament merely submits its non-binding opinion on this file whilst the EU Member States must decide by unanimity.

Plenary discusses taxation with Commissioner Moscovici, some MEPs not too keen on QMV for tax – 13 February

Commissioner Moscovici attended a hearing of the European Parliament Plenary titled Fair taxation for a just society. The debate revolved around the EU tax havens blacklists, fair taxation of internet giants and especially the **Commission's Communication pr**oposing to move from unanimity to Qualified Majority Voting (QMV) on tax decision-making.

If the Commissioner was hoping for MEPs to show quasi-unanimous support for the QMV/tax move given that it **would reinforce the Parliament's powers on tax files**, he must have been disappointed. Whilst naturally several MEPs spoke in favour of the proposal, others such as **Pervenche Beres (S&D/FRA)** lamented that it is unlikely to materialise even if she personally would support the measure.

A number of other MEPs were bluntly against the move. For example, **Gunnar Hökmark (EPP/Sweden)** and **Richard Sulík (ECR/Slovakia)** expressed their objections, fearing that the abandonment of unanimity on tax would lead to higher taxes across Europe and would thus undermine competitiveness. Others such as **Matt Carthy (GUE-NGL/Ireland)** and **Nuno Melo (EPP/Portugal)** took a more principled stance, defending taxation as a national sovereignty issue.

The Commissioner was firm in his defence of the proposal. He also elaborated that although no decision on QMV/tax **will be made during the current Commission's term, the timing of the Communication was nonetheless right. He** hopes that the Communication will spark discussion during the upcoming EU elections on abandoning unanimity for tax.

Nonetheless, the European Parliament has no powers in deciding whether or not QMV is expanded to taxation. This decision can only be made with a unanimity of all national parliaments of EU Member States – an unlikely scenario.

Council

Code of Conduct Group publishes Work Programme under Romanian Presidency – 4 February

The Code of Conduct Group for business taxation has published its work programme under the Romanian Presidency, i.e. until the end of June.

On the EU list of tax havens, the Group will start the screening of Argentina, Mexico and Russia. On OECD BEPS, the Group will initiate a debate on developing EU guidance for coordinating the implementation of OECD BEPS Actions 8-10 (aligning transfer pricing outcomes with value creation) and Action 13 (CBCR). And finally, the Group will continue discussions on revising its mandate that was established over 20 years ago in 1997.

Council Code of Conduct Group appoints new Chair – 5 February

Lyudmila Petkova (Bulgaria) has been appointed as the new Chair of the Council's Code of Conduct Group for business taxation, for a mandate of two years. She replaces the former Italian Chair Fabrizia Lapecorella. Ms. Petkova's CV is available here.

Council Code of Conduct Group publishes commitment letter from Mauritius – 5 February

The Council's Code of Conduct Group has published a letter of commitments sent to it by Mauritius, as part of the exercise for the EU list of non-cooperative jurisdictions (or the 'tax haven' list).

The Group publishes commitment letters submitted by third jurisdictions if they give permission for it. On top of Mauritius, the Group has recently requested permission from Barbados, Belize, Curaçao, Saint Lucia and Seychelles as well. If the jurisdictions agree, their commitment letters will be gradually published too.

ECOFIN discusses QMV for tax and flight taxes – 12 February

At the latest ECOFIN meeting between EU Finance Ministers, the European Commission and the Romanian Presidency held a discussion on the proposal to gradually move to Qualified Majority Voting (QMV) on taxation. Currently, all tax files must be adopted by a unanimity of EU Member States, which according to critics hampers EU decision-making on major tax reforms.

To say that Member States were divided on the matter is an understatement. With the exception of France and Spain, practically all other Member States were either vehemently opposed or open to discuss only on very specific cases.

The 'open for discussion' camp included Austria, Belgium, Denmark, Finland, Germany, Greece and Portugal. However, there are nuances within this faction as Austria, Denmark and Finland are willing to discuss QMV for administrative cooperation related tax matters. The others would consider going further. Italy's position, for its part, was "more ambiguous".

This left most of the other Member States strongly opposed in principle: Croatia, Cyprus, Czechia, Estonia, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Slovakia, Slovenia and Sweden. The critics once again turned Commissioner Moscovici's success against him, arguing that the current unanimity system clearly works fine since it did not prevent the myriad of EU tax legislation from passing in the past three years alone.

Replying to the Member States, Commissioner Moscovici insisted that this is the right time to have the debate, given that the EU elections are right behind the corner. In the meanwhile, the Romanian Presidency promised that it would hold further discussions about QMV/tax in the course of its term, although did not specify when.

Discussions on a possible flight tax

The other tax topic at the latest ECOFIN touched upon an area that is likely to be high on the next Commission's tax agenda – sustainable taxes.

Indeed, the Netherlands initiated a discussion with the Finance Ministers on a possible EU flight tax. The Dutch Government plans to introduce a national tax on flight tickets from 2021, and the Finance Minister proposed to do devise a EU-level framework for it.

Apparently, Belgium, France and Sweden expressed some openness towards the idea, whilst Spain was more wary. The Romanian Presidency, for its part, did not take a stance.

However, Commission Vice-President **Valdis Dombrovskis** expressed the readiness of the European Commission to explore the matter. He did also remind, however, that Member States failed to reach an agreement on a revision of the Energy Tax Directive in the past.

The Netherlands wants the subject to be discussed again at the informal ECOFIN Council meeting in April and a mapping of existing national approaches to be carried out in parallel.

Court of Justice of the EU - Rulings

Case C-295/17: Taxable transactions - 22 November 2018

CJEU has ruled that:

- Article 2(1)(c) of the VAT Directive means that the predetermined amount received by an economic operator where a contract for the supply of services with a minimum commitment period is terminated early by its customer or for a reason attributable to the customer, which corresponds to the amount that the operator would have received during that period in the absence of such termination — a matter which it is for the referring court to determine — must be regarded as the remuneration for a supply of services for consideration and subject, as such, to VAT.
- The fact that the objective of the lump sum is to discourage customers from not observing the minimum commitment period and to make good the damage that the operator suffers in the event of failure to observe that period, the fact that the remuneration received by a commercial agent for the conclusion of contracts stipulating a minimum period of commitment is higher than that provided for under contracts which do not stipulate such a period, and the fact that the amount invoiced is classified under national law as a penalty, are not decisive for classifying the amount predetermined in the services contract which the customer is liable to pay in the event of early termination.

OECD

Armenia and Mauritatnia sign up to international tax cooperation – 11/12 February

Armenia has joined the OECD Inclusive Framework, thus becoming the 128th member. The full list of Inclusive Framework members can be consulted here.

Moreover, Mauritania has joined the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, thus becoming the 127th signatory to the Convention. The Convention provides for 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 also guarantees safeguards for the protection of taxpayers' rights.

OECD invites public input on the possible solutions to the tax challenges of digitalization – 13 February

The OECD has published its awaited consultation document on the tax challenges of digitalisation. The consultation seeks technical comments on the various proposals being discussed within the OECD on how to adapt the tax system to a digitalising economy.

The deadline for comments is tight even by OECD standards – 1 March. Moreover, on 13-14 March a public consultation conference will be organised in Paris.

The now-published consultation document has two pillars with a total of four proposals:

- Pillar one – grant some taxing rights to market/user jurisdictions
  - Proposal #1 – user contributions: digital/internet companies should be allowed to be taxed by jurisdictions in which the users of digital platforms are located
    - Only applies to digitalised businesses and thus ringfences them from "traditional" ones
    - Supported, notably, by the UK
  - Proposal #2 – marketing intangibles: grant taxing rights to jurisdictions where a multinational's user/customer base and other marketing intangibles are located
    - Relatively similar rational to Proposal #1, but would apply to all relevant businesses, not only digitalised ones
    - Supported, notably, by the US
  - Proposal #3 – significant economic presence: allow a jurisdiction to tax multinationals that have purposeful and sustained interaction with the jurisdiction via digital technology and other automated means, without necessarily having any other form of economic presence there
    - Would be based more on existing transfer pricing rules
    - Supported, notably, by India as well as a number of developing countries
- Pillar two – establish a global minimum taxation framework
  - Seen as the least controversial of the two Pillars, where most initial consensus is likely to be reached
  - Supported notably by the US, France and Germany
  - Proposal #4 – address remaining BEPS challenges by proposing a solution to ensure that internationally operating businesses pay a minimum level of tax. Consists of two rules:

- Rule #1 – income inclusion rule: would tax the income of a foreign branch or a controlled entity if the income was subject to a low effective tax rate in the jurisdiction of establishment or residence
- Rule #2 – tax on base eroding payments: would deny a deduction or treaty relief for certain payments unless that payment was subject to an effective tax rate at or above a certain minimum rate

OECD releases BEPS peer review reports on improving tax dispute resolution mechanisms and preventing treaty shopping – 14 February

The OECD has published additional peer review reports assessing countries' efforts to implement BEPS Actions 6 and 14.

For Action 6, the peer review report on treaty shopping reveals that a large majority of Inclusive Framework members have begun to translate their commitment on treaty shopping into actions and are now in the process of modifying their treaty network. The report includes the aggregate results of the peer review and data on tax treaties concluded by each of the 116 jurisdictions that were members of the BEPS Inclusive Framework on 30 June 2018.

For Action 14, the reports of Estonia, Greece, Hungary, Iceland, Romania, Slovak Republic, Slovenia and Turkey contain over 200 specific recommendations that will be followed up in stage 2 of the peer review process. According to the OECD, these stage 1 peer review reports continue to demonstrate that countries remain dedicated to turning the political commitments made by members of the Inclusive Framework on BEPS into measureable, tangible progress.

State Aid

EU General Court rules against Commission decision on tax exemptions granted by Belgium – 14 February

The EU's General Court has ruled that the Belgian tax ruling system for multinationals does not constitute unlawful state aid, in contrast to the European Commission's decision from January 2016.

Back in 2016, the European Commission confronted Belgium for granting tax exemptions for the excess profit of 35 Belgian entities that are part of multinational groups, if they could demonstrate the existence of a new situation such as the creation of jobs or investment. This "Excess Profit" scheme was deemed by the Commission to be illegal state aid, and it called on Belgium to retrieve EUR 700 million from these 35 multinationals.

The General Court, however, has now concluded that the essential features of state aid were not present in the Belgian scheme, and that tax authorities have a margin of discretion over the elements of the exemption system. In particular, the Court aligned with the Belgian argument whereby the Commission should have analysed the cases for each of the 35 multinationals separately, rather than bundling them together. It thus annulled the Commission decision, although the Commission can still appeal against the decision.

No impact on other tax state aid cases

Crucially, however, the Court did not think that the Commission is in principle exceeding its powers by pursuing state aid investigations from a tax angle. Thus its ruling will not have an impact on the high-profile tax state aid cases that the Commission has been conducting in past years on individuals multinationals, such as the case where the Commission ordered Ireland to collect EUR 13 billion in unpaid taxes from Apple.

Other News

Tax Reporting can increase accountability of tax administrations too – 31 January

The Chair of Accountancy Europe's tax expert group, **Eelco van der Enden**, has highlighted that greater tax transparency should also apply to tax administrations. He made the remarks during a recent workshop jointly organised by Accountancy Europe and the Global Reporting Initiative (GRI).

The workshop's purpose was to discuss GRI's new voluntary tax transparency standard, which also includes public CBCR. The standard is currently going through a public consultation period until 15 March.

Mr. van der Enden welcomed voluntary market-led tax transparency initiatives, emphasising that both citizens and investors expect it. In the same breath, however, he highlighted that transparency should not only be a one-way stream and that greater transparency from companies should also lead to greater transparency by tax administrations and their treatment of taxpayers.

EESC publishes opinion on the definitive VAT regime – 7 February

The European Economic and Social Committee (EESC) has adopted its opinion on the proposal for a definitive VAT regime.

Whilst EESC welcomes the proposal, it is also concerned that it may turn out to be a prohibitive obstacle for both SMEs and start-ups, and maintains that the system of reverse charge should be granted to all B2B cross-border supplies of goods, until the implementation of a definitive regime.

The report also recommends adequate investment in IT hardware/software to efficiently manage the amount of information, and to enable businesses to continue operating without unnecessary interruptions.

EESC's opinion is non-binding, but given that its constituents include both industry and civil society organisations, its mandate holds great political legitimacy.

Stiglitz: how can we tax the footloose multinationals? – 14 February

The internationally renowned economist, **Joseph Stiglitz**, argues in his Guardian article that globalisation has enabled large multinationals, such as Apple, Google and Starbucks, to avoid paying tax.

To implement a more robust tax system, he calls for a global CCCTB and the use of a formula attributing companies' taxable profits to each jurisdiction in proportion to the share of sales, employment and capital. The formula should not be largely based on final sales, Stiglitz argues, as this would deprive developing countries of much needed revenues. He also calls for the introduction of a global minimum corporate-income tax.

MEP Questions & Answers

Status of CBCR file within the Council – 16 january

The Council has replied to a question asked by the MEP **Jeppe Kofod (S&D/Denmark)** with regard to the public CBCR file within the Council.

In his question, Mr. Kofod asks the Council when it expects to reach a unified position of public CBCR, and whether it will provide the general public and the European Parliament with minutes of discussions of the Code of Conduct on Business Taxation regarding CBCR, and with an overview of the positions of individual Member States.

In its reply, the Council merely re-iterates that the file is being discussed within the Council, but that it was not in a position to foresee the outcome nor the duration of these discussions. It also recalls that after the final adoption of a legislative act, any document is available to the public via the public register.

VAT on EU environmental grants – 21 January

The European Commission has replied to a question asked by the MEP **Janusz Zemke (S&D/Poland)** with regard to VAT on environmental grants.

In his question, Mr. Zemke asks the Commission whether EU rules require Member States to include EU grants in the VAT base, whether Member States are prohibited to set a lower rate or exempt grants from VAT, and whether EU grants can be increased by the VAT due so that the residents do not incur tax liabilities going beyond their own contribution to environmental investment.

In his reply, **Commissioner Moscovici** underlines that subsidies that are directly linked to the price of a supply of goods or services must be included in the taxable amount on which VAT is levied. Thus, whether the EU grants received are indeed directly linked to the price must be assessed on a case-by-case basis.

Moreover, he states that if the subsidy has to be included in the taxable amount, Member States are not allowed to apply a lower VAT rate than the one usually applied to the supply in question nor can they exempt the subsidy from VAT. However, the Commissioner also highlights that where VAT must be applied, it may be declared as an eligible cost by the beneficiary of an EU grant unless otherwise specified in the EU spending programme. The applicable eligibility rules regarding VAT are announced in the respective Calls for proposals.

Call for preferential VAT rate on alcohol used in gastronomy – 24 January

The European Commission has replied to a question asked by the MEP **Norbert Erdős (EPP/Hungary)** with regard to VAT on alcohol used in gastronomy.

In his question, Mr. Erdős asks the Commission what is its views concerning a possible reduction of VAT on quality beers and wines used in gastronomy.

In his reply, **Commissioner Moscovici** underlines that under current VAT rules Member States may apply a reduced VAT rate of a minimum of 5% to the supply of restaurant services including alcoholic beverages supplied in restaurants. The VAT rates reform proposed by the Commission and currently being negotiated on between Member States would also provide for the possibility of such reduced rates or even a full exemption.

Cum-ex scandal – 24 January

The European Commission has replied to a question asked by the MEP **Steeve Briois (ENF/France)** with regard to the Cumex scandal.

In his question, Mr. Briois what the Commission is doing to address the Cumex scandal revelations and whether it would consider restricting the free movement of capital which, he argues, is "driving tax optimisation and evasion".

In his reply, **Commissioner Moscovici** underlines that free movement of capital is one of the EU's fundamental freedoms and that the Commission has already taken action that would address Cumex-like activities. He lists the number of relevant tax proposals launched by the Commission in past years to ensure better administrative cooperation on tax, exchange of information and transparency – including new transparency rules for intermediaries that will become applicable from 1 July 2020.

Black and grey lists of tax havens in the context of Brexit – 28 January

The Council has replied to a question asked by the MEP **Dariusz Rosati (EPP/Poland)** with regard to the EU list of non-cooperative jurisdictions in a Brexit context.

In his question, Mr. Rosati fears EU-UK cooperation on tax havens after Brexit, with particular reference to the British Crown Dependencies. He asks the Council whether it has considered revising its listing criteria accordingly and whether it would consider mandatory reporting for the so-called grey-listed countries to provide transparency on their progress with their commitments.

In its reply, the Council merely states that eight UK Crown Dependencies were deemed to be cooperative during the EU's initial listing process. It provides no further indications or more elaborate answers to the questions asked by Mr. Rosati.

Reverse charging – 4 February

The Council has replied to a question asked by the MEP **Stanislav Polčák (EPP/Czechia)** with regard to reverse charing.

In his question, Mr. Polčák laments that the newly agreed reverse charge mechanism provisions are only temporary. He asks the Council whether it has considered instead more "stable legislation" on reverse charging as constant changes in regulations are "the road to hell".

In its reply, the Council acknowledges that it adopted the reverse charge measures referred to by the MEP, and merely states that the Member States are also currently working on the Commission's definitive regime proposals.

Double taxation – 6 February

The European Commission has replied to a question asked by the MEP **Nuno Melo (EPP/Portugal)** with regard to double taxation.

In his question, Mr. Melo refers to a specific case involving a US company supplying car parts to a European consumer, and argues that VAT charged on transport costs on which this tax has already been levied amounts to double taxation. He asks the Commission whether it is legal to charge customs duties not only on the value of the good that justified the creation of the duty, but also on transport costs that have nothing to do with this good, and whether VAT and customs duties can be charged on transport costs for which VAT, or equivalent tax, has already been paid.

In his reply, **Commissioner Moscovici** notably confirms that the taxable amount for the importation of goods is the value for customs purposes which includes, among others, customs duties due upon importation and transport charges incurred up to the first place of destination in the Member State of importation. He argues that this ensures equal treatment of imports of goods compared with similar domestic products that will bear VAT. As a general principle, the transport costs are exempt from VAT or an equivalent tax (if at all existing, which is not the case in the US) in the country of origin/exportation, the Commissioner concludes.

European cum-ex tax fraud scandal – 7 February

The European Commission has replied to a question asked by the MEP **Dimitrios Papadimoulis (GUE-NGL/Greece)** with regard to the Cumex scandal.

In his question, Mr. Papadimoulis asks the Commission what measures it has taken to address the Cumex scandal and whether it has investigated its magnitude, what sanctions it would consider on the board of directors of the implicated banks, and what went wrong in the application of the current EU rules.

In his reply, **Commissioner Moscovici** underlines that it is up to Member States to administer and enforce tax laws. The Commission merely promotes cooperation between the Member States. He highlights that the Commission has revised the Directive on Administrative Cooperation on tax already several times in past years, and currently evaluates how to strengthen administrative cooperation even further. Finally on penalties, the Commissioner highlights that relevant EU law (Directive 2013/36/EU) means that Member States will have to introduce administrative penalties in case of violations of EU banking legislation, including possible sanctions on management. However, the actual application of the penalties mostly rests with national authorities.

The 25% tax break – 8 February

The European Commission has replied to a question asked by the MEP **Jérôme Lavrilleux (EPP/France)** with regard to a new French **'Madelin' scheme, which raises the income tax break for investments in SMEs from 18% to** 25%.

In his question, Mr. Lavrilleux laments that this increase could not be applied in 2018 as the tax break is considered state aid for SMEs and must therefore be approved by the Commission before it can be applied. He asks the Commission when it plans to approve this tax break.

In her reply, **Commissioner Vestager** confirms that the Commission is in constructive contact with France on the matter. However, she cannot yet comment on any potential next steps or predict timing.

Events

- 19/02/2019, ***Fair and Sustainable Taxation in the EU***, Fair Tax, Brussels. Source
- 19/02/2019, ***Taxation of the digitalised economy***, Business Europe, Brussels. Source
- 21/02/2019, ***Corporate Tax Out of Control? Debating EU Tax Protectionism***, ECIPE, Brussels. Source
- 21/02/2019, ***Reforming decision-making for EU taxation policy***, Bruegel, Brussels. Source
- 13-14/03/2019, ***Public hearing on digital taxation***, OECD, Paris. Source
- 20/03/2019, ***Future trends of taxation***, ETAF, Brussels. Source