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Policy update

Tax Policy Update

17 – 28 September

HIGHLIGHTS

- European Parliament takes first steps towards a position on digital taxation
- Germany prepares to implement tax intermediaries Directive, auditors within LPP
- Ireland recovers EUR 13,1 billion from Apple, Commission rules McDonald's did not receive illegal state aid
- New study claims digital services tax is fundamentally flawed

European Commission

Commission publishes new VAT gap figures – 21 September

The European Commission has published latest figures (from 2016) on VAT gap in the EU in a new report. The Commission also published a helpful table summarising the VAT gap situation in the EU.

According to these latest figures, VAT gap decreased by EUR 10,5 billion to EUR 147.1 billion in 2016, a drop to 12.3% of total VAT revenues compared to 13.2% the year before. The individual performance of member states still varies significantly. The VAT gap decreased in 22 member states. Bulgaria, Latvia, Cyprus, and the Netherlands displayed strong performances, with each seeing a decrease of more than 5 % in VAT losses. However, the VAT gap increased in six member states: Romania, Finland, the UK, Ireland, Estonia, and France.

European Parliament

European Parliament publishes draft report on gender equality and taxation policies – 17 September

The MEPs **Marisa Matias (GUE-NGL/POR)** and **Ernest Urtasun (Greens-EFA/SPA)** have published their draft report on gender equality and tax policies in the EU. The draft report is a joint initiative of ECON and FEMM (gender equality) Committees.

The report looks into a wide range of tax areas, from personal to corporate and indirect taxation, and for each reflects on and proposes reforms to address potential gender inequality impacts of the prevailing tax system.

ECON and FEMM Committees will vote on the draft report in the course of autumn, ahead of a Plenary vote currently scheduled for 14 January 2019. This is a legally non-binding report, which will not commit the Commission or member states to any course of action.

ECON takes first step towards a position on digital taxation – 20 September

The European Parliament has taken a first step towards its position on the Commission's digital tax proposals, with the publication of two draft reports on significant digital presence (SDP) and the digital services tax (DST).

The SDP draft report has been prepared by the MEP **Dariusz Rosati (EPP/POL)**. In it, he notably calls for the SDP provisions to be integrated into the CCCTB framework. Moreover, the Commission should evaluate the Directive's impact after three years, rather than the proposed five. Mr. Rosati also maintains that sensitive data, such as information on users' location, should be protected. The Commission ought to also carefully study the potential impact of the provisions on SMEs. And finally, he calls on the Commission to issue further guidance for tax administrations and companies alike.

The DST draft report, in turn, has been prepared by the MEP **Paul Tang (S&D/NLD)**. He proposes notably the following changes to the initial Commission proposal:

- Increase the DST rate from 3% to 5%
- Broaden the tax base by including in DST's scope the supply of digital content such as video, audio or text using a digital interface and the sale of goods or services which are contracted online via e-commerce' platforms
- Clarification that DST should also apply to the sale and transmission of data attained through active participation of users on digital interfaces
- Introduction of a sunset clause – a proposal also supported by Accountancy Europe
- Introduction of an audit mechanism where the DST return filed with the member state of identification is audited every three years audited

ECON Committee will vote on both the DSP and the DST draft reports on 3 December. Likewise, a Plenary vote for both is expected for 14 January 2019.

For both files the European Parliament only provides a legally non-binding opinion, whilst the member states will decide by unanimity. The European Parliament, however, hopes to inspire negotiations within the Council.

ECON publishes draft report on reforming Fiscalis programme – 21 September

Sven Giegold (Greens-EFA) has published his draft report on the Commission's proposal to reform the Fiscalis programme. See Accountancy Europe's Tax Policy Update from 8 June for more information on the proposal.

In his draft report, Mr. Giegold proposes notably the following changes to the Commission proposal:

- The programme's actions should include a specific list of priority actions that member states and Commission should work on, including a particular focus on joint audits
- The participation of external experts shall be allowed but only under condition of public transparency and balance of interests. This means including representatives from academia, businesses, trade unions and civil society organisations
- Publication of progress reports, indicating member states' progress in achieving the Fiscalis programme's objectives and identifying areas for improvement

The European Parliament will legislate on this file on an equal footing together with the member states in the Council. A vote in Plenary is currently expected for late-November.

TAX3 Committee holds hearing on third country dimension of the fight against tax evasion and avoidance – 26 September

TAX3 Committee has held a public hearing on the third-country dimension of the fight against tax avoidance and evasion. Given the timeliness of the topic, Brexit and the future status of the UK as a new third country to the EU also emerged during the discussion. The hearing consistent of two panels – one focusing on the Brexit dimension specifically, and the second on third country dimension in general.

Panel 1 – Brexit and tax under the loop

The first panel on Brexit consisted of **Tove Ryding** from the NGO Eurodad (focusing on development policies, and how the tax system hampers developing countries), as well as the Labour MP **Margaret Hodge**.

Ms. Hodge emphasised that taxation is bound to be included in any future Brexit deal, and that Theresa May's recently renewed threats to turn the UK into a low-tax jurisdiction is thus not something to be worried about. Moreover, she elaborated on a cross-party effort that she is engaging in with a Conservative MP colleague to ensure that British overseas territories abide by the relevant tax and financial transparency standards.

Ms. Ryding, for her part, speculated that it will be difficult for the UK and its overseas territories not to be blacklisted by the EU after Brexit. However, speaking of tax havens more broadly she also insisted that the EU should also focus on what is happening within its own bloc, with countries such as the Netherlands arguably facilitating dubious practices. She thus lamented that the EU's blacklisting exercise does not include its own member states.

Panel 2 – relations with third countries and tax

The second panel, in turn, discussed how bilateral tax treaties and trade agreements could be harnessed for the benefit of the fight against illicit financial flows and tax evasion, and the impact of EU-third country agreements on developing countries.

The panel consisted of **Sandra Gallina** from the European Commission's DG TRADE, **Hannah Tranberg** from the NGO ActionAid Denmark, and **Eric Mensah** from the UN.

Ms. Gallina highlighted that the EU's trade agreements tend to include a taxation clause calling on all related parties to do their best to implement international standards. However, at the same time she emphasised that these agreements should be flexible, and not limit the policy choices too much. She also argued that free trade agreements are subject to strong monitoring, and bring about transparency and accountability.

In turn, Ms. Tranberg expressed concerns that tax treaties limit the taxing rights of developing countries, as their main aim is to prevent double taxation through reducing the scope of the related parties to enact tax policies. These limitations to taxing rights include, for example, withholding taxes, dividends and interest payments. Additional challenges for developing countries stem from the permanent establishment definitions, as well as capital gains tax restrictions. All of these results in millions of dollars being lost by developing countries each year. She called for a spill-over analysis of the bilateral tax treaties, but also of EU's tax policies, to better understand the impact that these may have on the development of poorer regions across the world.

Finally, Mr. Mensah insisted that whilst the OECD BEPS project may help the EU and developed countries, it is of less help to African and other less developed countries that were not even involved in devising the BEPS framework. He emphasised that the UN model might be better suited for developing countries, as there the focus is more on the retention of taxing rights rather than focusing on base erosion. Finally, he called for comprehensive global solutions to reform the international tax framework and tax treaties, with specific attention paid to the different needs and capabilities of developing countries.

The next meeting of the TAX3 hearing will be on Monday 1 October. The meeting will focus on EU-Swiss relations on taxation.

Court of Justice of the EU – Rulings

C-685/16: deduction of profits from shareholdings in a capital company – 20 September

The Fifth Chamber of the CJEU has ruled that the EU treaties preclude national legislation which subjects a deduction of profits from shareholdings in a capital company with its management and head office in a non-EU member state to stricter conditions than a deduction of profits from shareholdings in a non-exempt capital company governed by national law.

International

Macron waters down his plans to eradicate French 'EXIT TAX' – 15 September

According to the Financial Times, Macron has softened his promise to get rid of France's so-called 'exit tax', which is a levy on capital gains leaving the country.

Macron's promise to eradicate the tax was part of his efforts to improve France's public image and render it more "business-friendly". However, as reported by the Financial Times article, Macron no longer intends to scrap the tax, but rather to render it more targeted. This means that the exit levy would only apply to capital movements whose intention is to optimise tax obligations.

Germany prepares to implement tax intermediaries Directive, LPP to cover auditors as well – 17 September

Germany is preparing to transpose the European Commission's tax intermediaries Directive into national law.

The German finance ministry has sent discussion drafts to the local regions, which proposes to implement the EU proposal into the German Tax Code almost word by word. As with the EU proposal, the primary reporting obligation lies with the intermediary, whilst the taxpayer only reports under specific circumstances as defined in the Directive. These circumstances include, for example, if an arrangement is devised in-house by the taxpayer (i.e. there is no external intermediary) or if an intermediary invokes its legal professional privilege (LPP) exception.

Under the German draft law, LPP exception would cover lawyers, tax advisors, and auditors alike. However, they must inform their clients immediately about the reporting obligation.

In addition, a separate set of rules that would extend the reporting requirements to purely domestic tax arrangements is still under discussion. This reform is, reportedly, supported by the federal states. Upon conclusion of these discussions between the federal states and the federal government, the domestic reporting obligation could be added to the Tax Code at a later stage. The domestic arrangements would not, however, be subject to automatic exchange at EU-level.

Timeline for the EU Directive

As a reminder, the EU Directive must be transposed into national law by 31 December 2019 and becomes applicable applies by 1 July 2020. Moreover, member states must implement the Directive in a way that reportable cross-border tax arrangements that are put in place on or after 25 June 2018 must be retroactively reported.

Earlier this year, Accountancy Europe published a factsheet on the Directive and its implications for stakeholders.

Netherlands unveils tax reform proposals and opens public consultation on tax rulings and tax havens blacklist – 18/25 September

The Dutch ministry of finance has published a set of legislative proposals to reform the country's tax system and extending well into 2019 and beyond. The legislative package includes proposals implementing the EU's Anti-Tax Avoidance Directive (ATAD 1), additional Dutch corporate tax proposals as well as withholding tax developments.

More specifically, the proposals:

- Implement ATAD as adopted by the Council in June 2016, and most importantly the CFC rules and the earnings stripping rule
- Reduce the corporate income tax rate, and changes to the rules regarding tax losses and depreciation of buildings
- Abolish the current Dutch dividend withholding tax and introduce a withholding tax on intercompany dividend distributions to low tax jurisdictions and in abusive situations

Public consultations to inform future tax reforms

In addition to the new legislative proposals on tax, the Dutch government has also opened a public consultation on two possible tax reform measures: the introduction of a Dutch list of low-tax jurisdictions, and changes to the country's tax treaty policy.

The low-tax list would include jurisdictions such as Bahamas, Isle of Man, Bermuda, Guernsey, Jersey, Qatar, UAE and Saudi Arabia. The consultation on tax treaties, in turn, aims to ensure that Dutch bilateral tax treaties are compatible with the variety of anti-avoidance measures that the country has introduced in past years.

The deadline for responding to the consultation is rather tight – 22 October 2018.

The consultation document is available here. In turn, here is an annex to the tax treaty related matters, and here the annex to the low-tax jurisdiction list. All documents are in Dutch.

OECD

OECD publishes comments received on transfer pricing aspects of financial transactions – 14 September

The OECD has published all the public comments received as part of its consultation on transfer pricing aspects of financial transactions (BEPS Actions 8-10). The consultation ran from 3 July to 7 September 2018.

The consultation responses are available from here, here and here.

Saudi Arabia signs landmark agreement to strengthen its tax treaties – 18 September

Saudi Arabia has signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (the Convention). It thus becomes the 84th jurisdiction to join the Convention, which now covers over 1,400 bilateral tax treaties.

State Aid

Ireland recovers full sum of EUR 13 billion from Apple – 18 September

Ireland has collected the full sum of EUR 13,1 billion in unpaid taxes plus EUR 1,2 billion in interest from Apple. In turn, the Commission has dropped a lawsuit it filed against Ireland for delays in collecting the money.

The money has been put into an escrow account, where it will remain until the Court of Justice of the EU (CJEU) has given its final verdict on the case. This is likely to take several years.

As a reminder, the European Commission ruled in August 2016 that Ireland had granted Apple unlawful state aid by giving it a more favourable tax treatment than other businesses in the sector. It therefore ordered Ireland to recover over EUR 13 billion in taxes from Apple. Ireland and Apple, naturally, vehemently disagree with the Commission's assessment, and have challenged it in the CJEU.

Commission concludes that Luxembourg did not give illegal state aid to McDonald's – 19 September

The European Commission has 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. At the same time, the Commission welcomed steps taken by Luxembourg to prevent future double non-taxation.

Other News

NEW STUDY ON DIGITAL SERVICES TAX CRITICISES THE COMMISSION'S APPROACH – 20 September

A new study published by Copenhagen Economics claims to have found several flaws in the Commission's digital services tax (DST) proposal.

In particular, the study argues that:

- The rationale for introducing DST does not reflect the evidence that digital firms pay average corporate tax rates
- The Impact Assessment (IA) for the DST does not fully consider the substantial distortions and costs to EU consumers and firms from this new tax
- Actual revenues from the proposal are likely to be significantly lower than suggested

The study has been funded by CCIA, a trade association representing large technology businesses.

Oxfam report: major pharmaceutical firms are aggressively avoiding their tax obligations – 18 September

According to a new report by the NGO Oxfam, large pharmaceutical firms are engaging in "aggressive tax avoidance" that deprives governments of tax income that could be used for public healthcare. Moreover, these companies are reportedly by using their power and influence to undermine efforts to curtail drug prices.

The companies covered by the report are Abbott, Johnson & Johnson, Merck, and Pfizer.

Tax Justice Network report: EU tax haven black list too limited in scope – 23 September

The NGO Tax Justice Network has published a new report and data which argue that "tax havens" that are currently blacklisted by the EU are responsible for just 1% of the financial secrecy services facing EU member states. At the same time, 34% is supplied by financial centres from within the EU targeting other member states.

The implications of the research, if correct, is that the EU's blacklist has failed to include any of the top 10 suppliers of "financial secrecy services" to the EU. Out of these 10, four are EU's own member states, namely the Netherlands, Luxembourg, Germany and France. Such "financial secrecy services" include shell companies and banking secrecy laws which, according to Tax Justice Network, enable money laundering, corruption, tax abuse and the financing of terrorism.

MEP Questions & Answers

Capital allowances for intangible assets in the EU – 31 August

The European Commission has replied to a question asked by the MEP **Matt Carthy (GUE-NGL/IRL)** with regard to capital allowances for intangible assets.

In his question, Mr. Carthy refers to the particularities of the Irish tax system that enables allowances for intangible assets under certain circumstances. He asks the Commission how the Irish system compares with those of other EU member states.

In his reply, **Commissioner Moscovici** states that the Commission has not undertaken a detailed legal comparison of such regimes in different EU member states. However, the Commission's Taxes in Europe Database contains information on around 650 taxes. He concludes by reminding that in general, the detailed design of national corporate tax systems is a matter of national sovereignty. Moreover, allowances for intangible assets should always be understood in the context of the overall corporate tax system of a country.

Outsourcing of consulting services to the Big Four – 5 September

The European Commission has replied to a question asked by the MEP **Miguel Viegas (GUE-NGL/POR)** with regard to the EU using the Big Four (B4) for consulting services.

In his question, Mr. Viegas refers to a recent report by the NGO Corporate Europe Observatory (CEO), which claimed that the B4 are deeply entrenched in tax avoidance related lobbying in the EU. For further information on the CEO report, see Accountancy Europe's Tax Policy Update from 6 July. Mr. Viegas argues that the B4 are deeply entrenched in the tax avoidance industry, yet the Commission uses them to prepare reports on transfer pricing. He singles out KPMG and Deloitte, in particular. He asks the Commission whether this outsourcing is a conflict of interest, and why the Commission keeps on using them when alternatives exist e.g. in universities.

In his reply, **Commissioner Moscovici** states that the Commission awards studies as the result of public procurement contracts. As such, there is no margin of discretion to exclude the B4. He also argues that EU rules on public procurement help obtain better value by ensuring that contracts are awarded through transparent, non-discriminatory and competitive tender procedures.

He continues by emphasizing that the Commission regularly subcontracts research to consultancies and research institutions all over the world. In this respect, the Commission is particularly careful about not creating conflicts of interest. In this context, the Big Four are also eligible to apply for tenders and are treated by the Commission in the same way as any other organisation.

US Foreign Account Tax Compliance Act (FATCA) – 18 September

The European Commission has replied to a question asked by the MEP **Luke Ming Flanagan (GUE-NGL/IRL)** with regard to the US FATCA.

In his question, Mr. Flanagan asks the Commission whether it continues to believe that the US FATCA is in line with EU rules. If that is not the case, will the Commission intervene to protect EU citizens, the economy and sovereignty.

In his reply, **Vice-President Dombrovskis** re-iterates that in the EU, FATCA is implemented through bi-lateral intergovernmental agreements between EU member states and the US, and the Commission is not a part of them. However, the Commission will use publicly available information to conduct a factual assessment of FATCA's functioning. However, a lot of the non-public information – such as whether reciprocity is respected by the US – can only be provided by member states.

Ireland's transfer pricing regime – 19 September

The European Commission has replied to a question asked by the MEP **Matt Carthy (GUE-NGL/IRL)** with regard to the Irish transfer pricing regime.

In his question, Mr. Carthy asks the Commission whether the Irish transfer pricing regime is able to ensure compliance with the arm's length principle, and how the Irish transfer pricing system compares with that of other countries.

In her reply, **Commissioner Vestager** points out that in the Apple Ireland state aid case only concerned the attribution of profit to an Irish branch of a non-resident company. However, Ireland's transfer pricing legislation itself only focuses on the pricing of intra-group transactions. She also reminds that a legislation should not give rise to state aid infringements if it results in transfer prices for transactions between companies belonging to the same multinational corporate group that approximate prices negotiated at arm's length by independent companies on the market.

Events

- 05/10/2018, ***International tax: is multilateralism in crisis?*** Belgian Financial Forum, Brussels. Source
- 09/10/2018, ***Fair Taxation Seminar in Dublin***, European Commission, Dublin. Source
- 26/10/2018, ***Beyond tax policy***, FEFP, Amsterdam. Source
- 20/11/2018, ***Will digitalisation make taxation easier?*** ETAF, Brussels. Source