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EU Tax Policy Report

Semester II 2020

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CFE's EU Tax Policy Report provides a detailed analysis of primary tax policy developments at EU level of interest to European tax advisers. It also includes an overview of relevant CJEU case-law European Commission decisions covering the second half of 2020.

Highlights

The latter half of 2020 saw the continuation of the COVID-19 pandemic conditions and its accompanying public health and economic challenges. Germany, who held the Presidency of the Council of the European Union during this period successfully faced challenging negotiations on agreeing the terms of the EU Recovery Instrument and long-term budget, and managed to progress discussion on multiple taxation files. European Council President Charles Michel confirmed on 10 December that leaders of the European Union reached an agreement on the EU's multi-annual financial framework (MFF), encompassing the recovery package for the EU. German Chancellor Angela Merkel was instrumental in securing a balanced outcome that satisfied the rule-of-law requirements demanded by the EU and most western Member states and the criticism of such an approach led by Poland and Hungary.

European Commission President Von der Leyen delivered her first State of the Union address on 16 September 2020, setting out the Commission's vision on EU recovery from COVID-19 and the strengthening and advancement of the EU. Taxation was central to many of the issues focussed on during the address, in particular in relation to the goal announced to reduce EU emissions by 55% by 2030, up from the planned 40% decrease. Green taxes and the Carbon Border Adjustment Mechanism will be central to this plan. Von der Leyen also detailed 37% of the New Generation EU funds will be invested in projects in line with the EU Green Deal objectives, with 30% of the 672.5 billion Euro Next Generation EU recovery instrument to be raised through green bonds.

The Council of the EU adopted conclusions on the tax challenges facing the EU, emphasising the importance of fair and efficient tax systems in recovery from the coronavirus crisis, and the role of EU Green Deal in the recovery. The Council also reiterated support for EU participation in the ongoing OECD negotiations to agree an international solution to the challenges posed by the digital economy and urged the Commission to be ready with legislative solutions required following the outcome of negotiations. The Council in its report also expresses support for the Commission proposals concerning extending the scope of the directive on administrative cooperation in tax matters, to extend exchange of information to the platform economy and e-assets, in the DAC7 and DAC8 proposals. These issues, as well as country-by-country reporting and digital regulation will be the focus for the Portuguese in its Presidency of the Council of the EU in the first half of 2021. The EU will also re-introduce proposals for a digital tax should international negotiations at OECD level fail to result in a compromise.

After President-Elect Joe Biden's historic success in the US Presidential elections, the EU has also called for a partnership with the US to develop a *"rule book for the digital economy and society covering everything, from Big Tech to data use and privacy, from infrastructure to security".* Meanwhile, negotiations for a comprehensive post-Brexit free trade agreement between the EU and the UK came down to the wire as Christmas approached, with a deal reached just in time to avoid the much feared 'cliff-edge' scenario at the end of the transition period on 1 January 2021. The fisheries industry and access to the single market remained stumbling blocks up to the end of the negotiations.

2021 will no doubt prove an interesting year in tax policy, and CFE will remain engaged in policy develoments and keep informing its members thereof.

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Digital Tax Developments

01

How to Tax Digital Business: OECD Pillar 1 & 2 Blueprint Consultation

In October, the OECD launched a consultation concerning blueprints for Pillar 1 (review of profit allocation and nexus rules to reflect digital business models) and Pillar 2 (global anti-base erosion rules for a minimum effective taxation rate).

The OECD G20 Report and Inclusive Framework Cover Statement presented to Finance Ministers in advance of the G20 meeting scheduled for 14 October set out that the blueprints reflected "convergent views on a number of key policy features, principles and parameters of both Pillars, and identifies remaining political and technical issues where differences of views remain to be bridged".

As concerns Pillar 1, the Inclusive Framework noted that progress has been made on developing technical and policy solutions to the working blocks for agreeing tax allocations rights, and that the solution would:

- *Allocate a portion of residual profit of in-scope businesses to market/user jurisdictions,*
- *Be computed using consolidated financial accounts as the starting point, contain a limited number of book-to-tax adjustments and ensure that losses are appropriately taken into account,*
- *Contain broad safe-harbour or exemption rules from segmentation to reduce complexity,*
- *Contain effective means to eliminate double taxation in a multilateral setting, including a new multilateral tax certainty process with respect to Amount A, and a new multilateral convention would be developed to implement the solution.*

Issues of scope, quantum, safe harbour implementation and tax certainty matters for Amount A will be progressed in further work of the Inclusive Framework following the public consultation.

The Inclusive Framework Cover Statement additionally details that as regards Pillar 2, although no agreement had been reached, the Blueprint provides a solid basis for future agreement on:

- *Design of the four rules as set out in the Programme of Work: a) the income inclusion rule (IRR); b) the switch-over rule; c) the undertaxed payment rule (UTPR); and d) the subject to tax rule (STTR);*

- *The right of all members of the Inclusive Framework to implement the income inclusion rule and subject to tax rule as part of an agreed Pillar Two regime.*

- *That there may be members that are not in a position to implement these rules but those implementing them would apply them consistently with the agreed Pillar Two vis-à-vis all other jurisdictions (including groups headquartered therein) that also join this consensus;*

- *That a subject to tax rule will be an integral part of a consensus solution on Pillar Two;*

- *The basis on which the United States' Global Intangible Low Taxed Income Regime (GILTI) would be treated as a Pillar Two compliant income inclusion rule as set out in the Report on the Blueprint on Pillar Two.*

OECD Secretary-General Angel Gurría stated of the developments, *"It is clear that new rules are urgently needed to ensure fairness and equity in our tax systems, and to adapt the international tax architecture to new and changing business models. Without a global, consensus-based solution, the risk of further uncoordinated, unilateral measures is real, and growing by the day. It is imperative that we take this work across the finish line. Failure would risk tax wars turning into trade wars at a time when the global economy is already suffering enormously."*

The OECD held a webinar on 20 October 2020 examining the economic analysis and impact assessment of the blueprints, and though the COVID-19 crisis could reduce the revenue expected to be collected under the economic analysis, the analysis shows that Pillar 1 and 2 measures could increase global corporate income tax by 50 – 80 million USD per year, with around 100 million USD expected to be reallocated to market jurisdictions, representing an increase in tax revenue for all economies, apart from those where "investment hubs" are located.

The current Pillar 2 blueprint would reduce profit shifting incentives, and generate revenue gains across all jurisdictions. In addition, the webinar highlighted that although the measures would involve increased compliance costs for MNEs, the cost would be far higher without a global solution, given the numerous unilateral digital tax measures being implemented across the globe. A blogpost was also published further summarising the analysis.

A virtual public consultation will taken place in January 2021, with a view to an agreement being concluded and model draft legislation and guidelines for implementation being published by the Inclusive Framework by mid-2021. CFE issued an Opinion Statement concerning the blueprints.

In the meantime, French tax authorities have commenced collection processes for its digital tax signed into law in July 2019, with companies such as Facebook and Amazon having received communications with demands for payment of tax for the year 2020. Collection was suspended temporarily during efforts to agree an international means to tax digital companies at the OECD.

A reciprocal tariff will be imposed on French luxury items, such as handbags, make-up and champagne. It remains to be seen what may be achieved under US President-elect Joe Biden's administration, but negotiating positions on issues such as digital tax are likely to be unchanged under the new administration.

EU Commission President Ursula von der Leyen has also confirmed at multiple occasions that should no agreement be reached on digital taxation at the OECD by the deadline of mid-2021 that the EU will take further steps on its previously stalled digital tax discussions, stating, "We will spare no effort to reach agreement in the framework of OECD and G20. But let there be no doubt: should an agreement fall short of a fair tax system that provides long-term sustainable revenues, Europe will come forward with a proposal early next year."

Brexit

02

A Christmas Miracle: EU-UK Deal Reached

Negotiations for a comprehensive post-Brexit free trade agreement between the EU and the UK came down to the wire, with a deal reached on Christmas Eve, narrowly avoiding the much feared 'cliff-edge' scenario at the end of the transition period on 1 January 2021. The fisheries industry and access to the single market remained stumbling blocks up to the end of the failed negotiations. A summary of the key changes in EU-UK relations can be found here.

Most notably, the EU-UK Trade & Co-Operation Agreement provides for:

- *zero tariffs and zero quotas on all goods that comply with the appropriate rules of origin;*
- *a commitment to a level playing field by maintaining high levels of protection in areas such as environmental protection, the fight against climate change and carbon pricing, social and labour rights, tax transparency and State aid, with effective, domestic enforcement, a binding dispute settlement mechanism and the possibility for both parties to take remedial measures.*
- *a new framework for the joint management of fish stocks in EU and UK waters. The UK will be able to further develop British fishing activities, while the activities and livelihoods of European fishing communities will be safeguarded, and natural resources preserved.*
- *continued and sustainable air, road, rail and maritime connectivity, though market access falls below what the Single Market offers. It includes provisions to ensure that competition between EU and UK operators takes place on a level playing field.*

The EU's DGTAXUD has published a detailed Q&A document addressing the impact of the UK's withdrawal from the single market on taxation and customs, as well as a notice concerning the UK no longer being covered by EU preferential trade agreements with third countries. Additionally, DG TRADE has produced guidance on customs procedures post-Brexit and its Access2Markets trade portal provides product-specific information on customs procedures and rules of origin. Earlier in the year, the Government of the United Kingdom announced changes in the VAT treatment of goods imported from overseas and sold to UK customers from 1 January 2021, and also published guidance on actions required by business to continue importing from the EU Member states after 1 January 2021.

Although a deal was not able to reached in time to meet the EU Parliament's deadline to ensure implementation prior to the end of the transition period, EU member states approved the agreement on 29 December 2020, and the agreement will now apply provisionally until the EU Parliament's formal vote takes place. UK parliament approved the agreement on 31 December 2020. The European Parliament will vote on the agreement later this month.

The EU confirmed in December that the terms of the Withdrawal Agreement would be fully operational from 1 January 2021 and the EU Council adopted a series of legislative proposals aimed at preparing the transport sector for a no-deal scenario on 1 January 2021.

New EU Digital Rules 03

End of Market Domination for Digital Companies: New EU Rules Based on Renewed Antitrust Paradigm

In December, the EU Commission unveiled two new proposals as part of its plan to create an EU for the Digital Age, the Digital Services Act and the Digital Markets Act, which will introduce rules for digital services provided in the EU, such as online marketplaces, platforms and social media. The proposals are intended to "better protect consumers and their fundamental rights online, and will lead to fairer and more open digital markets", based on renewed antitrust paradigm which is fit to address the market dominance of the big tech companies, primarily by allowing the Commission to designate them as 'gatekeepers'. By doing so, the proposals also aim to support development of smaller and medium-sized enterprises by lowering compliance costs and prohibiting unfair conditions imposed by dominant online platforms. The Commission in its announcement of the package detail that the legislation is intended to operate as follows:

Digital Services Act

The Digital Services Act will introduce a series of new, harmonised EU-wide obligations for digital services, carefully graduated on the basis of those services' size and impact, such as:

- *Rules for the removal of illegal goods, services or content online;*
- *Safeguards for users whose content has been erroneously deleted by platforms;*
- *New obligations for very large platforms to take risk-based action to prevent abuse of their systems;*
- *Wide-ranging transparency measures, including on online advertising and on the algorithms used to recommend content to users;*
- *New powers to scrutinize how platforms work, including by facilitating access by researchers to key platform data;*
- *New rules on traceability of business users in online market places, to help track down sellers of illegal goods or services;*
- *An innovative cooperation process among public authorities to ensure effective enforcement across the single market.*

Platforms that reach over 10% of the EU's population will be subject to a new accountability framework, with an oversight body capable of imposing sanctions.

Digital Markets Act

The Digital Markets Act will:

- *Apply only to major providers of the core platform services most prone to unfair practices, such as search engines, social networks or online intermediation services, which meet the objective legislative criteria to be designated as gatekeepers;*
- *Define quantitative thresholds as a basis to identify presumed gatekeepers. The Commission will also have powers to designate companies as gatekeepers following a market investigation;*
- *Prohibit a number of practices which are clearly unfair, such as blocking users from un-installing any pre-installed software or apps;*
- *Require gatekeepers to proactively put in place certain measures, such as targeted measures allowing the software of third parties to properly function and interoperate with their own services;*
- *Impose sanctions for non-compliance, which could include fines of up to 10% of the gatekeeper's worldwide turnover, to ensure the effectiveness of the new rules. For recurrent infringers, these sanctions may also involve the obligation to take structural measures, potentially extending to divestiture of certain businesses, where no other equally effective alternative measure is available to ensure compliance;*
- *Allow the Commission to carry out targeted market investigations to assess whether new gatekeeper practices and services need to be added to these rules, in order to ensure that the new gatekeeper rules keep up with the fast pace of digital markets.*

The European Parliament and the Member States will discuss the Commission's proposals in the ordinary legislative procedure. If adopted, the final text will be directly applicable across the European Union.

The OECD has also published Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy. The Rules were developed as part of a wider OECD strategy to address tax challenges surrounding the digital economy, with the objective of tax administrations worldwide adopting a uniform set of rules concerning the reporting requirements for transactions and income of platform sellers. The Model Rules were developed to increase transparency and minimise compliance burdens for tax administrations and taxpayers, in properly recording and taxing activities carried out on digital platforms which may have been previous carried out via the informal cash economy.

Pascal Saint-Amans, Director of the OECD Centre for Tax Policy and Administration, stated *"The approval of the MRDP by the G20/OECD Inclusive Framework on BEPS proves that multilateral solutions to address tax challenges in the digital economy are possible and that they are to the benefit of tax administrations, taxpayers and businesses alike".* The OECD will progress the international legal framework to facilitate the automatic exchange of the information collected under the Model Rules.

EU & OECD COVID-19 Recovery & Guidance

04

Record Amount of Funds to Contend the COVID-19 Impact on the Single Market Agreed at EU Level

The leaders of the European Union reached an agreement on the long-term budget, effective 1 January 2021, i.e. EU's multi-annual financial framework (MFF). In addition, the agreement encompasses a COVID-19 recovery package for the EU. The agreement was confirmed by the European Council President Charles Michel on 10 December.

German Chancellor Angela Merkel, who holds the EU Presidency at present, was instrumental in securing a balanced outcome that satisfies the rule-of-law requirements demanded by the EU and most western Member states and the criticism of such an approach led by Poland and Hungary. According to the compromise, Poland and Hungary were able to support the budget until the European Court of Justice rules on the legality of making the use of EU budget funds contingent upon respect of rule of law by all Member states. Hungary and Poland previously vetoed the budget, demanding that the use of EU funds is not contingent on specific 'rule-of-law' requirements. EU leaders requested from the European Commission to refrain from enforcing the rule-of-law requirements against Poland and Hungary pending any challenge in the Court of Justice of the European Union.

The agreement allocates a further 16 Billion Euro beyond what was agreed at the Summit in July by Member States, to bolster EU flagship programmes and deal with future crises. The additional funds will be drawn mainly from competition fines. Under the agreement made last week, Own Resources will be comprised of "*an ETS (Emissions Trading System)-based Own Resource (from 2023, possibly linked with a carbon border adjustment mechanism), a digital levy (from 2023), and an FTT-based Own Resource as well as a financial contribution linked to the corporate sector or a new common corporate tax base (from 2026).*"

In July, leaders agreed to the "Next Generation EU" new recovery instrument, a one-off recovery measure to be embedded within the EU budget for 2021 – 2027. 672.5 billion Euros will be raised by the Next Generation EU recovery instrument, by lifting the ceiling on own borrowing on the open market, to be raised in grants and loans. The Recovery fund is intended to support Member State investments and reforms, incentivise private investment and strengthen EU healthy security and prepare for future crises. The fund will invest in programmes that align with EU policy priorities, in particular the European Green Deal, in circular economy and renewable energy projects, as well as in projects that strengthen the Single Market and the EU's digital and technological presence. 37% of the Recovery Fund is to be invested in programmes fighting climate change and 20% of the funds must be invested in improving the digitalisation of economies.

The European Parliament Committee of Economic Affairs (ECON) also published a report containing steps (legislative and non-legislative) that were accomplished or planned by the European Parliament to contend the economic impact of the COVID-19 pandemic.

In addition to amendments of certain EU Directives which allow for deferral of deadlines, the European Parliament set out policy options for the post-crisis economic recovery of the Single Market concerning in particular regarding the general budget of the European Union for the financial year 2021, the Capital Markets Union (CMU), improving access to capital market finance, in particular by SMEs, further enabling of retail investor participation, and Sustainable Europe Investment Plan on how to finance the European Green Deal.

In addition, the EU Commission prolonged the application of the Temporary State Aid Framework adopted in March to assist Member States in dealing with the economic impact of the COVID-19 outbreak. The application of the Framework will be extended for a further six months, until 30 June 2021.

To minimise the economic impact of the COVID-19 outbreak, the Framework allows Member States to provide aid by: providing grants, selective tax advantages, and advance payments of up to 800,000 Euro; providing State guarantees for loans taken by businesses; subsidising public loans to companies, putting in place safeguards for banks providing State aid to the economy; and providing short-term export credit insurance.

The EU Commission also held an online conference on 21 September, hosted by Commissioner Paolo Gentiloni, on the topic of the Role of Taxation in Recovery and Long-term Growth, examining EU taxation priorities in contending the impact of COVID-19 and EU tax policy and modern business. Speakers included Paolo Gentiloni, Olaf Scholtz, German Minister for Finance and Benjamin Angel, Director for Direct Taxation, TAXUD.

Commissioner Gentiloni set out the TAXUD priorities as EU own resources to fund COVID-19 measures, pursuing tax fairness by continuing work at the OECD level on minimum taxation and fair taxation of the digital economy, and implementing this at EU level. Benjamin Angel confirmed Commission support for progress on the files, stating that more transparency and fighting tax havens through minimum taxation and effective taxation of multinationals were high on the EU agenda.

OECD COVID-19 RESPONSE

The OECD has published a report aimed at improving tax administrations' response to the COVID-19 crisis. This document analyses the transformed role of tax administrations in particular with respect to providing financial assistance and support to citizens and businesses, using tax administration staff or services to support wider government COVID-19 responses and information assistance by using tax administration's data analytics capabilities.

Commenting, Pascal Saint- Amans, Director of the OECD Centre for Tax Policy and Administration said of the report: *"In addition to the support that tax administrations have been giving to taxpayers under their own powers, many administrations have also played a critical role in the provision of wider government support, including financial support. These new roles bring significant challenges in terms of rapid IT systems developments and redeployment of staff, and the lessons learned will help ensure that tax administrations emerge stronger and more agile from the crisis".*

The OECD also published a further updated version of the database containing the details of taxation and financial measures taken by governments around the world in response to the COVID-19 outbreak. The OECD also has a dedicated webpage concerning the COVID-19 outbreak, providing information and country profiles on the spread of the virus, and recommended responses concerning a variety of policy areas.

EU Policy – Direct Tax

05

Green Taxes Consultations

In the fall, following on from an inception impact assessment published in March as part of its work to progress the EU Green Deal, the EU carried out a public consultation concerning the Carbon Border Adjustment Mechanism and the Energy Taxation Directive. The CBA Mechanism will aim to prevent carbon leakage caused by offshore production and carbon intensive imports, to ensure import prices reflect their carbon footprint, in order to achieve EU climate goals. In addition, technical consultations with specialised stakeholders and an impact assessment will be carried out by the Commission.

The consultation set out that a *"Carbon Border Adjustment Mechanism (CBAM) would ensure that the price of imports reflects more accurately their carbon content. This measure will be designed to comply with World Trade Organization rules and other international obligations of the EU. This measure would be an alternative to the current free allocation of allowances or compensation for the increase in electricity costs that address the risk of carbon leakage, because of carbon pricing in the EU's Emissions Trading System (ETS)."*

Concerning changes to the Energy Taxation Directive, an inception impact assessment published earlier in the year set out that a legislative proposal is planned for June 2021, which will aim to align the *"taxation of energy products and electricity with EU energy and climate policies"* and to update *"the scope and structure of rates as well as …use of optional tax exemptions and reductions by Member States".*

The consultation background document sets out that since the adoption of the Energy Taxation Directive in 2003 energy markets and technologies have experienced significant developments and the EU's international commitments have evolved considerably. It discusses an evaluation published in September 2019, that concluded: *"The wide range of exemptions and reductions de facto, favours the consumption of fossil fuel, the Directive does not adequately promote greenhouse gas emission reductions, energy efficiency, or alternative fuels (hydrogen, synthetic fuels, e-fuels, advanced biofuels, electricity, etc. and the ETD does not achieve anymore its primary objective in relation to the proper functioning of the internal market."*

CFE was pleased to provide input on the consultations.

EU Taxpayers' Rights Initiative

In October, the European Commission published roadmaps concerning a planned Communication taking stock of taxpayers' existing rights in the EU and Recommendation to Member States to facilitate the implementation of taxpayers' rights and simplify tax obligations. The Roadmaps detail out that a public consultation will take place in the early 2021 and that the Communication and Recommendation are planned to be published in the latter half of 2021. The CFE Professional Affairs Committee issued an Opinion Statement welcoming the consultation.

The planned initiatives form part of the Commission's Tax Package Action Plan, within the section on Simplifying EU Tax Rules for Competitiveness in the Single Market. The initiatives aim to improve awareness of taxpayers' rights throughout the EU, and the Recommendation will *"reflect on how Member States may accommodate their tax laws' related procedures to better respect and make more effective such rights. The document also suggests how, if necessary, Member States can further coordinate them, in order to improve the relationship between taxpayers' and tax administrations in an EU and the overall support to the recovery context."*

CFE's 13th European Webinar Conference on Tax Advisers' Professional Affairs was held virtually on Monday, 30 November 2020, discussed the topic of "Taxpayer Rights and Legal Certainty in the Digital Era", examining European and global developments in the protection of taxpayers' rights and the impact and implications of technology on taxpayers' rights. The virtual conference welcomed tax experts and academics, with a panel featuring: Dr Philip Baker QC, Barrister, Queen's Counsel, Field Court Tax Chambers and Visiting Professor, Oxford University, United Kingdom; Professor Nataša Žunić Kovačević Professor, Faculty of Law, University of Rijeka, Croatia; Paul Kraan, Partner, Van Campen Liem, The Netherlands; and Albert Raedler, Policy Officer, DG TAXUD, European Commission. The conference was moderated by Wim Gohres, the outgoing Chair of the CFE Professional Affairs Committee.

Albert Raedler, who is leading the EU Commission Communication & Recommendation initiatives on taxpayers rights closed the conference by introducing the Roadmaps, explaining that the initiatives aim to improve awareness of taxpayers' rights throughout the EU and simplify EU Tax Rules for competitiveness in the Single Market. He discussed that the Recommendation will reflect on how Member States may accommodate their tax laws' related procedures to better respect and make more effective such rights. The projects will also examine how Member States can improve the relationship between taxpayers' and tax administrations. Mr Raedler encouraged input for the public consultation will take place in 2021 concerning the project.

This topic and input on the public consultation and published Recommendation and Communication will be a priority for the CFE Professional Affairs Committee in 2021.

Taxation of Cryptocurrencies

The European Commission has published an Inception Impact Assessment on expanding current exchange of information rules contained in the Directive on Administrative Cooperation in the field of taxation to include crypto-assets and e-money ("DAC8").

As limited information is available from tax administrations about the use of crypto-assets or e-money and any resulting revenue losses, the Commission will be carrying out an Impact Assessment and public consultation to consider which assets should be subject to any proposed Directive or Recommendation, how to define crypto-assets and how to identify the relevant intermediaries for tax and reporting purposes.

The Inception Impact Assessment sets out that the Commission through this initiative aims to *"provide tax administrations with information to identify taxpayers who are active in new means of exchange, notably crypto-assets and e-money. It will also ensure consistency with ongoing work at EU level, such as the Digital Finance Strategy adopted on 24 September 2020 and the proposal for a Regulation on Markets in Crypto-assets, and at international level on the taxation on crypto-assets and e-money."*

The public consultation, which will happen alongside consultations with tax administrations, is scheduled to take place in the first quarter of 2021.

The OECD also published a report in October on Taxing Digital Currencies, examining the tax treatment of virtual currencies, and emerging taxation issues surrounding crypto-assets. The report findings confirm that tax policymakers are in the initial stages of considering the implications of these assets, with G20 and finance ministers calling on organisations to analyse the evasion risk posed by digital currencies and establish compliance and taxation frameworks for emerging digital currencies.

The taxation implications of crypto-assets are being examined by the CFE Tax Technology Committee, and a specific working group was established in the Committee following on from the European Commission announcing as part of their Tax Package 2020 that EU rules on automatic exchange of information would be extended to crypto assets and e-money.

Tax Good Goverance & the EU Blacklist…

The European Commission in July recommended EU Member States not to approve financial aid to companies that have a link to countries listed on the EU List of Non-Cooperative Jurisdictions for Tax Purposes, the "Blacklist", or to companies which have been convicted of serious financial crimes. The Commission in its recommendation suggests a number of conditions that Member States could apply concerning restrictions on financial support. It also contains suggested criteria for carve outs and implementation of the recommendation.

Discussing the recommendation, Paolo Gentiloni, Commissioner for the Economy, said: *"Fairness and solidarity lie at the heart of the EU's recovery efforts. We are all in this crisis together and everyone must pay their fair share of tax so that we can support and not undermine our collective efforts to recover. Those who deliberately bypass tax rules or engage in criminal activity should not benefit from the systems they are trying to circumvent. We must protect our public funds, so that they can truly support honest taxpayers across the EU."*

Member States are asked to inform the Commission concerning any conditions imposed in line with the recommendation. A report compiling details of the measures will be produced by the Commission in 2023, three years from the date the Recommendation was adopted.

The EU's list of non-cooperative jurisdictions for taxation purposes was also updated by the Council of the EU on 6 October 2020.

Anguilla and Barbados were added to the Blacklist following on from the OECD's Global Forum peer review reports on transparency and exchange of information, in which the jurisdictions had their compliance ratings downgraded from partially compliant to non-compliant.

Additionally, the Council of the EU endorsed removal from the EU black and/or greylist of a number of jurisdictions, including Oman, the Cayman Islands, Mongolia and Bosnia and Herzegovina establishing that those countries have implemented reforms to comply with EU tax good governance standards.

Twelve jurisdictions now remain on the EU blacklist: American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu.

EU Parliament'sTax Subcommittee (FISC) Calls for Stricter & Binding Rules on Blacklist Jurisdictions

In June the European Parliament's established Subcommittee on Tax Matters ("FISC"), chaired by Paul Tang (S&D, The Netherlands) as a permanent body within theCommittee on Economic and Monetary Affairs (ECON). The subcommittee is responsible for investigating issues surrounding "tax-related matters, and particularly the fight against tax fraud, tax evasion and tax avoidance, as well as financial transparency for taxation purposes". The move to create a permanent tax subcommittee had been anticipated following several temporary inquiries into specific tax scandals being established in the past.

To that end, the European Parliament's Permanent Subcommittee on Tax Matters held a public hearing on 1 December on the topic of "Do harmful tax practices within and outside the EU create distortions of competition in the Single Market?". Agreeing that aggressive tax planning distorts competition and increases social-economic inequalities, members of FISC discussed means to revise the EU's "blacklist" to ensure these behaviours are identified and EU treaty provisions allowing action to be taken against a Member State for practices leading to distortion of competition.

Additionally, on proposal of the Permanent Subcommittee, the European Parliament's Economic Affairs Committee adopted a resolution in December calling for stricter and legally binding EU rules on non-cooperative jurisdictions for tax purposes, criticising the listing process at present as 'lenient and confusing'.

The resolution welcomes the legal link between tax good governance standards and the use of EU funds and calls for State Aid rules and Member States' national support programmes to be linked in order to ensure businesses with ties to listed jurisdictions are not eligible for support. The European Commission was criticised for failing to introduce effective measures that would reduce tax avoidance incentives. Taking into account the negotiations on Pillar II at OECD/ Inclusive Framework level, the European Parliament proposed that the Commission introduce the following measures with a separate legislative proposal:

a) Non-deductibility of costs;
b) Reinforced Controlled Foreign Company (CFC) rules;
c) Withholding tax measures;
d) Limitation of participation exemption;
e) Switch-over rule;
f) Reversal of the burden of proof;
g) Special documentation requirements, especially regarding transfer pricing.

In addition, the Parliament supported screening/ inclusion of the United Kingdom in the blacklisting process once the Brexit transitional period has lapsed, thus extending the geographical scope of the process, albeit excluding the least developed countries.

Commenting, Chair of the Subcommittee on Tax Matters, Paul Tang (The Netherlands) said that EU countries are responsible for 36% of tax havens: "By calling the EU list of tax havens "confusing and inefficient", the European Parliament tells it like it is. While the list can be a good tool, it is currently lacking an essential element: actual tax havens. Countries on the list account for just 2% of corporate tax avoidance! EU member states currently decide in secret which countries are tax havens, and do so based on vague criteria with no public or parliamentary scrutiny. This needs to change. If we focus on others, we also need to look ourselves in the mirror. And what we see is not pretty. EU countries are responsible for 36% of tax havens. The tax subcommittee commits itself to investigate and scrutinise all member states that are responsible for tax avoidance. Our work is only just starting."

End of A Golden Era: EU Cracks Down on Visa Schemes...

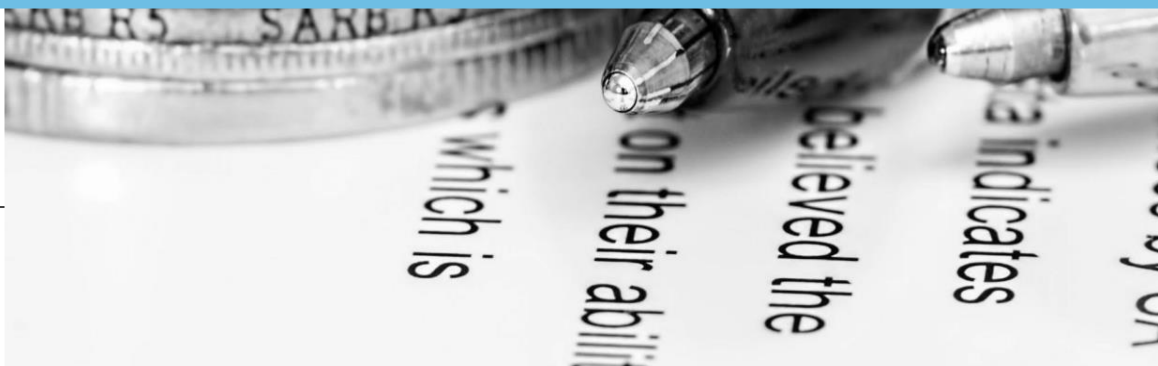
The European Commission commenced infringement proceedings against Malta and Cyprus in relation to investor citizenship "golden passport" schemes, on the basis that granting citizenship for a pre-determined amount of investment or payment without a genuine link with the Member State is not compatible with the principle of sincere cooperation in Article 4(3) of the TFEU.

This follows from reviews of these schemes by the European Parliament, and the resolution adopted in June 2020 calling on Member States to phase out citizenship or residency by investment schemes. It was also established as a priority by President Von der Leyen in her State of the Union Address in September.

Malta and Cyprus have been issued with letters of formal notice. The Commission, if not satisfied with the responses, can thereafter issue a Reasoned Opinion. In addition, Bulgaria was furnished with a request for further information concerning an investor citizenship scheme being operated.

EU Policy – Indirect Tax

06



VAT: E-Commerce Explanatory Notes

In September, the European Commission published Explanatory Notes on the E-Commerce Rules introduced under Directive 2017/2455 in December 2017 and Directive 2019/1995 in November 2019. The e-commerce rules were introduced as part of the EU Commission's Digital Strategy, to simplify VAT obligations on cross-border sale of goods or services, and to ensure taxation takes place in the place of supply, in line with destination principle.

The rules will apply as of 1 July 2021, after the implementation date was postponed for a period of six months due to the impact of the coronavirus crisis. Under the rules, platforms and marketplaces will charge and collect VAT at the point of sale to EU customers and declare and pay that VAT to the Member State of identification in the One-Stop-Shop. The Explanatory Notes "contain extensive explanations and clarifications on these new rules including practical examples on how to apply the rules if you are a supplier or an electronic interface (e.g. marketplace, platform) involved in e-commerce transactions. These explanatory notes are meant to help online businesses and in particular SMEs to understand their VAT obligations arising from cross-border supplies to consumers in the EU."

The European Commission's VAT Expert Group was consulted by the European Commission in relation to the Explanatory Note. CFE was active in contributing to all topics, and by elaborating on identified issues in written representations to the Commission. The Fiscal Committee will issue an Opinion Statement on the Explanatory Notes which were issued in the second half of 2020, identifying issues that tax advisers foresee arising in practice.

Customs Union – Single Customs Window

The EU Commission published an EU Customs Union Action Plan setting out measures to be taken over the coming four years to achieve an "integrated European approach to customs risk management."

Key initiatives that form part of the Action Plan include: the Single Window which will allow businesses to complete border formalities through a single portal, concerning which a legislative proposal is anticipated in October 2020; increased obligations on payment service providers and online sales platforms to help fight customs duty and tax fraud, concerning which a legislative proposal is anticipated in 2023; international customs cooperation through increased cooperation with trade partners and monitoring of the origin of products eligible to preferential trade arrangements; the rollout of more modern and reliable customs equipment; a new analytics lab to collate and analyse customs data; and a new Member States reflection group.

A dedicated webpage has been created concerning the Customs Union, which contains further information on the Action Plan and planned initiatives.

Accompanying this Action Plan, the European Commission also published a proposal for a Regulation to establish the European Union Single Window for customs which will allow businesses to complete border formalities through a single portal.

The proposal sets out that *"The concept of a single window is to be understood as a digital solution for the exchange of electronic information between different government authorities, and between the latter and economic operators. The window "places an onus on regulatory authorities to enable economic operators to submit to a single point both customs and EU non-customs data required for goods clearance. This will lead to reductions in duplication, time and cost of compliance for economic operators."*

Implementing Powers for the EU VAT Committee ?

The EU Commission published a Roadmap in October concerning a planned proposal for a Council Directive to confer implementing powers on the Committee in the area of value added tax (VAT). Following this, on 18 December the EU Commission then published a proposal for a Council Directive to confer implementing powers on the Commission in the area of value added tax (VAT). This action was contained in the Commission's 2020 Tax Package Action Plan, and is being pursued on the basis that consistent implementation of the VAT Directive is imperative for the proper operation of EU VAT rules.

Accordingly, the Commission proposes to confer empowerment on the Committee to adopt implementing acts by turning the VAT Committee into a 'comitology committee'. At present, the VAT Committee is comprised of Member States and the Commission, and agrees non-binding guidance on the interpretation of EU VAT rules. The Commission in its Roadmap sets out that this planned directive would 'contribute to a more uniform application of the EU VAT legislation to the benefit of taxable persons having economic activities in several Member States'. The proposal also points out that comitology procedures are already in use for excise duties and administrative cooperation matters.

The proposal sets out that the powers "*would only be applied in connection with a limited set of rules implementing the provisions of the VAT Directive, for which a common interpretation is required. Any change to the VAT Directive shall require, as is the case today, unanimous agreement in Council.*" The proposal also identifies articles in the VAT Directive concerning which the Committee could exercise proposed powers for providing a common interpretation.

The proposal will now be considered by Council and Parliament in line with the EU's special legislative procedure. Public input on the proposal can also be submitted via the Have your Say portal until 15 February 2021.

Roadmap on VAT for Financial & Insurance Services

In October, the EU Commission published a Roadmap concerning VAT rules for financial and insurance services, noting that the existing rules have been criticised for being complex and difficult to apply, leading to uncertainty, high compliance costs and lack of VAT neutrality. This initiative to review the VAT rules for financial and insurance services was contained in the Commission's 2020 Tax Package Action Plan.

The Roadmap details that a study is being completed to "produce an overview of the measures applied by all the Member States based on the provisions governing the VAT treatment of financial and insurance services", which will then form the basis, together with input from a public consultation, for a proposal for a directive to "address the competitive disadvantage faced by financial and insurance operators... caused by irrecoverable VAT". The impact assessment will consider the implications of either removing the existing exemption or keeping it and modifying the scope, as well as issues caused by the current exemption such as cost-sharing and issues with calculating VAT on high-frequency trading.

The Roadmap sets out that an impact assessment will be completed by autumn 2021, and a public consultation to gather stakeholder views on the current VAT provisions for the financial and insurance sector will take place early in 2021. CFE looks forward to participating in the consultation process.

International Tax Policy Updates

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BEPS Action 14:Country-by-Country Reporting

The OECD & G20 Inclusive Framework on BEPS published a compilation of the BEPS Action 13 Country-by Country reports.

The 2020 compilation includes data from 131 jurisdictions, an increase from the previous year, and that implementation is largely consistent with the Action 13 minimum standard. The report further shows that over 90 jurisdictions have introduce legislation with filing obligations on MNEs with revenue about 750 million, with all remaining Inclusive Framework members working towards implementing similar legislation. Additionally, recommendations made for jurisdictions in the first two peer review stages were found to have largely been addressed and removed.

The OECD's annual Corporate Tax Statistics, based on the Country-by-Country Reporting requirements for MNEs under the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project, indicate that corporate income tax remains a significant source of tax revenues for governments across the globe, accounting for 14.6% of total tax revenues on average across the 93 jurisdictions in 2017, compared to 12.1% in 2000. Corporate taxation is even more important in developing countries, comprising on average 18.6% of all tax revenues in Africa and 15.5% in Latin America and the Caribbean, compared to 9.3% in the OECD countries. The full report is available to read here.

OECD:Tax Dispute Resolution Statistics Published

The OECD has published the 2019 Mutual Agreement Procedure Statistics, examining the compliance of jurisdictions to implement the minimum standards on resolving treaty-related disputes, under Action 14 of BEPS. Members of the Inclusive Framework on BEPS provide annual reports of statistics concerning the resolution of disputes, in accordance with an agreed reporting framework.

The MAP statistics are now available for 82 jurisdictions, and set out detailed information for each jurisdiction, as well as aggregated information concerning all jurisdictions. The information sets out the number of existing cases, the number of new cases, the number of existing cases resolved, and the average duration of those cases. The outcomes of cases are also detailed in the statistics. The number of transfer pricing disputes increased in 2019, with 2700 new cases, representing a 20% increase in transfer pricing cases and a 10% increase in other cases, and the number of outstanding and new disputes also increased. This was despite the fact that the statistics demonstrate that more disputes were resolved in 2019 than in 2018.

Forum on Harmful Tax Practices 2020 Review

The OECD's Inclusive Framework has approved the 2020 reviews of the Forum on Harmful Tax Practices. The reviews are carried out as part of the implementation of Action 5 of the OECD/G20 Base Erosion and Profit Shifting Project, concerning assessments undertaken by the Forum on Harmful Tax Practices (FHTP) of preferential tax regimes.

From the 49 regimes reviewed in 2020, jurisdictions have made legislative changes to abolish or amend 29 of the regimes, 4 regimes are now fully compliant with the BEPS Action 5 standard, 7 regimes are in the process of being amended and 2 were found not to be harmful. The 2 remaining regimes were out of scope.

In 2021, the Forum on Harmful Tax Practices will focus on the effective implementation of the standard, including the spontaneous exchange of information on activities and income of entities by parent, ultimate parent and beneficial owner jurisdictions, as well initiate monitoring to ensure no or nominal tax jurisdictions have mechanisms in place to comply with the FHTP Standard.

2020 Global Forum on Tax Transparency Plenary Meeting

The Global Forum on Tax Transparency and Exchange of Information, an Inclusive Framework body established to support the process of strengthening the capacity of tax administrations to exchange information and fight tax evasion and avoidance, held its annual plenary meeting virtually from 9 -11 December. According to the Peer Review of the Automatic Exchange of Financial Account Information, 88% of jurisdictions engaged in automatic exchange since 2017-18 with satisfactory legal frameworks in place, which denotes a significant milestone in fight against tax evasion.

"The Global Forum continues to be a game-changer. In spite of the COVID-19 crisis, it has successfully delivered on the global peer review process, offering further proof that automatic exchange is becoming the global standard. Ensuring access to financial account information for tax administrations helps ensure everyone pays their fair share of tax, boosting revenue mobilisation for countries worldwide, and particularly for developing countries.", said OECD Secretary-General Angel Gurría.

UN Committee of Experts Reviews Draft Treaty on Digital Services

The UN Committee of Experts on International Cooperation on Tax Matters published a paper on the tax consequences of the digitalized economy focusing on issues of relevance for developing countries ahead of their 21th Session meeting, held virtually between 20 October and 6 November 2020.

At the meeting, the Committee of Experts considered a draft treaty provision concerning tax on digital services, intended to be inserted into the UN Model Tax Convention. The experts also reviewed progress on updating the Model Double Taxation Convention Between Developed and Developing Countries, as well as environmental taxation and taxation of the extractive industries. The report also contains a summary of the submissions received on the draft treaty provision concerning tax on digital services.

State Aid & Case Law Updates

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EU Commission to Appeal General Court Decision in Apple State Aid Case

The EU Commission has appealed the decision of the General Court in the €14 billion Apple State Aid case, in which the Court annulled the Commission's decision that Ireland's tax authorities granted Apple a "selective advantage" by failing to employ appropriate profit allocation methods to apportion income of the Irish Apple branches, in contravention of EU State aid law.

In a press release concerning the decision to appeal, EU Commission Executive Vice-President Margrethe Vestager stated, "*The General Court judgment raises important legal issues that are of relevance to the Commission in its application of State aid rules to tax planning cases. The Commission also respectfully considers that in its judgment the General Court has made a number of errors of law. For this reason, the Commission is bringing this matter before the European Court of Justice. Making sure that all companies, big and small, pay their fair share of tax remains a top priority for the Commission. The General Court has repeatedly confirmed the principle that, while Member States have competence in determining their taxation laws taxation, they must do so in respect of EU law, including State aid rules. If Member States give certain multinational companies tax advantages not available to their rivals, this harms fair competition in the European Union in breach of State aid rules.*"

The final determination of the case will be made by the Court of Justice of the European Union. The Court of Justice has repeatedly disagreed with the General Court on substantive issues concerning fiscal State aid (cf. Gibraltar, World Duty Free), where the ECJ subsequently annulled General Court judgments in particular regarding the interpretation of the notion of 'selectivity'.

AG Kokott: Belgian Excess Profit Rulings Constitute 'State Aid Scheme'

Advocate General Kokott issued an Opinion in Case C-337/19 *P Commission v Belgium and Magnetrol International NV* (Belgian Excess Profit Rulings). According to AG Kokott, the Commission rightly classified the Belgian practice of downward adjustments to profits of multinational group companies as a State aid scheme. The opinion recommends that the Court of Justice sets aside the judgment of the General Court of the EU and reassess the cases brought by Belgium and the aid beneficiary.

Key issue in the appeal was whether the General Court rightfully held that the Commission had not demonstrated to the requisite legal standard the existence of a 'consistent tax administration practice in the contested decision'. In the judgment under appeal, the General Court repealed Commission decision on grounds of failure to state reasons as to the choice of advance rulings used, in particular why 6 examples chosen by the Commission were sufficiently representative of all 66 advance rulings under scrutiny.

According to the Advocate General, contrary to the view of the General Court, the Commission sufficiently demonstrated in its decision that its sample is representative and thus sufficient to indicate a consistent administrative practice of the Belgian tax administration. In addition, the General Court erred in concluding that the two further conditions for the existence of a State aid scheme were not met: that no further implementing measures are required and that the beneficiaries are defined in a general and abstract manner. AG Kokott therefore opined that the General Court erred in law by wrongly classifying the sample as not sufficiently representative to the requisite legal standard, and not sufficient to demonstrate a consistent administrative practice.

Even if the Court of Justice were to find that all the conditions for the existence of an aid scheme were met, the General Court would still have to assess the pleas in law, i.e. whether the advance tax rulings concerning the downward adjustment of profits constitute State aid, and subsequently, whether the recovery of the alleged aid infringes the principles of legality and of the protection of legitimate expectations. Therefore the Opinion advises the Court of Justice to refer the case back to the General Court.

Cases C-245/19 & C-246/19 on Exchange of Information in Tax Matters ("Berlioz II")

The Court of Justice of the EU has handed down its decision in Cases C-245/19 and C-246/19, concerning cross border exchange of information in tax matters between tax authorities.

The Resumé sets out that as concerns the right of either a taxpayer or third party in cross-border requests for exchange of information to contest the request, that the Court held *"The right to an effective remedy guaranteed by the Charter of Fundamental Rights requires that persons who hold information that is requested by the national administration, in the context of a cooperation procedure between Member States, must be able to bring a direct action against such a request. Nevertheless, Member States may deny the taxpayer subject to the tax investigation and the third parties concerned by the information in question the right to bring such a direct action, provided that there are other remedies enabling them to obtain an incidental review of that request."*

The Court further held that in determining the scope of a request for information, "any information that is not manifestly lacking any realistic importance" is foreseeably relevant and that *"a request for information may relate to categories of information rather than specific information where such categories are defined by criteria establishing their 'foreseeable relevance' ".*

AG Kokott Opinion on Turnover Advertisement Tax

Advocate General Kokott has handed down her opinion in the cases C-562/19 *Commission v Poland* and C-596/19 *Commission v Hungary*, concerning the Polish tax on the retail sector and the Hungarian advertisement tax, turnover taxes based on a progressive tax rate.

AG Kokott in her opinion sets out that it is a competence of Member States to designate bases of assessment and tax burdens, and that a generally applicable tax law will not constitute State aid unless the design is manifestly inconsistent. Additionally, AG Kokott opined that a progressive rate does not constitute an inconsistency per se, nor the use of personal income tax losses in calculating the advertising tax in the first year.

The decision of the Court is expected in the coming months. The opinion of AG Kokott is not binding on the Court's decision.

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