ETAF
European Tax Adviser Federation

ETAF NEWS

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INTRODUCTION

Philippe Arraou, President of ETAF

Dear ETAF Members,
Dear friends,

The new year began with several positive news and the start of the vaccine campaign all over the EU is certainly the more comforting one. Now we can clearly count on the end of the pandemic and therefore the end of the health crisis.

In the meantime, we should get ready to cope with the effects of the economic crisis that will be evident, in term of a global raising of public debts and thus the need of tax revenues for our countries' coffers. The role of tax advisers will be crucial from a double angle in the course of the next few years: on one side, we will be required to ensure that our clients comply with tax law, thus paying their fair share of taxes. On the other side, even more significantly than in the past, we will be the first point of contact of the productive fabric of European economy: small and medium enterprises.

SMEs will need advices from highly qualified professionals such as we are for taking full advantage of the support that the European Union and the Member States provide for overcoming the crisis. Our expertise and our continuous training are the best support of the private sector.

In the tax area, at European level the change of government in the United States represents another positive development for 2021. The possible relaxation of the relationship between the EU and the US will probably not be limited to the trade tensions experienced in recent years, but will extend to the negotiations on the international tax reform being conducted at OECD/G20 level. The European Commission has clarified that the deadline of mid-2021 to reach a global agreement shall not be postponed and the work on a worst-case scenario where the Commission launches a European measure on digital taxation is already underway.

Dear Members, dear friends, I assure you that in 2021, ETAF will keep promoting needs and concerns of European tax advisers towards decision-makers in the European Commission, Parliament and any other stakeholders.

I hope you will enjoy reading our Newsletter!

Yours sincerely,
Philippe Arraou

PROFESSIONAL LAW

IMCO study withdraws wrong assumptions on German Professional Law

On 18 November 2020, the Committee on Internal Market and Consumer Protection (IMCO) published a study titled "Legal obstacles in Member States to Single Market Rules". It was provided by the Policy Department for Economic, Scientific and Quality of Life Policies at the request of the European Parliament.

The study analyses the current state of national obstacles to the free movement in the Single Market. It focuses on various aspects of obstacles related to free movement of goods and services, the right to establishment, the Digital Single Market, consumer protection and public procurement. Furthermore, it also entailed a case study which specifically concerned the establishment requirements for tax advisers in Germany. Unfortunately, several assumptions were legally incorrect and therefore had to be withdrawn from the study.

Two of our members, namely, the Bundessteuerberaterkammer together with the Deutscher Steuerberaterverband contacted the authors of the study and clarified the following points:

On the one hand, temporary and permanent service provision were not clearly separated from each other and sometimes even confused. The wrong impression arose that a branch was needed in case of temporary provision of services which is not what the German Law states (cf. § 3a StBerG).

As far as the establishment in Germany is concerned, the authors also assumed a wrong legal basis: They overlooked the fact that the prohibition of the requirement of establishment does not apply at all to activities reserved for a specific profession (exception of Art. 17 Para. 6 to Art 16 (2) Services Directive) - a serious legal error, especially since the European Court of Justice has fully confirmed the exception of tax advice in Germany from this regulation in its judgement X-Steuerberatungsgesellschaft (C- 342/14, December 15, 2015).

Finally, the authors of the study made false statements about the shareholding requirements stating that “all shares must be held by tax advisers” which is not the case either since other professions can be shareholders too.

In response to the intervention of our German Members, the authors of the study agreed to withdraw the mentioned case study and correct the incorrect statements.

Update on the Digital Services Act

The European Commission presented on 15 December 2020 its new rulebook to boost digital competition and protect citizens from online harm, namely, the Digital Markets Act and the Digital Services Act. Under these proposals, big online platforms like Google, Amazon and Facebook will face new limits and obligations on how they control content on their platforms and how they interact with their business users. Under the Digital Services Act, online platforms will have to do more to limit the spread of illegal content, goods and services. The objective is that, what is considered to be illegal offline, should be illegal online too. These proposals are supposed to be the most ambitious attempt to contain the downsides of Big Tech companies but their path to becoming law is still long.

They will have to be approved by the European Parliament and the Council of the EU, which will most likely introduce several amendments and draft their own versions of the bills. Commission Executive Vice President Margrethe Vestager herself estimated at best they might take two years to come into force but she also acknowledged it isn’t in the Commission’s hands anymore. European lawmakers and the 27 EU countries will need to agree — first among themselves and then with each other — on what they want the rules to look like. The process starts with agreeing on what the texts actually cover. EU countries seem already to disagree on whether the Digital Services Act should also include harmful, yet legal, content such as disinformation. Even if the law is expedited and passed with record speed, legal challenges could still be faced. Big Tech companies could still challenge these rules before the EU’s General Court.

TAX LAW

The tax priorities of the Portuguese Presidency

On 1 January 2021, Portugal took over the Presidency of the Council of the European Union from Germany, that had inaugurated the trio Presidency composed by Germany, Portugal and Slovenia. The official work programme drafted for the Portuguese Presidency confirms the commitment of Lisbon to reach an agreement on the proposal for a public Country-by-Country Reporting (CbCR). The commitment follows the request of several Members of the European Parliament who had unsuccessfully asked the German Presidency to include the file on the agenda of the Competitiveness Council on several occasions. The MEPs highlighted that, since Austria has changed its view on the dossier, the majority in the Council to adopt the file is within reach. The Portuguese Presidency is also ready to address the challenges of European taxation, including the model for taxation of the digital economy, under the principles of fairness and tax efficiency. The aim of Lisbon is to ensure a fair and equitable distribution of taxation, the strengthening of good governance mechanisms and to step up the fight against tax fraud, evasion and avoidance through non-cooperative jurisdictions. With regard to environmental taxation, the programme remarks that tax policy should be aligned with the objective of decarbonization, by facilitating the transition to a competitive and carbon-neutral economy and boosting sustainable growth.

The EC plans for VAT: more implementing powers and reform of financial services

Towards the end of 2020, the European Commission has started to work on two relevant VAT-related measures.

On 18 December 2020, the European Commission has published its proposal to update the decision-making process for interpreting VAT rules. The proposal, which is part of the Commission's Action Plan of 15 July 2020, focuses on changing the VAT Directive. The objective would be to create a committee made up of representative of the EU Member States that would oversee the adoption by the Commission of implementing acts in certain areas of VAT. The proposal would apply the "comitology procedure" only to a limited set of well-defined rules implementing the provisions of the VAT Directive, for which a common interpretation at EU level is required. According to the Commission, it is in the interest of both tax administrations and businesses to facilitate the adoption of common interpretations of the provisions of the VAT Directive.

On 22 October 2020, the Commission has launched a roadmap on the review of the VAT rules for financial and insurance services. In the Commission's view, the rules regarding the VAT treatment of financial and insurance services are obsolete, dating back to 1977. The Commission considers the current rules to be complex and difficult to apply, given that they have not kept pace with the developments of new services in the financial industry (i.e. fintech services including cryptocurrencies and e-money). It is worth noting that the Commission had already proposed a revision of these rules in 2007, but the discussions were blocked at Council level and the proposals were withdrawn in 2016.

Administrative Cooperation progresses: DAC 7 approved, DAC 8 launched

In the course of autumn 2020, the European institutions have made several steps forward to update the Directive on Administrative Cooperation in the field of taxation (DAC).

At the end of November 2020, the Member States have reached a political agreement on DAC7, which provides for an obligation for digital platforms to submit to the respective tax authority the revenues generated by services providers or sellers that use the platform. It should apply to all platforms conducting business in the EU, even if they are not incorporated or do not have a permanent establishment in a Member State. The EU Finance Ministers expressed their satisfaction on the agreement: German Minister Olaf Scholz stated that *"with these new rules the EU makes an important step in addressing tax challenges arising from digitalisation of the economy".* France remarked that this was an important step forward and demonstrated that tackling tax evasion was not restricted to the digital giants. In December, the European Parliament's rapporteur for DAC 7, Sven Giegold (Greens/EFA, Germany), has published a draft opinion that includes additional contents compared to the Commission's original proposal. The draft opinion required the inclusion of a review clause for the Commission to assess the implementation of the reporting obligation and consider the possibility of a European supervisor in charge of the Directive's enforcement. The opinion highlighted that the agreement reached at Council level weakens the original text with regard to joint audits, while postponing the application of DAC 7 to 2023. The formal adoption of DAC 7 should take place in February, after the European Parliament approves its opinion.

On 23 November, the European Commission launched an impact assessment on a new revision of the Directive (so-called DAC 8). This new update seeks to extend the automatic exchange of information to crypto-assets. The objective is to obtain information that is necessary to make sure that taxpayers who earn money via crypto-assets pay their fair share, as well as to provide for better cooperation across tax administrations and keep business compliance costs to a minimum by providing a common EU reporting standard.

The status of the Digital Services Tax at EU and global level

The taxation of the digital economy remains the main tax topic discussed at European and international level. The European Commission has decided that mid-2021 is the final deadline to reach an agreement at OECD level, before coming up with an EU comprehensive measure. Some commentators believe that the change in the U.S. administration represents a positive signal leading to an international agreement by July 2021. Meanwhile, on 14 January 2021, the European Commission has launched an inception impact assessment on a new EU Digital Levy (closely followed by a public consultation). There are no specific details on the proposal, but the Commission is taking all necessary steps to be ready if the OECD/G20 summer negotiation should fail. On 14-15 January, Pascal Saint-Amans (Director of the OECD's Centre for Tax Policy and Administration) remarked that the OECD has already begun to address some of the main issues highlighted by the commentators on the blueprints for the two pillars of the international tax reform, namely the complexity of the measures identified and the cost of compliance. He has also stressed that negotiations will probably restart at the G20 meeting at the end of February, when the new US Treasury Secretary should be in place. Across the Atlantic, in the final days of Trump's administration, the US Trade Representative (USTR) issued findings on the investigation on the Digital Service Taxes (DSTs) adopted by Austria and Spain, concluding that each of the DSTs discriminates against U.S. companies, is inconsistent with prevailing principles of international taxation, and burden or restricts U.S. commerce. The USTR Robert E. Lighthizer emphasized that *"the best outcome would be for countries to come together to find a solution"*. A few days before, the USTR had suspended the tariff action in the investigation of France's DST (announced in July 2020) and it has published a Report on Italy's DST highlighting that Italy's tax is unreasonable or discriminatory and burdens or restricts US commerce and thus is actionable under Section 301. However, no trade sanctions were determined against Italy at this stage.

Post-Brexit tax rules worry the European Parliament

On 31 December 2020, the Brexit transition period ended: since 1 January, the United Kingdom left the EU Single Market and the Customs Union as well as all EU policies. The relationship between the EU and the UK is now governed by four treaties: the Withdrawal Agreement, the Trade and Cooperation Agreement, the Security of Information Agreement and the Agreement for cooperation on the safe and peaceful uses of nuclear energy. On 11 January 2021, the European Parliament's Committee on Economic and Monetary Affairs held an exchange of views with the European Commission's Task Force for Relations with the United Kingdom. Several MEPs warned the Commission about the weaknesses of the Brexit agreement regarding money laundering and tax evasion. The MEPs remarked that the exclusion of taxation and the fight against money laundering from the rebalancing provisions represents a problematic point and they expressed the fear that the UK could start practicing an aggressive tax policy. The risk had been already flagged by Sven Giegold (Greens/EFA, Germany) and Philippe Lamberts (Greens/EFA, Belgium), by sending a letter to the President of the European Commission Ursula von der Leyen and to the Brexit Chief Negotiator Michel Barnier, where the MEPs express their concern over the risk of the UK becoming a "Singapore on Thames" in terms of tax and anti-money laundering policies.

FISC Subcommittee's work on tax blacklist, harmful tax practices and tax tools for economic recover

The Subcommittee on Tax Matters (FISC) of the European Parliament has worked on several tax topics in the last few months. The main political act is the resolution setting out changes to the system used to draw up the EU list of tax havens, which was approved on 21 January 2021 by the European Parliament with a broad majority. According to the MEPs, the changes included in the resolution would make the process of listing or delisting a country more transparent, consistent and impartial.

They also propose adding criteria to ensure that more countries are considered a tax haven and prevent countries from being removed from the blacklist too hastily. Finally, the document remarks that EU Member States should also be screened to see if they display any characteristics of a tax haven and those falling foul should be regarded as tax havens too.

In autumn 2020, the FISC Subcommittee has also organised two hearings to discuss interesting tax topics. On 1 December, in the framework of a discussion on harmful tax practices, Mario Monti (former Tax Commissioner and Italian Prime Minister) stated that this could be the right time for updating the EU tax framework, also thanks to Brexit and to a renewed link between taxation and the EU own resources. On 16 November, during the hearing on the role that tax policy should play in the European recovery from the COVID-19 economic crisis, Grace Perez-Navarro (Deputy Director of the OECD's Centre for Tax Policy and Administration) highlighted that no global solution can be recommended, but she remarked that some core points, such as fighting tax fraud, reviewing labour taxation and using tax tools to combat climate change, should be discussed and agreed at international level. In the course of the same hearing, Liina Carr (Confederal Secretary of the European Trade Union Confederation ETUC) advocated in favour of a tax on billionaires and a minimum effective corporate tax rate of 25 % to sustain the recovery.

COVID-19: Agreement on VAT exemption of vaccines and medical equipment

On 2 December 2020, the Council adopted an amendment of the VAT Directive proposed by the European Commission to support access to more affordable equipment, vaccines and testing kits. The measures will allow EU Member States to put in place a temporary VAT exemption for vaccines and testing kits being sold to hospitals, doctors and individuals, as well as closely related services. Member States will be able to apply either reduced or zero rates to both vaccines and testing kits if they so choose. The rules will apply until the end of 2022, or until an agreement is reached on the Commission's pending proposal for new rules on VAT rates, if the latter occurs earlier. On 28 October 2020, the Commission had already issued a Decision to prolong the temporary relief from customs duties and VAT on the import of protective and medical equipment from non-EU countries until the end of April 2021. The prolongation was made after consultation with Member States and as a response to the increased number of coronavirus cases reported in the entire EU. Many Member States are indeed still dependent from import of those goods from third countries.

Tax controversies: proceedings before from the Court of Justice and the Court of Human Rights

Between December 2020 and January 2021, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights issued four important judgments on cases involving tax matters.

On 3 December, Advocate General Juliane Kokott proposed to the CJEU to overturn a General Court decision that assessed the legality of Belgium's excess profits tax scheme. According to the Advocate General, the Commission was right to consider that the Belgian practice of making downward adjustments to profits of undertakings forming part of multinational groups constituted an aid scheme. The dispute regarded a reduction of the tax base of Belgian group members to account for excess profits resulting from the company being part of a multinational group. The tax benefit was agreed with a tax ruling by the Belgian tax authority. In 2016, the Commission decided that the scheme was illegal state aid but, following a legal controversy, in 2019 the EU General Court annulled the Commission's decision. The General Court concluded that the Commission failed to prove that the tax authorities used a systematic approach in all the rulings because the Commission only reviewed a sample of the rulings. Advocate General Kokott expressed the view that *"the Commission may also use a sample for the purposes of proving a consistent administrative practice"* and proposed that the case be referred back to the General Court which must still assess whether the advance tax rulings concerning the downward adjustment of profits constitute State aid and whether the recovery of the alleged aid infringes the principles of legality and of the protection of legitimate expectations.

On 17 December, the CJEU confirmed that the VAT Directive precludes national legislation which exempts from VAT the supply of heat by an association of residential property owners to its members. An association of residential property owners and co-owner (WEG Tevesstraße) operates a cogeneration power unit on land belonging to its members and supplies the electricity produced to an energy distribution company, though the heat produced is supplied to its members. The local tax authority refused the deduction of input VAT on the ground that the supply of heat by an association to its members is a transaction that is exempt from VAT under the German law on turnover taxes. The Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany), hearing the action brought by the WEG Tevesstraße asked the CJEU, who confirmed that the VAT Directive applies in the present case and that the supply of heat in question is a supply of property that is subject to VAT.

On 14 January, the CJEU dismissed an action brought by the Commission against Italy for failing to apply the Energy Taxation Directive. The residents of the Italian Region Friuli Venezia Giulia have benefitted from a reduction in the "pump price" of fuel based on a Council Decision between 1996 and 2006 and later on based on a regional law. The Commission claimed that the legislation infringes the Energy Taxation Directive which establishes minimum excise rates which Member States must apply. However, the CJEU has concluded that the Commission has not established that the introduction of the contribution system by Italy implies a reduction in excise duty in the form of a refund of the amount of the tax, thus the reduction of price does not, in itself, constitute an infringement of the Energy Taxation Directive.

On 12 January, the European Court of Human Rights (ECtHR) issued its judgment in the case *"L.B. v. Hungary"* (application no. 36345/16) confirming that the Hungarian tax authority did not breach article 8 of the European Convention on Human Rights (Right to respect for private and family life). The tax authority had published the personal data of the applicant, including home address, on the tax authority website portal, for failing to fulfil his tax obligations. It named the applicant as a tax defaulter, and subsequently a major tax evader, and detailed his name, the amount of his tax arrears and debts, his tax identification and home address. The case was brought before the ECtHR by the applicant who complained that the publication of his data was not necessary and that it aimed at publicly shaming him. The judgment of the ECtHR rejected these claims concluding that the publication of the data *"could not be considered a serious intrusion into the applicant's personal sphere"*. Furthermore, the judgment states that *"it does not appear that making his personal data public placed a substantially greater burden on his private life than was necessary to further the State's legitimate interest"*.

European Commission acts against unlawful Member States' tax practices

In its infringement package on 30 October 2020, the European Commission has pursued legal action against Member States that failed to comply with their obligations under EU law. In the field of taxation, the European Commission issued 6 letters of formal notice, 1 reasoned opinion and referred 4 countries to the Court of Justice of the European Union (CJEU). Two letters of formal notice were sent to Luxembourg which was required to change its rules on the taxation of interest received by individuals and to bring its rules on reduction of inheritance tax into line with EU law. Two letters of formal notice were also sent to Belgium which was asked to stop taxing dividends on shares held by life insurance companies abroad more heavily than dividends received by Belgian insurance companies and to bring its rules on exemption of income from savings deposits in line with EU law. The letter of formal notice sent to France required Paris to amend its legislation on the taxation of capital gains made by foreign investment funds while the letter sent to the United Kingdom regards its failure to comply with EU VAT rules for trade in financial instruments on certain terminal markets. The reasoned opinion sent to Spain urged Madrid to transpose the Directive on anti-tax avoidance practices concerning hybrid mismatches. The Commission referred Greece to the CJEU about the restriction to the freedom of establishment linked to its income tax rules for businesses with foreign branches. The referral of The Netherlands to the CJEU concerned its rules on the cross-border provision of pensions and the transfer of pension capital which, according to the Commission, restrict the free movement of citizens and workers, the freedom of establishment, the freedom to provide services and the free movement of capital. The European Commission decided to refer Belgium to the CJEU regarding its legislation on the deductibility of alimony payments from the taxable income of non-residents. Poland was referred to the CJEU for its failure to align with EU rules on the exemption of imported alcohol used in the production of medicines.

On 4 December 2020, the European Commission asked Italy and Portugal to stop their respective tax regimes that are in breaches of EU state aid rules. In Italy, port authorities are fully exempt from corporate income tax. In January 2019, the Commission invited Italy to adapt its legislation in order to ensure that ports would pay corporate tax on profits in the same way as other companies in Italy. In November 2019, the Commission opened an in-depth investigation to assess whether its initial concerns as regards the compatibility of the tax exemptions for Italian ports with EU State aid rules were confirmed. As a consequence, Italy has been required to abolish the corporate tax exemptions granted to its ports. With regard to Portugal, the Commission has found that the implementation of the Madeira Free Zone aid scheme in Portugal is not in line with State aid rules. The aid scheme was meant to contribute to the economic development of the outermost region of Madeira by granting tax reductions to companies creating jobs in Madeira. However, the Commission's investigation has shown that the tax reductions were applied to companies that have made no real contribution to the development of the region, in breach of the conditions of the decisions and EU State aid rules. Therefore, the Commission asked Portugal to recover the incompatible aid, plus interest, from companies that did not meet the conditions.

Green and digital: the MFF leads the tax work of the Commission

In the course of the autumn 2020, the European Parliament and the Council have continued the negotiations on the EU's Multiannual Financial Framework 2021-2027. The outcome of the negotiation and the work that the European Commission intends to undertake in 2021 are unsurprisingly intertwined. The points of contact in the tax area are particularly relevant when it comes to the taxation of the digital economy and the update of the taxation of polluters.

On 10 November, the European Parliament and the Council have finally reached an agreement on the MFF 2021-2027 and the European Economic Recovery Plan to overcome the COVID-19 crisis. The amount of the MFF 2021-2027 is 1.74 trillion and the negotiators have agreed that the costs of repaying the debt resulting from the Recovery Plan should not be at the expense of MFF investment programmes nor by higher Member States' contribution. The roadmap for the own resources provides for the introduction in 2021 of a tax on non-recycled plastic packaging waste and of an own resource based on the Emission Trading Scheme (ETS). In 2023, the ETS own resource should be linked to a Carbon Border Adjustment Mechanism (CBAM), while an own resource based on digital tax should be available from 2024. From 2026, an own resource based on the financial transaction tax and a financial contribution linked to the business sector or a new common corporate tax base should be introduced. The tax measures included in the Commission's 2021 Work Programme are deeply linked with the European Green Deal. The "package 55" (targeting a reduction by 2030 of 55 % of greenhouse emission compared to 1990), will be launched in the second quarter of 2021 and it should include the proposal for a CBAM and the Revision of the Energy Tax Directive. In January, the European Commission remarked its commitment to work on a proposal that uses the resources of the CBAM for the European budget and the Next Generation EU programme. The Commission has also ensured that the proposal, which is expected to be published in June 2021 (and applicable from 2023), will be WTO-compatible not to create undue limitations at the EU border.

MISCELLANEOUS

ETAF Tax Conference on the role of tax advisers in strengthening tax compliance

On 1 December, the European Tax Adviser Federation (ETAF) hosted its second Tax Conference of 2020. Gerassimos Thomas (General-Director at DG TAXUD, European Commission) and Paul Tang (MEP Chair of the FISC Committee) discussed with the President of ETAF, Philippe Arraou, on the role of tax advisers in strengthening tax compliance. Philippe Arraou opened the conference stressed the importance of tax compliance in this moment of economic crisis and how tax compliance is the very first step towards fair taxation. Mr Thomas highlighted the efforts of the European Commission in providing a simplified tax framework to provide taxpayers with easier tools to comply with their respective tax systems. Mr Tang remarked the role that taxpayers play in facilitating tax compliance, with particular reference to regulated tax professionals such as the members of ETAF. The conversation touched many topics, including the possible use of digital technologies for supporting tax compliance and the next EU initiative regarding business taxation (including taxation of the digital economy). The three panellists have also discussed the possibility of a future shift towards qualified majority voting in the Council when it comes to approving tax policy measures and the growing responsibilities of the European Parliament in this field.

You can watch the registration of the Conference on the ETAF website.

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ETAF www.etaf.tax is a European umbrella organisation for 300,000 tax professionals from France, Germany, Italy, Belgium, Romania, Hungary and Austria. ETAF was launched in January 2016 as an international non-profit organisation (AISBL), governed by Belgian law and located in Brussels. The main role and mission of ETAF is to represent the tax profession at European level in liaising closely with European policy makers to promote good legislation in tax and professional matters. ETAF is a registered organisation in the EU Transparency Register with the register identification number 760084520382-92.

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