ETAF
European Tax Adviser Federation

ETAF NEWS

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INTRODUCTION

Philippe Arraou, President of ETAF

Dear ETAF Members,
dear friends,

2022 will be a very busy and eventful year considering the highly ambitious programme laid out by the French presidency of the Council for the first six months. One of the priorities in tax will be to reach an agreement in the Council on minimum corporate taxation within the EU. In December 2021, the European Commission finally revealed its plan on how it intends to implement the historic OECD tax agreement on a global minimum effective corporate tax rate of 15 % on European level. We are convinced that this agreement is the right move towards making taxation in the EU fair and transparent. Therefore, we support the ambitious plan of the French presidency to find a consensus in the Council by June this year.

The fight against tax fraud, money laundering and the abuse of so-called shell companies are also on the political agenda in Brussels for this year. ETAF will actively participate in these discussions and point out that a regulated tax adviser profession can help fighting fraud and detecting money laundering schemes. We are bound by our strict professional codes and well-functioning sanction systems which have proven to be very effective in the countries of our members. New rules in the fight against money laundering and terrorist financing could significantly change the way tax advisers across Europe work. We conduct a comprehensive risk assessment of our clients and are obliged by law to report certain data when we suspect wrongdoings. Failure to do so may lead to criminal sanctions and disciplinary action. While we support the anti-money laundering ideas of the European Commission, ETAF recommends in an opinion statement to consider and enforce existing regulations before implementing additional requirements and a new framework.

Dear Members and friends, I am looking forward to this new year full of projects and I am especially looking forward to a lot of fruitful discussions with you!

I hope you enjoy reading our Newsletter!

Sincerely yours,

Philippe Arraou

PROFESSIONAL LAW

ETAF accompanies new proposals to fight Money Laundering

On 20 July 2021, the European Commission published a comprehensive legislative package to combat money laundering and the financing of terrorism (hereinafter: AML/CFT) with a total of four legislative proposals: a regulation to establish a new European anti-money laundering authority AMLA, a regulation to introduce a single corpus of rules, a recast of Regulation 2015/847 on information accompanying transfers of funds and a 6th anti-money laundering Directive.

Money laundering and the financing of terrorism are criminal activities. They jeopardise the security of our societies and the financial stability of the economy. In particular, cross-border organised crime and international terrorism are exploiting loopholes which are available due to the different implementation of the current European legislation in the area of AML/CFT by the Member States.

ETAF is closely accompanying this legislative process. In November 2021, it presented its reasoned opinion statement to the relevant EU institutions. For the above-mentioned considerations, ETAF supports the European Commission in its effort to replace the existing patchwork of regulations by a single corpus of rules. If possible, ETAF argues, this should take place under consideration of the different national structures, legal cultures and the different professional law systems in Europe. Furthermore, ETAF welcomes the Commission's plan for a closer cooperation between control bodies and Financial Intelligence Units, the establishment of a 'grey' list of third countries at risk of money laundering, the proposal for an EU-wide maximum cash limit and the proposal to expand AML rules to cryptocurrencies.

Concerning the AMLA, ETAF advocates that the competencies of the AMLA in the non-financial sector should be limited to a coordinating and advisory function. The non-financial sector has multi-layered economic sectors and a variety of existing obliged entities. The supervision of this sector should remain decentralized at the level of Member States; they can act faster, more effectively and more appropriately. This prevents an unnecessary interference with the competencies of the Member States.

In the Council, meanwhile, the French Presidency has rated the AML proposals as a big priority and demanded *"ambitious"* and *"proportionated"* compromises by June 2022. MEP Luis Garicano (Renew Europe, Spain), one of the main negotiators of the EP on this file, would like to broaden the scope of the entities falling under the direct supervision of AMLA and is asking – in contrast to ETAF – for more resources in order to focus more on the non-financial sector. ETAF will stay vigilant because we can expect controversial discussions on this file.

Commission calls on 18 Member States to strengthen the EU Single Market for regulated professions

On 2 December 2021, the Commission sent letters of formal notice to 18 Member States (including Austria, France, Germany, Romania and Hungary) for failure to transpose the 2018 Directive on a Proportionality Test before adoption of new regulation for professions.

The transposition deadline for the Directive was 30 July 2020. According to the Commission, the proportionality test, that the Directive put in place, shall ensure that all requirements concerning regulated professions are necessary and balanced.

After a careful examination of the national transposition rules, the Commission found that some Member States failed to ensure a proper implementation of the directive's requirements. Although its press release does not give detailed information about concrete loopholes, it reveals as common problems the failure to capture all types of measures such as those adopted by professional associations, the failure to accurately transpose the criteria of the proportionality test and the failure to ensure the necessary procedural guarantees.

The concerned Member States now have two months to respond to the letters of formal notice. Otherwise, the Commission may send them a reasoned opinion.

The Commission wants to go one step further and will invite Member States to share their experience and views regarding the transposition of the Directive and what they have done or intend to do to ensure that national proportionality assessment procedures effectively work in practice, during a working group on 3 February 2022. In a preparatory note, it emphasizes again that the effective transposition of the Directive at national level is crucial in order to realize its full potential in terms of prevention.

Justified and unjustified barriers in the EU Single Market

The removal of restrictions on the cross-border movement of goods and services in the EU is a key factor for economic growth in the member states.

The European Parliament's Internal Market and Consumer Protection Committee (IMCO) had published a draft report on the removal of non-tariff and non-tax barriers to the single market in the EU on June 16, 2021.

In his report, the Polish rapporteur MEP Kosma Złotowski calls for the removal of justified and unjustified barriers to improve cross-border economic activity.

He notes that the completion of the internal market is prevented by the incorrect or misapplication of EU legislation. He also regrets the failure of the electronic Services e-Card and the renewal of the Notification Procedure, two initiatives from the so-called Services Package of 2017. The EU Commission and member states are asked to examine whether national regulations constitute barriers to the internal market and are necessary, proportionate and justified.

In September 2021 ETAF reacted in a Letter to MEPs to the report and proposed amendments. Among other things it suggested to reduce the scope of the report to unjustified barriers in order to avoid the removal of necessary national regulation. MEPs have taken this point into account in their compromise amendments and have included unjustified barriers. ETAF also called on MEPs to recognise so-called natural barriers, that are caused by the diversity of language or culture in member states. In December 2021 a consolidated version of the report was published.

The report recognises that regulated professions have a special place in the internal market as they play an important role for the general interest. At the same time, the rapporteur warns against using professional regulations to maintain unjustified barriers and thus fragment the internal market.

In this context, the EU Commission is called upon to present an action plan by mid-2022 to initiate a reform of the current legal framework.

TAX LAW

The EU starts the implementing process of Pillar II

Two days after the publication of the OECD model rules, the European Commission unveiled on 22 December 2021 a proposal for a Directive implementing the minimum 15% effective tax rate (so-called Pillar II) within the EU. It is the first jurisdiction to have started the process.

The proposed rules stay really close to what has been agreed at international level and will apply to any large group, both domestic and international, which meet the annual threshold of more than €750 million of consolidated revenues in at least two of the four preceding years, and with either a parent company or a subsidiary situated in an EU Member State.

One of the main differences with the OECD agreement is that the minimum top-up tax will also apply to purely domestic companies that pass the threshold of €750 million turnover, in order to be in conformity with EU law and not to discriminate between cross-border and domestic situations. According to the Commission, this extension is expected to involve *“limited number of taxpayers”*.

All of the other features of the OECD agreement (scope, rates, exclusions, etc.) are unchanged. As provided for in the OECD Model Rules, the proposal for a Directive allows Member States to opt to levy a domestic top-up tax on their low-taxed domestic subsidiaries. This option will allow the top-up tax due by the subsidiaries of the multinational group to be charged locally, within the respective Member State, and not at the level of the parent entity.

The Directive will have to be adopted by the unanimity of Member States and the new rules would start to apply on 1 January 2023.

In a press release, ETAF welcomed this proposal, which will bring the EU one step closer to fair taxation but outlined the complexity of implementing the OECD tax deal for tax advisers as well as for the companies they advise, especially in such an ambitious timeline.

The French Presidency of the Council of the European Union intends to devote the early months of the semester in the tax field mainly to this issue. The file was discussed for the first time by EU Finance Ministers on 18 January 2022.

The debate showed some emerging concerns. Poland, Hungary and Estonia asked for legal safeguards linking Pillar II to Pillar I of the OECD tax reform. The three countries, as well as Sweden, expressed concerns about the 2023 deadline, that might not be achievable for everyone. Malta also expressed *"serious concerns"* that might lead it to ultimately withdraw its support to the proposal if not tackled adequately.

The discussion will continue at the next Ecofin Council on 15 March, where France hopes an agreement can already be reached.

European Commission proposes taking part of revenues of Pillar I for the EU budget

The European Commission unveiled on 22 December a 'basket' of three new own resources for the EU budget, to help repay the €750 billion of financing for the EU Economic Recovery Plan.

It proposed that 25 % of the revenue from the EU Emissions Trading System (ETS), 75 % of the revenues generated by the Carbon Border Adjustment Mechanism (CBAM) and 15 % of the share of residual profits from multinationals that will be re-allocated to EU Member States under the Pillar I of the OECD tax deal should flow into the EU budget.

These three new own resources are expected to generate a total of around €17 billion (in constant 2018 prices) per year for the EU budget over the period 2026-2030.

The OECD tax deal requires all parties to remove all Digital Services Taxes and to commit not to introduce new ones. As an alternative, the Commission thus proposed to link the digital levy it promised for the EU Budget with the OECD Pillar I.

Concretely, Member States will have to provide a national contribution to the EU budget based on the share of the taxable profits of multinational enterprises re-allocated to each Member State under Pillar I. The Commission estimates that it would generate between €2,5 and €4 billion per year.

This own resource would be introduced once the Multilateral Convention negotiated by the OECD and the related EU Directive – which should be presented in July 2022, would both be in force and effectively apply.

The Commission also announces that it will propose in 2023 a second basket of new own resources, which could include a Financial Transaction Tax (FTT) and an own resource linked to the corporate sector, to reach the €15 billion per year needed to repay the €750 billion recovery fund.

European Commission proposes new rules to go after shell companies

On 22 December 2021, the European Commission presented a proposal for a Directive to better fight the misuse of shell companies within the EU.

The proposal seeks to create a new *"economic substance"* test to help Member States to identify undertakings that do not perform any actual economic activity, even if they are presumably engaged with one, and that can be misused for tax avoidance or evasion purposes, as the recent revelations of the *Pandora Papers* recalled.

According to the proposed rules, being declared as a shell company would have consequences for the tax treatment of the transactions and assets of the entity. To obtain tax advantages, an undertaking normally needs to provide a certificate of residence for tax purposes. The proposal foresees that the Member State of tax residence of the shell will either not issue a tax residence certificate at all or will issue a certificate with a warning statement to prevent its use for the purposes of obtaining tax advantages in the EU.

The Directive is clearly organised in 7 steps. It first differentiates between risky and non-risky entities. Risky entities will have to declare in their annual tax return, for each tax year, whether they meet the three indicators of minimum substance based on their premises, bank account, director and employees.

If one of these requirements is not respected the risky entity will be presumed a shell company. A mechanism is nevertheless foreseen to allow a company to rebut this presumption. Moreover, the Member States will need to share all information to a central depository and penalties can be imposed to companies not respecting their obligations under the Directive.

This proposal, once adopted as a Directive by the unanimity of Member States, should be transposed into their national laws by 31 December 2023 and come into effect as of 1 January 2024.

Taxation is high on the agenda of the French Presidency of the EU Council

France took over the rotating Presidency of the Council of the European Union, succeeding Slovenia, on the 1st of January 2022. This is France's thirteenth presidency, the last one taking place in 2008. And one thing is for sure: taxation will be high on France's agenda for the next sixth months.

France's programme states that it will *"advance"* work on the implementing Directive for Pillar II, presented just before Christmas. Although it chose to stay cautious in the phrasing, the government said publicly on several occasions that it absolutely wants to have an agreement on this Directive by June.

Paris also wants to continue the work on the recast of the Energy Taxation Directive, with a possible policy debate at the Ecofin Council of June, as well as on the Carbon Border Adjustment Mechanism (CBAM), with a possible agreement already in March, according to a provisional calendar.

On the VAT front, the French Presidency wants to prepare an *"assessment"* of the reform of the VAT rules for e-commerce, which entered into force on 1 July 2021, *"in order to consider the follow-up to be given to it with a view to the proposal that the Commission has planned to make in the second half of 2022"*, i.e. a revision of the VAT Directive and a revision of the Council regulation on VAT administrative cooperation to modernise the VAT rules. Possible Council conclusions on this topic could be adopted at the Ecofin Council of 15 March.

We can also expect, by June, possible progress reports on the recast of the Tobacco Taxation Directive and on the partial revision of the Directive laying down general arrangements for excise duties, for which proposals from the European Commission are expected in May.

Moreover, the programme states that the French Presidency will initiate work on *"future initiatives"* to strengthen administrative cooperation between Member States and the fight against fraud and tax evasion. It should indeed start the work on the eighth revision of the Directive on Administrative Cooperation (DAC) in the field of taxation – which should be presented during the course of 2022 – but only a progress report is expected in June and not an agreement.

Updated rules for reduced VAT rates

After almost 4 years of negotiations, EU Finance ministers unanimously reached an agreement on 7 December 2021 on the proposal on reduced rates of value added tax (VAT). The text modifies the VAT Directive of 2006 to grant more flexibility to Member States in the setting of VAT rates.

The EU Council's text shifts away from the approach the European Commission took in its initial proposal presented in January 2018. Originally, the Commission wanted to introduce a negative list of products and services to which reduced rates can never be applied such as alcohol, tobacco and petrol. But Member States decided to have a positive list of products and services instead.

According to the final text, Member States will now have the possibility to apply a maximum of two reduced rates of a minimum of 5 %, one super-reduced rate lower than the minimum of 5 % and one zero rate. Each Member State will be able to choose 24 items on the positive list to which a reduced rate could be applied and 7 items to which a super-reduced or a zero rate could be applied.

Concerning existing derogations certain Member States have for historical reasons, the agreement says that they could be opened to all Member States, as long as they comply with the seven-item rule.

The list of items for which reduced rates can be applied has been updated to include, amongst others, products and services that protect public health, such as personal protective equipment or that support the digital transition, such as livestreamed events and internet access services.

Reduced VAT rates for environmentally harmful products will also be progressively phased out and the text allows Member States to better respond to exceptional circumstances like pandemics, humanitarian crises or natural disasters.

As the Council's text diverges significantly from the Commission's initial proposal, a new opinion of the European Parliament will be requested before the Council will be able to formally adopt the directive.

The revision of the Code of Conduct on Business Taxation stuck in the EU Council

The EU Finance Ministers failed on 7 December 2021 to find an agreement on the revision of the 1997 Code of Conduct, which aims to limit harmful business taxation practices in the European Union. The European Commission proposed this reform in July 2020 to cover all measures that pose a risk to fair tax competition.

Slovenia – which held the Presidency of the EU Council at the time - decided that it was high time to submit the file to the Ecofin Council despite the opposition of Hungary and Estonia but the two countries maintained their blockade.

Estonia explained in a public statement that it preferred to await the outcome of the OECD global tax reform before embarking on amending the Code of Conduct while Hungary reportedly held the reform hostage because the European Commission refuses to unlock recovery cash to Budapest over concerns of corruption.

The draft text which was submitted to ministers, stated that, in addition to tackling very low or zero tax rates, the Code of Conduct will cover generally applicable tax features of a Member State which create opportunities for double non-taxation or that can lead to multiple use of tax benefits, in connection with the same expenses, amount of income or chain of transactions. Moreover, a State would be able to bring to the attention of the EU Council's Code of Conduct Group any tax measure that an EU country has introduced and not spontaneously notified.

The Code of Conduct will likely remain a *"political commitment"* from Member States and not a binding instrument, as MEPs and NGOs asked in the past. Some improvements in terms of transparency were nevertheless considered such as the publication of the final documents and the possibility for the Group "Code of Conduct" (responsible for the management of the Code) to decide to make public additional documents *"when appropriate"*.

According to a provisional calendar, the French Presidency of the EU Council aims at unlocking the situation by June and obtain a possible agreement.

Disclaimer:

European Tax Adviser Federation AISBL – ETAF
Rue Montoyer 25 | 1000 Brussels
Phone: +32 2 2350-105 | Email info@etaf.tax | www.etaf.tax

Head of Office: Michael Schick

For enquiries, please contact: Melek Gecici, melek.gecici@etaf.tax, Ronja Heydecke, ronja.heydecke@etaf.tax or Marion Fontana, marion.fontana@etaf.tax