ETAF
European Tax Adviser Federation

# ETAF NEWS

October 2020

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## INTRODUCTION

### Philippe Arraou, President of ETAF

Dear ETAF Members,
Dear friends,

The first impact of the Coronavirus has been enormous and extremely challenging for our health care systems and for the economic stability throughout the European Union. With measures that are designed to support the recovery like the launch of bridge money for businesses to ensure liquidity for heavily affected SMEs or short-term working schemes to preserve employment, Member States and the EU have been tackling the most pressing issues.

Tax advisers have been playing a crucial role in navigating through these uncertain times, taking on new responsibilities to be able to thoroughly advise their clients. Our profession has been contributing substantially to limit the damage and, in some countries, this has led Governments to upgrade the profession to a "compliance authority".

As a trusted body, regulated tax advisers ensure that applications for government aid are correct and check the fulfillment of eligibility requirements before applying for the grant in the name of their clients. Yet one more time it has become very clear how important our national regulations are for the healthy functioning of tax systems and disbursement of government funds.

This crisis forces us to surpass ourselves and become better in what we do. In this way, we will prove that we can improve tax compliance and help close the "tax gap". In fact, ETAF is planning an online conference on exactly the role of tax advisers in improving tax compliance for the 1st of December 2020. I cordially invite you all to participate, when we explore this topic with high-end decision takers on European level.

This crisis has also impacted work across Europe. The restrictions on the freedom to provide services due to Corona measures were a shock for many Europeans and an economic fiasco for many cross-border service providers. This raises the question how the internal market can be strengthened without neglecting consumer protection and quality. The freedom of movement and provision of services are two ground pillars and substantial achievements of the internal market, after all. For our profession, it is essential that we can rely on clear and strong rules that safeguard our self-determination rights, so that we can do our job in the best possible way and lead our clients towards recovery as soon as possible.

I hope you will enjoy reading our Newsletter!

Yours sincerely,
Philippe Arraou

## PROFESSIONAL LAW

### What is illegal offline should be illegal online – the Digital Services Act

The Commission intends to present a proposal that will largely replace the E-Commerce Directive (2000/31/EC) by the end of this year. Improving liability and security rules for digital platforms, services and products is one of the priorities of the European Commission. With this proposal, it aims to complete the digital single market. The goal is for digital business models to be able to spread and develop more easily in order to improve the competitiveness of European companies compared to providers from third countries.

The Committee on Internal Market and Consumer Protection (IMCO) in the European Parliament has drafted an own initiative report (2020/2018 (INL)) with recommendations on the Digital Services Act in September. This serves as a political impetus to the European Commission and the Council. The plenary adopted the text as a European Parliament resolution on 20 October 2020.

The Digital Services Act can make a significant contribution to strengthening the digital services market in Europe. It is important to strengthen legal certainty for consumers and service providers online, to ensure consumer protection and to increase investment in digitalization among service providers.

When it comes to the establishment in another country, ETAF has always been a strong defender of the country-of-destination principle. In our profession, it is simply impossible to provide permanent tax advice without meeting the professional requirements in the respective Member State. In contrast, the departure of this principle for *temporary* cross-border services, which is foreseen in the underlying EU-Directives, has been fully accepted, transposed in the ETAF Member States – and is also operational in practice.

Now, of course, a *permanent digital* cross-border provision of services does not require an establishment in the destination country. ETAF has therefore always warned that a breaking of the establishment principle for digital provisions could harm consumer protection and quality of services. Due to the existing diversity of services in Europe and their different legal cultures, a renunciation from the rules laid down in the Services Directive would create considerable disadvantages for legal certainty, for service providers and for the quality of services offered online. This would unnecessarily undermine the trust that consumers place in the internal market.

ETAF does therefore not agree with the adopted resolution to basically defend the country-of-origin principle, but strongly welcomes the statement in the report that the Member States can break this principle if they have overriding interests like consumer protection and where they think it is necessary, proportionate and in accordance with Union law.

The country of destination principle should also apply in the digital sector, in particular if national protective rules apply to for example maintain the quality of services or to protect the independence of service providers. What is not allowed offline in a country, should also not be allowed online in the same country. Otherwise, there is a threat of competitive disadvantages, especially for service providers in the Member States.

## TAX LAW

### Gentiloni opens the FISC Committee's work

On 23 September 2020, the new subcommittee on Tax Matters of the European Parliament (named "FISC" Committee) held its constituency meeting online as these days of pandemic demand. Unsurprisingly, the members of the subcommittee have appointed Paul Tang (S&D, the Netherlands) as Chair of the Committee, while the four Vice-Chairs are: Markus Ferber (EPP, Germany), Martin Hlaváček (Renew Europe, Czech Republic), Kira Marie Peter-Hansen (Greens/EFA, Denmark) and Othmar Karas (EPP, Austria).

On 24 September 2020, during the first official meeting of FISC, MEPs have had the chance to exchange with the Tax Commissioner Paolo Gentiloni on tax topics. Mr. Gentiloni confirmed his commitment to propose an EU solution on digital taxation if the OECD negotiations would not reach an agreement by the end of 2020, which has been the case since the OECD finally postponed a global solution to mid of next year. Gentiloni explained that, though digital taxation would not bring billions in the coffers of the EU Member States, it is a political duty to create a fairer tax system. When asked about the new own resources, the Commissioner explained that they are not meant to increase the tax pressure on EU citizens, but to render the tax system fairer and more sustainable. Answering to questions from MEPs, he has reassured them that the revision of the Energy Taxation Directive and the introduction of the Carbon Border Adjustment Mechanism will not harm the competitivity of European companies, but will serve as a tool of the European Green Deal.

## ETAF gives feedback to climate related tax files

In March 2020, the European Commission launched its work on the revision of the Energy Taxation Directive, which was adopted in 2003 and has remained unchanged ever since. DG TAXUD published an impact assessment in which the goals of the revision were explained: primarily it is about aligning the taxation of energy products and electricity with EU climate policies and the European Green Deal. The reform addresses the minimum tax rates covering energy products and electricity to tackle imbalances, in particular between petrol and diesel. Secondly, the plan is to promote renewable energy and energy efficiency through taxation. Thirdly, the review will re-evaluate the treatment of electricity and natural gas products and streamline the wide range of reductions, exemptions and subsidies for fossil fuels.

DG TAXUD also published an impact assessment on the Carbon Border Adjustment Mechanism. With this project the Commission plans to tax the imports of selected products that are emission-intensive and thus reduce methane emission overall. Since many international partners do not share the same climate ambition as the EU, there is a risk that production is transferred from the EU to countries with lower climate constraints. Another goal is also to reduce the amount of EU products that are being replaced by more carbon-intensive imports. By putting a price on imports based on their carbon content the Commission hopes to meet the global climate objectives of the Paris Agreement.

In July 2020, the Commission then launched two consultations on both measures which ran until 14 and 29 October, respectively. Legislative proposals should be expected in June 2021.

ETAF has contributed to the consultations and argued for a revision of the Energy Taxation Directive in order to reach climate neutrality and ensure the smooth functioning of the internal market. Furthermore, the revision has to consider the changed energy mix with a higher share of renewables and electricity. With regards to the minimum tax rates of an energy product, the cost should be based on all their externalities such as greenhouse gas emissions and air polluting emissions.

Regarding the Carbon Border Adjustment Mechanism, ETAF argued that such a measure is welcome if it can contribute to global climate efforts and help reduce emissions. In addition, it could help promote clean technologies in the EU and elsewhere, boost innovations and increase competitiveness. Nevertheless, ETAF expressed its concern about increasing costs for businesses, as well.

## The German Presidency pushes for an FTT

On 2 September 2020, Germany's finance minister Olaf Scholz attended a hearing of the European Parliament's ECON Committee to present the priorities of the German Presidency. Mr. Scholz expressed explicit optimism on the prospect of reaching an agreement on the financial transaction tax (FTT) now in the COVID context.

On 22 September 2020, Germany provided further details about the government's tax policy priorities for its presidency of the European Union. Germany will continue to push for an EU FTT, based on the existing French rules. Under proposals issued in January 2020, this would entail a tax of no less than 0,2 percent being imposed on the purchase of shares in domestically listed companies with a market capitalization in excess of EUR 1 billion. The tax would also apply to depositary receipts issued domestically and abroad and which are backed by shares in these companies. Initial share offerings would be excluded from the FTT.

The German Presidency hopes to negotiate a political agreement between participating Member States allowing for the legislative process to begin. 10 Member States are still discussing the FTT on the basis of enhanced cooperation, a legislative mechanism used when the required consensus on proposed EU laws cannot be reached. These Member States are Austria, Belgium, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain.

## VAT: Implementing powers for the European Commission?

On 29 September 2020, the Commission published a roadmap on its planned initiative to turn the VAT committee into a 'comitology committee' enabling the Commission to adopt implementing acts on certain aspects of VAT. The EU's current VAT committee is composed by representatives from national authorities and the Commission. It aims to ensure EU rules on VAT are applied consistently throughout Member States. However, it has an advisory status and can therefore only issue non-binding guidance. If the VAT Directive is amended (unanimity is required) and the VAT Committee turns into a comitology-committee, the Commission would from now onwards submit the drafts of implementing acts to the comitology-committee, which will have to give its opinion in form of a vote. In that vote, the qualified majority voting system will be applied.

This initiative was announced in mid-July within the Commission's tax package. Stakeholders were able to provide feedback to the Roadmap until 29 October 2020. ETAF welcomed this initiative and supported it in order to promote a uniform application of VAT rules within the EU. A proposal for a Directive to make the initiative a reality is scheduled for the fourth quarter of 2020.

**Explanatory Notes on the new VAT e-commerce rules**
Simultaneously, on 30 September 2020, the Commission published Explanatory Notes on the new VAT e-commerce rules. They 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.

## MEPs push for an ambitious reform of the own resources

In the last few months, after the European Council reached an agreement on the EU Recovery Plan on 21 July 2020, the discussion regarding the new EU's own resources system continued between the European Parliament and the Council. In August 2020, the European Parliament's Committee on Budgets voted on the proposal concerning the EU's own resources system linked to the post-2020 Multiannual Financial Framework. The report from José Manuel Fernandes (EPP, Portugal) and Valérie Hayer (Renew Europe, France) called for a uniform call rate for the weight of non-recycled plastic packaging waste (starting on 1 January 2021) and a set of new own resources. The MEPs have made very specific proposals: a uniform call rate on the proceed from the sale of allowances under the Emissions Trading Scheme (from 1 January 2021); the use of revenues generated by the tax on digital services (from 1 January 2023); the introduction of a financial transaction tax (from 1 January 2024); a system of revenues generated by a Carbon Border Adjustment Mechanism (from 1 January 2023). The MEPs have also remarked the need to eliminate the budget rebates and corrections granted to some EU Member States. On 11 and 12 September 2020, the EU Finance Ministers held an informal meeting in Berlin where they discussed, amongst others, the possible introduction of new own resources in the context of the European Recovery Plan, but no final decision has been taken regarding the subject.

## OECD postpones international tax reform deal to mid-2021

On 12 October 2020, the OECD released the blueprints adopted by the 137 members of the Inclusive Framework on Pillar 1 and on Pillar 2 of the international tax reform (along with the economic impact assessment). On the same day, the Inclusive Framework issued a statement clarifying that the remaining issues to be agreed on the reform of international taxation needed further discussions. The members of the Inclusive Framework have highlighted that they would agree to "bringing the process to a successful conclusion by mid-2021 and to resolve technical issues, develop model draft legislation, guidelines, and international rules and processes as necessary". Regarding Pillar 1, some of the points still under discussion are of primary importance, the main one remains the scope. The blueprint provides two categories of activities in the scope: automated digital services (ADS) and consumer facing businesses (CFB). ADS are provided on an automated and standardised basis to a large and global customer or user base and provided remotely to customers in markets with little or no local infrastructure. The definition of CFB includes businesses that generate revenue from the sale of goods and services of a type commonly sold to consumers, including those selling indirectly through intermediaries and by way of franchising and licensing. Some members of the Inclusive Framework are in favour of implementing automated digital services as a first step and consumer facing businesses in a second moment. On the other hand, the proposal of the U.S. to have Pillar 1 as a safe harbour still stands. This and other major points (carve-outs, thresholds, nexus rules) still under discussion are crucial for determining whether EU Member States will be satisfied with the international tax reform. France, one of the main promoters of the taxation of the digital economy, reacted promptly to this postponement by confirming that it will begin to collect tax on digital companies already in 2020. The French Finance Minister, Bruno Le Maire, remarked that towards the U.S. it has always been clear that if there was no agreement at the OECD by 2020, France would levy its national digital tax. The reaction of the European Commission was a bit milder, a spokesperson remarked that the new deadline of mid-2021 should be the final one. It is worth reminding that many EU Member States have introduced or have decided to introduce some form of tax on digital companies: France, Italy, Spain, the Czech Republic and lately Belgium, just to name a few.

## State aid and tax: it is not just about Apple

In the last few months, the Court of Justice of the European Union (CJEU) has decided on a series of interesting tax-related cases. The most famous is the Apple case, involving Ireland, but other interesting judgements involve Spain, Hungary, Poland and Luxembourg.

On 15 July 2020, the General Court dismissed the European Commission's decision that Ireland had granted the multinational enterprise Apple an illegal State aid. In 2016, the Commission found that two Irish tax rulings were contrary to the EU State aid rules and ordered Ireland to recover €13 billion from Apple. However, the General Court concluded that the Commission was wrong to declare that the Irish subsidiaries of Apple had been granted a selective economic advantage and, by extension, State aid. According to the General Court, the Commission incorrectly concluded that the Irish tax authorities had granted to the Apple subsidiaries an advantage for not having allocated the group's intellectual property licenses held by such subsidiaries and, consequently, all of the subsidiaries' trading income to the Irish branches. The General Court added that the Commission failed to demonstrate methodological errors in the contested tax rulings or that such tax rulings were the result of discretion exercised by the Irish tax authorities.

On 25 September 2020, Competition Commissioner Margrethe Vestager confirmed the Commission's decision to appeal before the European Court of Justice against the Apple case judgement of the General Court.

Recently, the General Court ruled in favour of the Commission in the case of the Spanish tax lease scheme. Back in 2013, the Commission found that the Spanish tax lease scheme constituted state aid in the form of a selective advantage partially incompatible with the internal market. However, in 2015, the General Court of the European Union annulled the Commission's decision, after an action brought by a Spanish company. In 2018, the Court of Justice, hearing an appeal brought by the Commission, set aside the judgement of the General Court. The Court of Justice referred the case back to the General Court for its final ruling of 23 September 2020 that dismissed the actions brought by the Spanish company. The General Court assessed that the benefit of the tax regime was granted in the context of a system of prior authorisation *"on the basis of vague criteria requiring an interpretation exercise for which no provision was made"*. According to the General Court, the discretionary aspects *"favoured the beneficiaries over other taxpayers in a comparable factual and legal situation"*. The Court concluded that the Commission had not erred in considering that the system was selective.

On 6 October, the CJEU ruled on Joined Cases C-245/19 and C-246/19 in the context of the exchange of information in the field of taxation. In a nutshell, the CJEU stated that a person 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 (based on the right to an effective remedy guaranteed by the Charter of Fundamental Rights of the European Union). However, Member States may deny that person subject to the tax investigation (and the third parties concerned) the right to bring such action, provided that there are other remedies enabling them to obtain an incidental review of that request.

On 15 October, Advocate General (AG) Kokott delivered an opinion on the Cases C-562/19 and C-596/1, regarding the Hungarian advertising tax and the Polish turnover tax. According to the opinion, there was no evidence in either tax regime of any selective advantage and therefore the AG proposed that the Court of Justice dismiss the Commission's appeals.The background is the following: the 2016 Polish tax introduced a requirement for retailers to pay taxes on their monthly turnover from the sale of goods to consumers, where turnover exceeds certain thresholds (around EUR 4 million); the 2014 Hungarian levy requires broadcasters or publishers of advertisements to pay a tax at a progressive rate on annual net turnover generated by the broadcasting or publication of advertisements in Hungary. In 2016 and 2017, the European Commission declared both taxes incompatible with the common market because they grant an advantage to smaller undertakings, which are "taxed at too low a level". Poland and Hungary challenged the Commission's decisions before the General Court. In 2019, the General Court annulled the Commission's decisions since there was no evidence in either tax regime of any selective advantage and therefore State aid in favour of small undertakings. The Commission brought an appeal against both judgments but the opinions of AG Kokott proposes the CJEU to dismiss such appeals.

## The latest change to the EU Tax Blacklist

On 6 October 2020, the Council decided to add Anguilla and Barbados to the EU list of non-cooperative jurisdictions for tax purposes. Cayman Islands and Oman were removed from the list, after having passed the necessary reforms to improve their tax policy framework. The decision of removing the Cayman Islands triggered the reaction of some Members of the European Parliament: The Chair of the FISC Committee, Paul Tang (S&D, the Netherlands) stated that EU Finance Ministers are undermining the main tool to fight tax avoidance. Pedro Marques (S&D, Portugal) asked for the FISC Committee to prioritize a review of the blacklist criteria.

The EU list of non-cooperative jurisdictions for tax purposes is part of the EU's external strategy for taxation and aims to contribute to ongoing efforts to promote tax good governance worldwide. It lists non-EU jurisdictions that either have not engaged in a constructive dialogue

with the EU on tax governance or have failed to deliver on their commitments to implement reforms to comply with a set of objective tax good governance criteria, concerning tax transparency, fair taxation and implementation of international standards against tax base erosion and profit shifting.

Anguilla and Barbados were included in the EU list following peer review reports published by the Global Forum on Transparency and Exchange of Information for Tax Purposes, which downgraded the ratings of Anguilla and Barbados, respectively, to "non-compliant" and "partially compliant" with the international standard on transparency and exchange of information on request. Cayman Islands was removed from the EU list after it adopted new reforms to its framework on Collective Investment Funds in September 2020. Oman was considered as compliant with all its commitments after it ratified the OECD Convention on Mutual Administrative Assistance in Tax Matters, enacted legislation to enable automatic exchange of information and took all the necessary steps to activate its exchange-of-information relationships with all the EU member states.

Following this update, twelve jurisdictions remain on the list of non-cooperative jurisdictions: American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu.

## MISCELLANEOUS

### The strategy for European SMEs – an attempt to guide the economy through the green and digital transformation

The European Parliament is currently working on an initiative report on a new strategy for European SMEs (2020/2131). It is part of the industrial strategy presented by the European Commission in March 2020. The policy package consists of a New Industrial Strategy for Europe, an SME Strategy for a sustainable and digital Europe, a report on identifying and addressing barriers to the single market, and an Action Plan for better implementation and Enforcement of the single market rules. It aims at supporting the European industry transforming into a green and digital industry, encouraging innovation and experimentation to allow regions to develop new solutions with SMEs and consumers and thus ensuring that the EU remains a frontrunner.

The SME strategy, in particular, is set to support the 25 million SMEs in the EU who are seen as a substantial part of the economy within the EU. Since SMEs play a key role in every sector of the economy, the Commission's goal is to strengthen their competitiveness and to guide them through the transition to a more sustainable economy as well as support them in their efforts to keep up with new technologies and a more and more digitalized industry.

In the European Parliament, the SME strategy is currently being discussed under the leadership of the Committee on Industry, Research and Energy (ITRE). The political groups have diverging opinions: While the EPP group supports the approach to change entire industries and sectors and to advance a profound transformation, the S&D group considers the proposal on the table as too vague and requires more concreteness in certain areas. For the Greens, it is unclear whether the objectives of the Green Deal will be met with this new strategy or not. They criticize a lack of definitive regulatory measures and incentives to enable SMEs to integrate sustainability and circularity into their business plans and processes.

The deadline for tabling amendments to the ITRE initiative report expired in October 2020. Other committees, like INTA, ECON, IMCO, TRANS, AGRI have adopted their opinions. The European Parliament is expected to adopt a resolution within this year.

## ETAF Tax Conference on “The role of tax advisers in strengthening tax compliance” – 1 December 2020

# SAVE THE DATE

ETAF Web Conference on 1 December 2020

The role of tax advisers in strengthening tax compliance

## 1 December 2020

**15:00 – 16:00**

Register here

SPEAKERS:

- **Gerassimos Thomas**, Director-General at DG TAXUD, European Commission
- **Paul Tang**, Member of the European Parliament and Chair of the FISC Committee
- **Philippe Arraou**, President of the European Tax Adviser Federation

Simultaneous interpretation EN-FR-DE-IT
The conference will be livestreamed on the ETAF social media.
For more info: **info@etaf.tax**

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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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