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European Commission's tax policy 2019 to 2024: what can we expect?

1 December 2019 marked the start of the new European Commission led by incoming President Ursula von der Leyen. This means the setting of new political priorities at an EU level, in particular, in the field of taxation. The mission statements from Von der Leyen to her commissioners, and the recent confirmatory hearings in the European Parliament, set out the new Commission's tax programme. In addition to continuing the tax work inherited from previous Commissions, the main tax priorities of the new Commission will focus on measures relating to the digitalisation of the economy and addressing climate change.

The new President of the European Commission, Ursula von der Leyen (German, member of the Christian Democratic Party) was elected in July 2019 by the European Parliament. She announced the composition of her college of European Commissioners at the beginning of September 2019.

The economy portfolio, including the supervision of EU tax policy, is the responsibility of former Italian prime minister and minister of foreign affairs Paolo Gentiloni, who succeeds Pierre Moscovici. As both belong to the Social Democratic family, their ideological positioning should not be too far apart.

Von der Leyen has also surrounded herself with three 'super-commissioners' – Frans Timmermans, Margrethe Vestager and Valdis Dombrovskis – all of whom were members of the outgoing Commission chaired by Jean-Claude Juncker, and are this time appointed as executive vice-presidents. They will each play an important role in defining and implementing EU tax policies over the next five years.

The new College of Commissioners officially took office on 1 December 2019. While it was initially planned that the new commissioners start their mandate on 1 November 2019, this date was ultimately postponed due to the rejection of three commissioner-designates by the European Parliament, which considerably delayed the new legislature.

The start of a new Commission results in new political priorities at an EU level, in particular in the field of taxation. As the Commission is solely responsible for submitting legislative proposals to the EU Parliament and Council, it can be expected that the programme of the new Commission will have a significant impact on EU tax developments in the coming years.

The outgoing Commission chaired by Juncker focused strongly on tax measures fighting aggressive tax planning implemented by large multinational groups. Between 2014 and 2019, significant parts of the OECD action plan on base erosion and profit shifting (BEPS) were adopted at EU level by way of directives. This includes various measures provided for in the Anti-Tax Avoidance Directives (ATAD), including: restrictions on interest deductibility; anti-hybrid mismatches provisions and controlled foreign company rules; country-by-country reporting rules (CbCR); and various measures to increase tax transparency and facilitate the automatic exchange of tax information, including the automatic exchange of tax rulings and, most recently, the EU tax disclosure rules (or 'DAC 6').

This trend, driven by the Juncker Commission, has also been illustrated by several high-profile competition law investigations, requiring several multinational groups to repay considerable sums, sometimes record amounts, to certain member states on the grounds that these groups had received illegal state aid. Vestager, who takes up an unprecedented second term as competition commissioner, has already announced that other similar investigations are in the pipeline.

The mission letter of 10 September 2019 from Von der Leyen to Gentiloni sets out the new European Commission's tax programme. In addition to continuing the projects initiated by the previous Commissions (see below), the Von der Leyen Commission will focus on tax measures relating to the digitalisation of the economy and addressing climate change.

Climate change and digitalisation: the two pillars of the new EU tax policy

Taxing an increasingly digitalised economy

The digital revolution has led to the emergence of new business models. These economic mutations raise new international tax challenges. In particular, thanks to new technologies, businesses in the digital sector can capture the value creation attached to users located in a country without having a physical presence in that country. This results in a mismatch between the locations where tax is imposed and where value is created. One of the major tasks of the new Commission will be to agree on a concerted approach to address these challenges, alongside the OECD and the G20 countries.

The work undertaken under the BEPS action plan has paved the way for a detailed examination of the taxation of the digital economy at an international level. Within the framework, the OECD has notably identified that some profit shifting issues are aggravated by the digital economy. Some of the proposals have resulted in recommendations, some of which have been transposed into the relevant clauses of the OECD's multilateral instrument (MLI), particularly articles 12 and 13 on permanent establishment. However, the key measures addressing the fundamental issues raised by the digital economy (the most striking of which was the overhaul of the concept of permanent establishment and the definition of a new nexus test based on 'significant economic presence') have not been adopted.

As a follow-up to the BEPS project, the OECD published an interim report in March 2018 to examine the possible international tax implications of digitalisation. The report notes that there are still significant differences between countries as to the nature of the tax issues related to the digital economy and the solutions to overcome them. Given these divergences, no long-term reform proposals could emerge. The report also sets out the provisional measures that may be implemented but does not reach a conclusion.

In January 2019, the OECD published a policy note entitled '*Addressing the tax challenges of the digitalisation of the economy*', and launched a consultation on 12 February 2019 to gather stakeholders' views on concrete proposals. The proposal is divided into two 'pillars':

- the first concerns 'nexus' and profit allocation; and
- the second relates to remaining BEPS issues by ensuring that profits of international businesses are subject to a minimum level of taxation.

At the end of this consultation, on 28 May 2019 the OECD adopted a work programme aimed at developing a consensual solution by 2020. This programme was endorsed by G20 finance ministers at their meeting in Fukuoka on 8-9 June 2019, and by G20 leaders in Osaka on 28-29 June 2019. More recently, the OECD has launched public consultations on a proposal for a 'unified approach' under pillar one and on a global anti-base erosion (GloBE) proposal under pillar two. It is apparent that under the 'unified approach' the OECD has shifted its focus from 'taxing digital giants' to 'taxing large consumer-facing businesses'.

Paolo Gentiloni (Italian, president of the Democratic Party), is the commissioner for the economy. His responsibilities include the coordination of the EU tax agenda.

Frans Timmermans (Dutch, member of the Labour Party) is the commissioner responsible for climate action policies and the implementation of the European Green Deal. He will have to increase the EU's climate objectives with a view to achieving carbon neutrality by 2050. In this capacity, he will supervise and intervene on green tax issues.

Margrethe Vestager (Danish, member of the Social Liberal Party), commissioner in charge of 'Europe in the digital age' and competition, will be responsible for overseeing EU digital policy. During her previous mandate as commissioner for competition, one of her objectives was to fight harmful tax competition between member states. She has issued several state aid decisions against digital giants. Her new responsibilities will now steer her towards tackling digital taxation issues.

Valdis Dombrovskis (Latvian, member of the Christian Democratic Party), commissioner for financial services, will also oversee 'The economy in the service of citizens'. His key focus will be the evolution of banking prudential rules and the fight against money laundering.

Notwithstanding the work undertaken by the OECD and the G20 countries, some countries have decided to take a unilateral approach based exclusively on the taxation of digital giants, as shown, for example, by the digital services tax (DST) measures recently adopted or currently under discussion in various EU jurisdictions, including France, Austria, the UK, Italy and Spain. In most cases, these unilateral initiatives are described as being temporary measures that will disappear as and when an international agreement is reached.

In view of the political pressure applied by some member states, the Juncker Commission decided to move forward on a proposal at an EU level. Though initially supporting the OECD's proposed approach to tackle the problems by fundamentally rethinking existing tax systems, the

Commission's approach, at least in the short term, was to introduce a revenue-based tax specifically targeting digital giants. This was the same type of tax as that recently adopted in France, the main instigator and most vocal supporter of the Commission's project. (It should be noted that on 21 March 2018 the Commission also proposed a Directive relating to the corporate taxation of a significant digital presence.)

The proposal is still in draft form as agreement could not be reached due to the opposition of four member states (unanimity within the Council of Ministers is required for EU tax matters). The Commission's legislative proposal and the various amendments proposed by the Council are still officially on the table, but have been put on hold in the hope that a more comprehensive compromise will emerge at OECD level. As currently proposed, the EU tax based on the revenues of digital giants would apply from 1 January 2022 and would be repealed once an appropriate solution is found at OECD level.

Such a digital services (or advertising) tax raises numerous questions on the interaction and compatibility with existing tax rules, not to mention political tensions and threats of trade wars, particularly with the United States, as shown by the recent transatlantic fight over the new unilateral French DST.

For these reasons, the Von der Leyen Commission will focus its efforts on agreeing a common approach to digital taxation at OECD and G20 level in order to overcome bilateral tensions between member states. The Commission has also made it clear that if such a consensus cannot be reached by the end of 2020, it will move forward with a 'fair' EU DST. At his hearing before the European Parliament on 3 October, Gentiloni said that his team would be ready to work on an EU proposal in the 'third quarter of 2020' if no international agreement is reached in the meantime. However, in order to do so, the Commission would need to obtain the unanimous agreement of the member states, which might prove to be difficult.

The role of taxation in the European Green Deal

Taxation will play a central role in the 'European Green Deal', which is a comprehensive plan to be presented in early 2020 with a view to achieving a climate neutral EU economy by 2050. Implementing such tax policy should assist the EU to achieve its climate objectives and will therefore be a priority for both Gentiloni and Timmermans, executive vice-president in charge of implementing the Green Deal.

The reform of the European Energy Tax Directive (ETD) will be the cornerstone of the Von der Leyen Commission's green tax policy. The ETD sets out minimum tax rates for excise duties on energy products used as motor or heating fuel and for electricity. Other ways of using energy products (e.g. as raw materials) are outside the scope of the Directive. The ETD also provides for certain exemptions and reductions (e.g. exemptions for energy products used to produce electricity, or those applicable to the air navigation and maritime transport sectors).

The ETD was adopted mainly with a view to strengthening the functioning of the internal market by reducing the risks of distortion of competition likely to result from the disparity in the tax rates applicable in each member state. It also aimed at supporting member states' policies on environmental protection, energy efficiency, business competitiveness, transport and employment.

While the framework set by the ETD has facilitated the convergence of member states' national tax rates, a number of imperfections have been identified over the years, in particular with regard to the creation of conditions of fair competition and the free movement of energy products within the EU. More specifically, the minimum rates set by the ETD do not follow any specific logic and are too low, which does not encourage green technologies and activities that produce lower emissions. In addition, certain activities such as aviation and shipping are simply exempt from fuel tax.

In 2011, the Commission proposed amending the scope and structure of the ETD in order to deal with these issues. In particular, the proposal sought to tax energy products in a way that reflects both their energy content and their CO_2 emissions. The European Parliament and the European Economic and Social Committee delivered a positive opinion on this proposal; however, absent agreement between the member states, the Commission decided to withdraw it in 2015.

More recently, an evaluation report published by the Commission services concluded that the ETD was no longer adapted to the EU and international climate commitments. One of the main objectives of the Von der Leyen Commission will therefore be to modernise the ETD. It is still uncertain whether the Commission will propose targeted changes to the ETD or a more comprehensive overhaul of the EU's energy tax system, but there is no doubt that the proposals will ensure that energy taxation will aim at promoting environmentally sustainable technologies and energy products, while furthering the convergence of tax rates within the EU. The Commission is expected to start work very soon on an impact assessment, which will provide more concrete guidance on the ETD review.

It is expected that the transport sector will be central to this debate. Transport accounts for almost a quarter of greenhouse gas emissions in Europe and is the main cause of air pollution in cities. In this respect, the specific exemptions applicable to fuels used in the aviation and maritime transport sectors are in sharp contrast with the environmental objectives of the EU. It might therefore be the case that these exemptions would be called into question. Discussions on energy tax reform began at the informal meeting of finance and economy ministers (ECOFIN) held in Helsinki on 14 September 2019. The discussion was confidential, but it is reported that three member states (Estonia, Malta and Cyprus) firmly pushed back on a proposal put forward by the Swedish government to establish an EU aviation tax on kerosene. The Swedish finance minister appeared opposed to using qualified majority voting (QMV) (see below) to overcome the veto of some member states, and instead seemed determined to create a 'coalition of the willing' within the Council, allowing member states in favour of an aviation tax to progress the proposal.

At his confirmation hearing before the European Parliament on 8 October 2019, Timmermans said: 'Our Energy Directive is nowhere near where it needs to be, we need to revisit that. And I want to have the possibility to at least have the possibility to envisage taxation of kerosene, because I don't see the logic of why that energy source should be exempt from tax.'

In addition to the taxation of kerosene, some member states (including France, Germany, Austria, Italy, Sweden and the UK) have introduced, or are considering introducing, a tax on airplane tickets. While the proposed tax on kerosene seeks to plug an excise duties exemption, the proposed tax on airplane tickets is considered as a substitute for the VAT exemption on tickets and fuels. If such unilateral initiatives by member states multiply, the Commission could propose harmonisation measures to avoid distortions in the internal market.

With carbon prices rising within the EU, in particular under the emission trading scheme (ETS), the EU industry will increasingly face a competitive disadvantage compared to goods and services produced in countries that do not take similar action on climate change. To restore a level playing field and avoid 'carbon leakage' (i.e. businesses moving production to countries with lower carbon cost), the new European Commission sees the introduction of a carbon border tax as a key priority. Such a carbon border tax would be levied on imported goods and services in order to address the difference in carbon cost between the EU and third countries where the goods or services are produced. Such a tax raises a number of difficulties, particularly for estimating the carbon footprint of each product and the price of carbon in the EU and in the country of origin. Aside from its complexity, one can expect that the introduction of a carbon border tax will face political resistance from the EU's trading partners, who may view this as a protectionist measure. Finally, as recalled in the mission letter addressed to Gentiloni, the tax should be designed in accordance with the rules of the World Trade Organisation, in particular the principle of non-discrimination between states.

On this very point, Gentiloni stated during his hearing before the European Parliament on 3 October: 'I think we should move quickly on the so-called carbon border tax. We all know the legal and technical constraints, but this should not mean waiting.'

Ongoing projects: simpler and fairer tax systems

The next European Commission plans to continue the work on making tax systems simpler, clearer and easier to use. Indeed, some of the Juncker Commission's proposals are still pending adoption by the Council.

The common consolidated corporate tax base (CCCTB)

The CCCTB, the seemingly never-ending story of EU tax policy, has its origins in work on the harmonisation of direct taxation undertaken in the 1960s. It was not until the early 2000s that the Commission began working on a definite proposal. Initially, formalised in a proposal for a directive in 2011, the CCCTB project was relaunched in 2016 by two proposals for directives, but without reaching a consensus between the member states. The CCCTB will be high on Von der Leyen Commission's tax agenda. In his answers to the European Parliament's questions, Gentiloni indicated that the work on the CCCTB is a crucial element of his programme.

According to the most recent proposals, the CCCTB would be mandatory for large multinationals and would be introduced in two phases: the establishment of a single corporate tax base in the first phase, followed by the addition of consolidation features in the second phase (this second phase being the main point of discussion between member states). The new Commission's proposal could also provide for a minimum corporate tax rate applicable within the EU, as Vestager confirmed during her hearing before Parliament on 8 October 2019. In fact, her view is that a 'combination' of CCCTB and a minimum level of corporate tax is necessary in order to rule out any possibility of companies being able to 'play' with their tax base.

Modernisation of the VAT system

The current VAT system, which dates back to 1993, was supposed to be transitional. The Juncker Commission has undertaken negotiations with the member states to move towards a final VAT system that would be simpler, more efficient, reduce compliance and fight the growing risk of fraud. In parallel, the Commission has been working on solutions to deal with the most urgent needs of the current VAT system.

This work led to the adoption of a Directive of 5 December 2017 on electronic commerce, as well as a Directive of 4 December 2018 laying down four temporary 'quick fix' measures to reduce the administrative burden on businesses, and the possibility for member states to be authorised by the Council to apply a generalised reverse charge mechanism to fight carousel fraud.

The new Commission will be responsible for continuing these modernisation efforts by proposing permanent solutions, in particular by setting up a fraud proof VAT system and improving cooperation between national authorities. It would appear that the Commission is also examining the possibility of revising the current VAT exemptions for financial and insurance services.

Combatting harmful tax competition

Gentiloni's mission will also include developing stricter measures to fight harmful tax competition around the world. The EU 'black list' of non-cooperative jurisdictions for tax purposes, which so far has largely been used as a political instrument, should be strengthened in the fight against harmful tax regimes. No common approach has been agreed on possible defensive measures at an EU level, but it is reasonable to assume that these measures will tend to penalise persons having business relations with companies located in countries on the EU blacklist. (In addition to non-tax sanctions, it is conceivable that tax sanctions could be imposed, such as non-deductibility of payments, withholding taxes, disclosure obligations, etc.)

Breaking the political deadlock: towards QMV?

In many areas of taxation, the decision making process currently requires unanimity between member states. This unanimity rule is perceived by the EU decision makers as a major road block to EU harmonisation in tax matters. Some proposals have been put on hold for years due to opposition from a minority of member states. One example is the CCCTB project (see above), which despite several proposals for directives has not made any progress.

On 15 January 2019, the European Commission presented a Communication whereby it proposes to move gradually (in four stages) to a decision making process for tax matters based on QMV as follows:

- as soon as possible: measures to fight tax fraud and avoidance (stage 1), and those in which taxation supports other policy goals (e.g. the fight against climate change) (stage 2); and
- by 2025: the modernisation of rules already harmonised (VAT and excise duties) (stage 3), as well as for major tax projects such as CCCTB and taxation of the digital economy (stage 4).

In order to achieve this objective, the Commission proposes to use the 'passerelle clause' (TEU article 48(7)), which already provides for the possibility of switching to QMV in certain circumstances. The Communication has expressly identified almost all the tax policy priorities described above as areas where it is necessary to move away from unanimity in tax matters: improving cooperation between tax administrations, fighting tax abuse, energy taxation (for which the EU Treaties contain a specific 'passerelle clause'), creating a fraud-resistant VAT system, digital taxation and CCCTB.

Although it looks hard to adopt in practice, this shift in decision making, if successful, might change the course of future negotiations on major EU tax initiatives. Vestager, Timmermans and Gentiloni have all recently confirmed their willingness to use this mechanism, where appropriate, to ensure the success of their tax reform proposals without being impeded by the unanimity rule.

The European Parliament, which in the current system has only a consultative vote on tax matters, is in favour of the transition to QMV, which could also allow members of the European Parliament to participate more strongly in the legislative process in tax matters.

Conclusion

The Von der Leyen Commission looks set to have a packed tax agenda. As from 2020, the new commissioners, and Gentiloni in the first instance, will have to tackle the major tax challenges of the next decade: the advent of a tax system adapted to an increasingly digitalised and dematerialised economy, and aligned with the major challenges of the 21st century, including the fight against global warming.

In addition to this ambitious programme, there may be other existing measures that could be given a second wind during the new Commission's tenure. Examples include 'public CbCR' (the obligation for international groups to make their CbC reports public) and/or an EU financial transaction tax; these two proposals are once again at the centre of the Brussels negotiations. In addition, other opportunities and challenges are likely to arise. As a result of Brexit, the EU is expected to negotiate a new trade agreement with the UK, which is likely to include a tax and customs component.

Against the prospect of a new global economic crisis and in a context of geopolitical instability, the task of the new Commission will be far from easy. There is no doubt that this new chapter in the EU story will bring its fair share of surprises.

This briefing is based on an article first published in Tax Journal on 10 January 2020

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