

Recent Developments in EU Tax Policy: An Overview

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The first semester of 2018 has witnessed notable – if not unprecedented – activity in the area of tax policy, in the EU as well as internationally. The wind of change that we sense in international taxation the last decade is evidently becoming stronger and stronger, while its direction remains largely undefined.

The CFE Tax Advisers Europe has provided a fair overview of the developments in EU tax policy from January to June 2018 in a brief but cohesive and critical manner, in its relevant report published in July 2018. The report permits contextualization of the EU actions by including references to corresponding international initiatives, e.g. under the aegis of the OECD.

This blogpost provides a short presentation of the developments included and further analyzed in the aforementioned report. Purpose is to evidence the impressive flow of actions that have been undertaken in just half of 2018 while highlight points that can prove tricky. This can then serve as a good basis to predict the upcoming or – more likely – prepare for it to the extent possible.

In this light, notable progress has been made in terms of EU legislation, through the submission of new legislative proposals by the Commission, through the discussion of existing proposals or through the final adoption of proposals under discussion:

- The release of the Digital Tax Package in March: it encompasses two proposals for directives on the taxation of digital business activities in the

EU and a recommendation on the re-negotiation of Member States' tax treaties with extra-EU countries;

- The adoption of a new so-called Tax Intermediaries Directive in May: it introduces mandatory disclosure obligations on tax intermediaries and taxpayers in relation to certain cross-border tax planning schemes, which (tax planning schemes) implementation starts from 25 June 2018;
- The adoption of the 5th Anti-Money Laundering Directive in May: it seeks to enhance corporate transparency, requiring public disclosure of information on beneficial ownership; it also extends the scope of the relevant legislation to virtual currencies;
- The Commission's proposal for a directive for whistleblowers' protection in April: it refers to infringements of EU law, e.g. on money laundering and terrorist financing, environmental and consumer protection, competition, data protection etc.;
- The release of the Company Law Package in April: it seeks to facilitate (i) corporate procedures through the use of digital technology and (ii) re-organization of companies in the EU;
- The release of the VAT Reform Package in January: it aims at (i) allowing further margin to Member States to set VAT rates and (ii) removing unnecessary administrative burden from SMEs;
- Progress in the discussions for the adoption of the proposed directives on a Common Corporate Tax Base (CCTB) and a Consolidated Common Corporate Tax Base (CCCTB): the European Parliament has approved both proposals stressing the need for them to be aligned with the Digital Tax Package.

Furthermore, important progress was noted in relation to the common list of non-cooperative jurisdictions. To evidence the effectiveness of the initiative, a number of jurisdictions initially included in the list have taken action towards transparency and have been de-listed in the course of the year.

Finally, the report includes an overview of tax relevant EU case law. In particular, there is a brief analysis of recent decisions of the Commission in the area of fiscal state aid, e.g. the final negative decision in the Amazon case as well as the opening decision of the Ikea case. In addition, there is reference to critical developments at the level of the Court of justice, with:

- the issuance of the AG Opinion in the Bevola case, an opportunity for the

review of the *Marks&Spencer* ruling and the clarification of the current uncertainty;

- the issuance of the decision in *AGNED v. Asturias*, including clarifications on questions related to the EU state aid regime.

From the above-cited developments, the Digital Tax Package seems to be the one attracting most of the attention in the EU and also beyond. It touches the highly sensitive topic of the taxation of the digital economy, a topic – reasonably – argued to inspire the overhaul of the current international tax framework.

There is no question that the existing rules were constructed to address a bricks-and-mortar economy. Such economy does not exist any more anymore; or – more precisely – it exists in a limited version, largely substituted by digital economic models and processes. Seeking to lead the global discussion towards new rules and at the same time to ensure coordination at EU level, the Commission proposed the Digital Tax Package.

Yet there is an important downside. Just one week before the above Package was released, the Inclusive Framework on BEPS, the best representative of the international community at the current stage, published an Interim Report reflecting the agreement reached among its members on the way ahead in international taxation. From the report, it arises clearly that at the current stage there is no consensus on the new rules to tax the digital economy. It is however equally clear that consensus must be reached for any solutions to be adequate, since the matter of the digital economy cannot be restricted by national borders and hence cannot be addressed effectively in a unilateral manner. On these premises, the members of the Inclusive Framework, which include the EU Member States, agreed to cooperate to re-visit basic concepts of international taxation, i.e. nexus and profit allocation, with a view to concluding to a common solution by 2020.

In this view, the EU Package could be argued not to be in line with the agreement reached at international level. In fact, the EU is being accused of unilateralism that puts into at risk the achievement of international consensus. Remarkably, the EU Package seems to generate also strong reactions within the EU, with several Member States expressing clearly their opposition thereto.

To conclude, taxation of the digital economy is an urgent issue, which however

needs careful consideration. As mentioned by the Australian Treasurer in the context of the relevant G20 meeting in Argentina, “the G20 discussions were useful because they established the root of the problem: that “no one knows” how to measure for tax purposes the value of the data users of social media services like Facebook create outside of the countries where those companies are based.”

There is need to understand the mechanisms of the digital reality, even if this might be time-consuming. Most of all there is need to reach broad consensus.