Kluwer International Tax Blog

The Contents of EC Tax Review, Volume 33, Issue 01, 2024

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We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

Joachim Englisch, Dynamic References to International Soft Law Agreements: Flexibility with Limits

The European Union relies increasingly on non-binding international agreements as a blueprint for its legislation on direct taxation. This implies converting a flexible soft law instrument into hard law that is subsequently difficult to amend due to the unanimity principle. A nascent trend to ensure that such Union legislation nevertheless stays in sync with future developments of the underlying soft law agreement are dynamic references to the latter. However, the scope for this approach is limited by the requirements of sufficient democratic legitimacy and legality of taxation, and respect for the institutional balance of the Union. Dynamic references to international soft law standards should therefore primarily be used as a source of interpretation or illustration for the concretization of already executable rules in the relevant EU legal act. They do not normally allow to incorporate also amendments and supplements of the original soft law agreement, unless additional safeguards exist that ensure compliance with the aforementioned Union law principles – at the expense of the desired flexibility, however. In this regard, the better approach would be the conferral of delegated powers upon the Commission to ensure a timely yet controlled alignment of the relevant Union tax legislation with new soft law standards.

Stefanie Geringer, Reconciling Environmental VAT Differentiations With EU State Aid Law

Differentiations in value added tax (VAT) rates and VAT exemptions are used to pursue environmental policy goals, among other things. This article analyses the compatibility of such environmental VAT measures with European Union (EU) state aid law. It is found that the criteria for the granting of a fiscal advantage to (certain) undertakings and the liability to (threaten to) distort competition and affect intra-Union trade are typically fulfilled in these situations. Conversely, the qualification of the relevant advantage as ‘state’ aid (as opposed to Union aid) essentially depends on the (voluntary or mandatory) character of the advantage according to the EU VAT Directive. In any case, one could argue that aligning the VAT legal framework with the

European Green Deal is now an additional objective of EU VAT law. Such a reading would speak against the selectivity of these environmental measures pursuant to the Court of Justice of the European Union's (CJEU's) established three-stage assessment.

Claudio Cipollini, DAC8 and Extraterritoriality: How to Enforce Compliance for non-EU Operators

Directive on Administrative Cooperation (DAC8) extends its scope to non-EU operators to improve the effectiveness of the exchange of information on crypto-asset transactions. Nonetheless, it is still for the Member States to determine the nature and size of the penalties for non-compliance and address their extraterritorial enforcement. Starting from this assumption, the present article aims to explore what penalties the Member States can adopt against non-compliant operators based in third countries. Furthermore, this study focuses on the multilateral, bilateral, and unilateral instruments for the extraterritorial enforcement of such penalties. To this scope, the author conducts doctrinal research followed by a conceptual analysis of the existing literature as well as interdisciplinary research focusing on the effectiveness of DAC8 for decentralized crypto-assets. The conclusions underline that the Member States should introduce a combined set of monetary and non-monetary penalties, including internet content blocking and a ban on cryptoasset transactions with blacklisted non-EU operators assisted by a sanctions program. Besides, to ensure their extraterritorial enforcement, Member States should adopt a broader definition of tax claim within the Convention on Mutual Administrative Assistance in Tax Matters (CMAAT) and the OECD Model Tax Convention as well as appropriate dissuasive measures against noncooperative jurisdictions in the area of recovery assistance.

Rafaela Pardete, Márcia C. Santos & Francisco Leote, Future VAT Regime for Financial Services from a Stakeholder Perspective: Analysis of the European Commission 2020 Public Consultation's Position Papers

This study sought to address the challenges of formulating the European Union's value-added tax (VAT) reform for the financial services sector and implementing the proposed changes. The concerns and suggestions submitted by this sector's stakeholders during the European Commission's 2021 public consultation are used as inputs. The research included automated computer-assisted content analysis of fifty-two position papers, using up-to-date text mining techniques to define four cluster containing the most salient terms. An in-depth critical review highlighted the most significant concerns and suggested alterations to the current VAT framework. The results include a three-layered discussion model that goes well beyond a straightforward one-shot discussion of whether financial services should charge VAT. First, the technical rationality view of not charging VAT when providing financial services is no longer applicable. Second, intermediary and cost-sharing groups are characteristic of these services, which puts into question the tax's neutrality principle if the current VAT exemption regime remains in place. Last, abolishing the VAT exemption for these services could put an especially heavy burden on end consumers and small businesses, thereby implying extra measures will be needed to avoid a strongly negative socioeconomic impact. Significant implications for theory, practice and policy are presented.

Fabian Barth, Speculative Crypto-Assets and VAT: Why It Is (Almost) All Exempt.

Following the judgment Hedqvist in 2015, it appeared settled that cryptocurrencies fall within the same (Value Added Tax) VAT exemption as their more traditional counterparts. Discussions however have recently emerged around Non-Fungible Tokens (NFTs), for which an exemption appears not to be in reach. The article argues that a re-evaluation is now necessary. Most crypto-assets have proven themselves to be useful, and in fact used, predominantly for speculative purposes only, i.e., as high risk investments which might generate significant returns or losses. As such, the paper argues that cryptocurrencies and other volatile NFTs should be placed on the same footing, and discusses whether they are not in fact properly classified as 'other securities'.

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