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EU Business Taxation Code of Conduct Group: Semester 1 2022 Work Programme

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The Council of the EU Code of Conduct Group on Business Taxation has published its work programme for the first semester of 2022 during the French Presidency of the Council of the European Union.

The main priorities for the Code of Conduct (Business Taxation) Group include: 1) Monitoring of standstill and the implementation of rollback; 2) Monitoring the implementation of agreed guidance; 3) Links with third countries. Under the third aspect of the work programme, the Group will continue to monitor third country jurisdictions and update the EU list of non-cooperative jurisdictions for tax purposes. The list will first be updated in February 2022.

In addition, the Group will work on the coordination of defensive measures towards non-cooperative jurisdictions, the future criterion on the exchange of beneficial ownership information, follow-up actions to the Pandora Papers, as well as "discuss possible impacts of the international agreement that was reached on a minimum effective taxation (OECD Pillar 2) on its work, including on the EU listing criteria".

ECJ Decision on Spanish Obligation to Provide Tax Information: *Commission v Spain* - C-788/19

The European Court of Justice has handed down its decision in case C-788/19 *Commission v Spain*, concerning a taxpayer's obligation to provide tax information, holding that the elements of the Spanish legislation requiring Spanish tax residents to declare overseas assets or rights are contrary to EU law in that the legislation's restrictions on the free movement of capital are disproportionate. The case was referred to the ECJ by the European Commission, which had commenced infringement proceedings against Spain in February 2017 after receiving a large number of complaints by taxpayers in relation to the legislation.

The ECJ held that the the legislation went beyond what is necessary to achieve its objectives to guarantee the effectiveness of fiscal supervision and to prevent tax evasion and avoidance in three respects: 1) That failure to comply or partial or late compliance with the legislation resulted in taxation of the undeclared income corresponding to the value of those assets as 'unjustified capital gains', with no possibility, in practice, of benefiting from limitation; 2) That failure to comply or partial or late compliance with the legislation resulted in a fine of 150% of the tax calculated on amounts corresponding to the value of those assets or those rights held overseas, applied concurrently with the flat-rate fines; and 3) That failure to comply or partial or late compliance with the legislation resulted in flat-rate uncapped fines which were disproportionate to the penalties imposed in respect of similar infringements in a purely national context.

The Court held that those aspects of the legislation were disproportionate in light of its objectives, and that the fines imposed were of a highly punitive nature, constituting a disproportionate interference with the free movement of capital.

Spain was ordered to pay the Commission's costs in bringing the application, and must now amend its legislation in line with the ECJ decision.

Draft European Parliament Resolution on a European Withholding Tax Framework

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Last week, Members of Parliament sitting at the Committee on Economic and

Monetary Affairs adopted the amended draft report of the Committee on a European withholding tax framework. The report contains a motion for a European Parliament resolution calling on the EU Council and Commission to take steps to: 1) Put an end to profit shifting practices; 2) Step up the fight against dividend arbitrage; and 3) Remove barriers to cross-border investments in the single market.

On profit shifting, the draft report suggests a resolution "calling on the Commission and the Member States to set up a harmonised withholding tax framework that ensures that all dividend, interest and royalties payments flowing out the EU are taxed at a minimum effective tax rate", "urges the Council to swiftly resume and conclude the negotiations on the IRD and encourages the inclusion of such a measure in the announced directive for the implementation of Pillar II"; and "calls for the adoption of an effective minimum tax rate for dividend payments to shareholders in the EU, thereby reducing harmful tax competition in this realm".

Concerning dividend arbitrage, the proposed resolution will call on the Commission to "enhance cooperation and mutual assistance between tax authorities, financial market supervisory authorities and, where appropriate, law enforcement bodies regarding the detection and prosecution of withholding tax reclaim schemes" and "calls on the Commission to evaluate to what extent rules have contributed to revealing harmful tax arrangements such as cum-cum and cum-ex schemes and to what extent they have had a deterrent effect".

As to removing barriers to cross-border investments in the single market, the draft resolution will encourage "the development of a harmonised EU procedure for withholding tax refunds for all Member States, thereby addressing the concerns about regulatory discrepancies" and notes that "digitalising these procedures and improving cooperation between national tax administrations could reduce the administrative burden and uncertainty in cross-border investments".

The resolution will be voted on in the plenary session of the European Parliament on 7 March 2022.

European Court of Auditors Assess Energy Taxation, Carbon Pricing and Energy Subsidies in the EU

The European Court of Auditors has today published a report assessing whether existing energy taxes, carbon pricing and energy subsidies within the EU assist in achieving EU climate goals. The auditors examined the Energy Taxation Directive, existing Emissions Trading System and the proposals of the Commission to update this legislation, as well current energy taxation in the Member States. In addition, the auditors review how carbon pricing instruments and energy subsidies incentivise climate action.

The report finds that: *"under the current Energy Taxation Directive, more polluting sources of energy may have a tax advantage compared to more carbon-efficient ones: for instance, coal is taxed less than natural gas, and some fossil fuels are taxed significantly less than electricity. Moreover, while a majority of Member States impose high taxes on fuels, several others keep taxes close to the minimum established by the Directive, and this may distort the internal market. Low carbon prices and low energy taxes on fossil fuels increase the relative cost of greener technologies and delay the energy transition. The auditors note that while some energy subsidies can be used to move towards a less carbon-intensive economy, fossil-fuel subsidies hinder an efficient energy transition. Overall, Member States' subsidies for fossil fuels amount to over €55 billion per year, and fifteen Member States spend more on fossil-fuel subsidies than on renewable energy subsidies. Phasing out fossil-fuel subsidies by 2025, a goal which the EU and its Member States have committed to, will be a challenging social and economic transition."*

The Member of the European Court of Auditors responsible for the review, Viorel Stefan, said of the report, *"Energy taxation, carbon pricing and energy subsidies are important tools for achieving climate goals. The main challenge, in our* *opinion, is how we strengthen the links between regulatory and financial measures and find the right mix between these two. With our review, we aim to contribute to the discussion on energy prices and climate change, and in particular to the upcoming debate around the proposed revision of the Energy Taxation Directive".*

EU Commission Proposes a European Declaration on Digital Rights & Principles

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The European Commission has proposed to the European Parliament and Council that the institutions establish a Declaration of Digital Rights and Principles, to help guide digital transformation in the EU and act as a guide for policy makers, citizens and companies when dealing with new digital developments and technology.

The draft declaration covers key principles such as freedom of choice online, participation in digital public spaces, safety and security of users, sustainability of digital development, as well as aspects such as affordable and high-speed digital connectivity, use of digital tools in education, access to public services, and control over personal data use.

Executive Vice-President Margrethe Vestager said of the proposed Declaration: *"We want safe technologies that work for people, and that respect our rights and values. Also when we are online. And we want everyone to be empowered to take an active part in our increasingly digitised societies. This declaration gives us a clear reference point to the rights and principles for the online world."*

The draft Declaration will now be discussed by the EU Parliament and Council. The European Commission hopes the draft Declaration can be endorsed before the summer.

More information is available here.

The selection of the remitted material has been prepared by: Piergiorgio Valente/ Aleksandar Ivanovski/ Brodie McIntosh/ Filipa Correia