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Changing Gear: Commission Unveils Plans to Change Tax Legislative Process from Unanimity to QMV.

by Danny O'Connell, Associate Director at Kreab

The idea of changing the legislative procedure for EU tax law to allow for qualified majority voting (QMV), rather than unanimity, was first touted by Commission President Jean-Claude Juncker in his 2017 State of the Union address. The President argued that it would allow for much-needed tax reforms to take place for the benefit of EU citizens. Mr. Juncker repeated the call in his 2018 State of the Union address.

Then on 15 January 2019, the European Commission released its Communication entitled "towards a more efficient and democratic decision making in EU tax policy." The Communication outlines how the Council could change the legislative process for tax law from the current unanimity requirements to QMV. The Communication does not intend to propose any change to the attribution of EU competences in the field of taxation nor shift towards harmonised tax rates across the EU. Rather, it aims to trigger a policy debate and serve as a talking point for EU leaders ahead of the European elections.

Notably, the Communication highlights the drawbacks of the unanimity rule which has "hampered progress on important tax initiatives" such as the VAT Definitive Regime, Common Consolidated Corporate Tax Base (CCCTB), Financial Transaction Tax (FTT) and Digital Services Tax (DST).

As a potential solution, it suggests using the "passerelle clause" as the "most practical way" to move from unanimity to QMV and which would not require a formal amendment of the Treaty.

The Communication proposes introducing QMV progressively on a step-by-step approach for different aspects of tax law. Firstly, measures that are critical for combatting tax fraud, evasion and avoidance such as administrative cooperation and international agreements. Secondly, proposals which are "designed to support other policy goals" such as the fight against climate change. Thirdly, measures which are "already largely harmonized and which must evolve and adapt to new circumstances" such as VAT and excise duties. Lastly, other initiatives which are necessary for the Single Market such as the CCCTB.

In order to affect this passerelle clause change however, a unanimous decision by Member States is required and therein lies the crux of the issue.

Unsurprisingly, initial reactions show that there is already clear opposition to such a move with Ireland, Malta, Sweden and Cyprus expressing dissatisfaction. France, Spain, Italy and Portugal are reportedly in favour of the move. Even if some Member States are sympathetic to the idea of using QMV in certain limited areas such as combatting tax fraud, they would be highly reticent to make concessions here as they fear it would lead to the opening of the floodgates and a complete abandonment of the veto power.

While the likelihood of such a change happening now is slim to none, it is quite significant in that the Commission feels there is merit in raising the idea formally. It is indicative of how the landscape has changed as only a few years ago the idea of releasing such a Communication would have been dismissed as pointless by the Commission. The Commission is no doubt looking towards the future and it is debatable whether such an idea will be considered feasible in 10 years time. The idea is thus almost symbolic in its purpose. It also raises broader questions about the future direction of the EU after Brexit with the Communication saying that moving to QMV would "control more effectively the part of their sovereignty that they have pooled together in the interests of the Union as a whole and for greater collective and individual results."

In terms of next steps, EU leaders are invited to endorse the Communication roadmap and the Commission will then decide what concrete measures to take.

FURTHER INFORMATION

If you'd like to find out more about the EU taxation policy, please contact Danny O'Connell.

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FTT

Another False Start?

Following the circulation by France and Germany of a high-level 3-page outline of an EU FTT based on the French model in December, it seemed that the group of 10 participating Member States were about to embark on another round of negotiation. This would be accompanied by a new legal text which has so far not been forthcoming.

What has materialized however is further rumour and speculation, which has been par for the course with the FTT. According to the rumours, the German Finance Ministry is increasing its efforts towards reaching agreement on the Financial Transaction Tax (FTT) within the group of 10 Member States participating in the enhanced cooperation process and has set a deadline of April 2019 for reaching agreement. Critics remain skeptical, however. The group of 10 Member States were due to meet on the margins of the Eurogroup meeting on 21 January to discuss the FTT but this meeting never took pace as there was no new legal text to discuss.

This leaves the FTT in the same position it appeared to be a couple of months ago i.e. apparent high-level political support but with little concrete action on the ground. What has changed however is that the release of the high-level outline in December giving the group of 10 some foundations for future discussions and if the political will really is there, then negotiations could move quickly. The group of 10 is now expected to meet in the margins of February's ECOFIN.

Digital Service Tax

Diluted Proposal Still Not Palatable

The rejection of the proposed Digital Services Tax (DST) by EU Finance Ministers in December saw France push the negotiation into extra time by moving for a new approach based only on taxing the sale of data.

On 15 January, Member States representatives met to discuss the new approach, in the absence of a legal text. Despite carving out the majority of the scope of the proposal, there remains significant opposition to the idea of a digital services tax. Ireland, Denmark, Sweden and Finland all voiced their dissatisfaction at the meeting.

On balance, it appears that any momentum the DST had has now evaporated, and Member States are unwilling to support even a substantially diluted version of the Commission's proposal. The Romanian Presidency will likely question the merit therefore in drafting a new text which will essentially be dead-on-arrival. Nevertheless, France is determined to see this project through to the end and so should be expected to encourage the Romanian Presidency to at least release a new legal text. The failure to agree by the end of 2018 has begun to result in a fragmented approach across the EU, as Austria has now joined France, the UK and Spain in announcing that it will introduce a domestic DST.

EU Tax Blacklist

Moment of Truth Nearing for Grey-listed Countries

When the EU list of non-cooperative tax jurisdictions, (i.e. blacklist) was published in December 2017, it contained 17 countries and a further 47 countries on the 'grey-list.' The vast majority of those grey-listed countries made political commitments to address the shortcomings identified in their tax systems by end-2018. Notable inclusions on the grey-list included Cayman, Switzerland, South Korea, Jersey, Guernsey and Hong Kong.

We are now approaching the moment of truth for those reforms as the Council, with the assistance of the Commission, will soon evaluate whether grey-listed countries have actually done what they said they would do. If the reforms undertaken in those countries are deemed sufficient, then they will be removed from the grey-list and given a figurative clean bill of health. If they are deemed to have failed in meeting their commitments, then in theory they should be placed on the blacklist.

The Council Code of Conduct Group meeting of 30 January is expected to see a tentative endorsement / rejection of the reforms from grey-listed countries. Ideally, this should then allow for sign-off by the Committee of Permanent Representatives (COREPER) on 6 February and by EU Finance Ministers at ECOFIN on 12 February. If there are any slip-ups in terms of timing, then it will move to the 12 March ECOFIN. It is worth recalling that the voting procedure is by unanimity.

While the assessment of legal reforms is largely a technical exercise – hence the Commission's involvement in doing the heavy lifting – it remains an inherently political exercise. Reports indicate that France is expected to take a particularly tough line and not allow any leeway for those jurisdictions who did not live up to their commitments (even in the slightest manner) which is in line with the French approach taken at OECD level. The overarching backdrop to these developments is of course, Brexit. Jersey and Guernsey have become important centres for banks, insurance companies and investment funds. With the UK departing from the Council, these locations may find themselves under stricter scrutiny for their tax practices in the future, even if they come off the grey-list now.

Regardless of the outcome over the next couple of months, it's clear that the broader work on tax havens outside the EU is only beginning and this is the start of a long-term project. The EU's work on tax planning and tax avoidance is only gaining momentum and who is to say where this will lead in the future, especially in the light of increased transparency demands on financial institutions.

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