ec TAX REVIEW 2020–1

Editorial

A Union that Strives for More Also in the Area of Taxation: Tax Measures in the Incoming Commission's Political Guidelines

Roland Ismer*

In her electoral manifesto, the new President *Ursula von der Leyen* presented political guidelines for the next European Commission.[1] The guidelines inter alia concern the area of taxation, where they deal with two different fields, namely corporate taxation in the wider sense and, somewhat more surprisingly, environmental taxation. While the tax-related agenda laid out by the previous president was not really put into practice,[2] such statements do not necessarily represent merely vague and largely irrelevant pronouncements that are necessary for winning support in the European Parliament. Instead, the guidelines deserve to be taken seriously as a first attempt at defining the political agenda for the Commission's coming five-year mandate. Indeed, it appears well conceivable that the European Parliament will hold the Commission to account for these promises.

1 Proposals on corporate taxation

In the context of the goal of promoting 'An Economy that works for people', the guidelines hold out the prospect of both carrots and sticks.

On the one hand, the guidelines, when implemented, would give rise to tax increases for certain taxpayers. The guidelines claim that the social market economy requires that everybody without exception pay their fair share. Moreover, international tax competition in the form of a race to the bottom on taxation is seen as potentially dangerous for" the ability of countries to set tax policies that meet the needs of their economies and people." Instead, taxpayers must through levies and taxes contribute to the social security systems, the education systems and the infrastructure in the places where they generate profits.

Against this background, the Commission intends to step up the fight against tax fraud and against harmful tax regimes in third countries,[3] which, however, would have to comply with the limitations derived by the Court of Justice from the free movement of capital.[4] More generally, the EU and international corporate tax systems are seen as urgently requiring reform, as they 'are not fit for the realities of the modern global economy and do not capture the new business models in the digital world.' The guidelines then make several proposals regarding corporate taxation in the wider sense that purportedly seek to promote fair taxation.[5] The taxation of big tech companies continues to be a priority. The Commission is to work hard on turning 'the proposals currently on the table … into law'. The guidelines explicitly mention the ongoing work at the level of the Organization for Economic Cooperation and Development (OECD) to find an international solution. They thus refer to the work on the taxation of the digital economy, which have converged into a unified approach under Pillar 1 and which were the object of a public consultation by the OECD.[6] Nevertheless, the guidelines, without going into further detail, favour unilateral action if there is no global solution for a fair digital tax by the end of 2020.

* Prof. Roland Ismer holds the chair for tax law and public law at the Friedrich-Alexander-University Erlangen-Nuremberg (FAU). He thanks Sophia Piotrowski for helpful comments. Email: roland.ismer@fau.de.

[1] Ursula von der Leyen, *A Union that Strives for More – My Agenda for Europe: Political Guidelines for the Next European Commission 2019-2024*, https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf (accessed 19 Nov. 2019).

[2] The proposals by Jean-Claude Juncker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change – Political Guidelines for the Next European Commission*, https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf (accessed 19 Nov. 2019) were not implemented ('we should step up our efforts to combat tax evasion and tax fraud, so that all contribute their fair share. I will notably press ahead with administrative cooperation between tax authorities and work for the adoption at EU level of a Common Consolidated Corporate Tax Base and a Financial Transaction Tax.').

[3] *See* von der Leyen, *supra* n. 2, at 12.

[4] *See* e.g. most recently CJEU of 13 Nov. 2019 – C-641/17 – College Pension Plan of British Columbia, ECLI:EU:C:2019:960. Yet it must also be seen that the Court's case law concerned Member States' measures, while the Court could well turn out to be more lenient towards harmonization measures.

[5] *See* von der Leyen, *supra* n. 2, at 12.

[6] OECD, *Public Consultation Document: Secretariat Proposal for a 'Unified Approach' Under Pillar One, 2019*, https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf.

On the other hand, the guidelines also promise carrots in the form of simpler tax systems and rules for cross-border activities in order to improve the business taxation environment in the single market. In particular, they mention the prospect of a common consolidated (!) corporate tax base. Were the proposal by the previous Commission[7] implemented, business would benefit from a single rulebook to compute their corporate tax base in the European Union and thus from lower compliance costs.

More uncertain as to whether they will entail beneficial or adverse consequences for taxpayers finally are the commitment to a transition to co-decision procedures and qualified majority voting in the Council. This is again in line with proposals developed by the previous Commission.[8]

2 Proposals on environmental taxation

The guidelines postulate a New Green Deal that would set the European Union on the path to climate neutrality by 2050.[9] They seek to enshrine the 2050 climate neutrality target into law in the first 100 days in office. Accompanying and facilitating that transition pathway, the guidelines somewhat unexpectedly also provide for measures in the field of environmental taxation.

Admittedly, the big surprise lies not so much in the fact that the Commission is meant to pursue the revision of the Energy Taxation Directive.[10] This revision has been an ongoing project for almost a decade now.[11] Although the project has so far not been crowned with much success and the original proposal was even withdrawn in 2015,[12] the evaluation of the directive undertaken by the previous Commission[13] suggested that the work in this regard was going to be continued. Thus, it could be expected that new attempts to reach the necessary unanimity to update the directive will be made.

What was foreseen by few, if any, pundits, however, was the explicit positioning on 'border carbon taxes to combat carbon leakage'[14] in the context of the EU Emissions Trading Directive.[15] Yet this is precisely what the guidelines stipulate: They contain a clear profession that the Commission will not only strive to widen the EU Emissions Trading System to cover traffic and construction as well as the maritime sector and to reduce the free allowances allocated to airlines over time, but also to introduce border carbon taxes as a complementing measure.[16] The tax is meant to ensure European companies can compete on a level playing field. It is supposed to be fully compliant with world trade law and to start with a number of selected sectors and then be gradually extended.[17]

The guidelines necessarily leave it at that level of concreteness. Observers will therefore wonder how such tax can be implemented (and whether it will turn out to be a true tax after all). In my view, while it is clear that the guidelines hint at some sort of border adjustment mechanism[18] for carbon pricing, there are three contenders as to the precise design:

– First, imports from third countries[19] could be included in the EU ETS. In the past, there have been French proposal that sought to implement just that, either in the form of an obligation of importers to purchase and surrender allowances equivalent to the number of allowances that would have been surrendered had the imported good been produced in the European Union.[20] This scheme would mean that imports would be charged, whereas there would be no relief for exports going from the European Union to third countries.

[7] European Commission, *Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, COM(2016) 683 final – 2016/0336 (CNS) of 25 Oct. 2016.

[8] Communication from the Commission to the European Parliament, the European Council and the Council: Towards a more efficient and democratic decision-making in EU tax policy, COM(2019)8 final of 15 Jan. 2019.

[9] *See* von der Leyen, *supra* n. 2, at 5.

[10] Council Directive 2003/96/EC of 27 Oct. 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283, 51–70 (31 Oct. 2003).

[11] *See* European Commission, *Proposal for a Council Directive Amending Directive 2003/96/EC Restructuring the Community Framework for the Taxation of Energy Products and Electricity*, COM (2011) 0169 final – CNS 2011/0092 of 13 Nov. 2011.

[12] *See* European Commission, *Withdrawal of Commission proposals*, 2015/C 80/08, OJ C 80 17–23 (7 Mar. 2015).

[13] *See also* European Commission, Commission Staff Working Document, Evaluation of the Council Directive 2003/96/EC of 27 Oct. 2003, SWD(2019) 329 final of 11 Sept. 2019, https://ec.europa.eu/taxation_customs/sites/taxation/files/energy-tax-report-2019.pdf (accessed 19 Nov. 2019).

[14] In a world of different carbon prices, stringent climate policy in one region may lead to shifting of production or to a relocation of plants to other regions without a carbon price, thus weakening or even eliminating the reduction in carbon emissions resulting from carbon pricing. For a discussion of leakage channels *see* e.g. Susanne Dröge et al., *Tackling Leakage in a World of Unequal Carbon Prices* 21 (2007), http://climatestrategies.org/wp-content/uploads/2009/10/cs-leakage-final-230909.pdf (accessed 19 Nov. 2019). The sectors receiving carbon leakage protection have been defined by Commission Decision 2014/746/EU of 27 Oct. 2014 determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage, for the period 2015 to 2019 (OJ L 308, 114 (29 Oct. 2014)).

[15] On this *see* e.g. Harro van Asselt et al., *How von der Leyen Could Make a Carbon Border Tax Work*, https://www.climatechangenews.com/2019/07/22/von-der-leyen-make-carbon-border-tax-work/(accessed 19 Nov. 2019).

[16] *See* von der Leyen, *supra* n. 2, at 5.

[17] *Ibid.*

[18] *See* generally on border tax adjustments for environmental taxes Alice Pirlot, *Environmental Border Tax Adjustments and International Trade Law: Fostering Environmental Protection*, 2017.

[19] I.e. States that are neither members of the EU nor of the EEA, which form part of the EU ETS.

[20] Frédéric Simon, *France Details Plans for 'Carbon Inclusion Mechanism'*, https://www.euractiv.com/section/trade-society/news/france-details-plans-for-carbon-inclusion-mechanism/; Sam van den Plas, *Comment: Taxing Carbon at the EU Border? Only if Free Pollution Permits Go*, https://carbon-pulse.com/84419/ (accessed 19 Nov. 2019).

- Alternatively, the scheme could be widened so as to place a charge on imports and symmetrically provide relief for exports.[21] This would better reflect integrated value chains implying the goods cross the border several times during the production process. Nevertheless, one may wonder whether a relief for exports could really be justified by the environmental objectives pursued by carbon pricing in the first place.
- A third contender,[22] which arguably would be the easiest to implement, would be a charge ('climate contribution') on certain primary materials that could be added to the EU Emissions Trading System under Article 192(1) TFEU without triggering the unanimity requirement under Article 192(2) TFEU.[23] Indeed, it arguably was the unanimity requirement for the introduction of a tax on carbon emissions that gave rise to the introduction of the EU ETS, which only required qualified majority voting in the Council.

In any event, the border adjustments might give rise to a further hybridization of taxation on the one hand and emissions trading on the other, allowing the charge to follow the role model of the EU Excise Tax Directive.[24]

The guidelines furthermore stress the need for a just transition.[25] This rather general statement does not mention explicitly the distributional impact of carbon and energy pricing schemes. The issue of nevertheless warrants attention as Article 3 TEU arguably not only requires the environmental integrity, but also the taking into account the social implications of carbon pricing schemes. Moreover, the gilets jaunes protest movement in France has drawn attention to the fact that carbon pricing and energy taxation have a regressive effect in the European Union.[26] Since poorer households spend a larger share of their income on energy and goods subject to the EU ETS, the charges create a disproportional burden on such households. In the economic literature, several measures have been proposed that would reduce or eliminate the regressive effect, ranging from a reduction of energy charges to lump sum refunds to all households.[27] Yet such measures must not affect the environmental integrity of the scheme. Therefore, they would have to be independent of actual spending. Among economists, a lump sum refund to all citizens has many prominent supporters.[28] Paying the refund only to citizens causes obvious problems with respect to European Union law. But could such a refund be paid by Member States to their residents rather than citizens? One could still see such a compensation as a discrimination of non-residents who would be subject to charges, but would not receive a refund. The Court of Justice has indeed rightly struck out a compensation mechanism in the Austria v. Germany road toll case, where a new motorway use charge was introduced, but residents were simultaneously compensated through a lowering of motor vehicle tax.[29]

Does that mean that lump-sum compensation schemes to residents for environmental charges paid by both residents and non-residents alike cannot be reconciled with European Union law? Arguably, the cases can be distinguished: In the road toll case, the whole measure was all about making foreigners pay for use of domestic motorways without creating an additional burden for residents. This was the only and avowed aim of the measure. By contrast, the environmental charges seek to modify behaviour by internalizing externalities. The refund then is motivated by political feasibility concerns as well as the desire to mitigate the regressivity of the charges, or in other words: to reflect the different ability to pay. Conceivably, the Court could therefore take a bold approach and transfer the reasoning in *Schumacker*[30] to such refund mechanisms: just as under *Schumacker*, the residence state was obliged to take account of the taxpayer's personal and family circumstances, mitigating regressivity concerns would also be incumbent on the residence state. Residents and non-residents would then generally not be in a comparable situation. Ideally of course, there would be a European Union framework, possibly giving Member States the choice among several measures so as to mitigate regressivity.

3 The way forward

Exciting times! Rest it to hope that the community interested in European tax law scholarship and in

[21] *See* e.g. Stéphanie Monjon & Philippe Quirion, *A Border Adjustment for the EU ETS: Reconciling WTO Rules and Capacity to Tackle Carbon Leakage*, 11 Climate Pol'y (2011), 1212 with further references.

[22] Karsten Neuhoff et al., *Inclusion of Consumption of Carbon Intensive Materials in Emissions Trading–An Option for Carbon Pricing Post-2020*, Climate Strategies Report, 2016, https://climatestrategies.org/publication/inclusion-of-consumption-of-carbon-intensive-materials-in-emissions-trading-an-option-for-carbon-pricing-post-2020/ (accessed 19 Nov. 2019).

[23] Roland Ismer & Manuel Haussner, *Inclusion of Consumption into the EU ETS: The Legal Basis Under European Union Law*, 25 Rev. Eur., Comparative & Int'l Envtl. L. 69 (2016).

[24] Council Directive 2008/118/EC of 16 Dec. 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, OJ L 9, 12–30 (14 Jan. 2009).

[25] *See* von der Leyen, *supra* n. 2, at 6.

[26] Florens Flues & Alastair Thomas, *The Distributional Effects of Energy Taxes*, Technical Report 23, OECD Taxation Working Papers, 2015.

[27] *See* e.g. Roberton C. Williams III. et al., *The Initial Incidence of a Carbon Tax Across Income Groups*', 68 Nat'l Tax J. 195 (2015). These measures would address concerns of vertical equity. By contrast, horizontal equity would arguably require additional instruments, such as targeted subsidies.

[28] George Akerlof et al., *Economists' Statement on Carbon Dividends Organized by the Climate Leadership Council*, https://www.econstatement.org/ (accessed 19 Nov. 2019).

[29] CJEU of 18 June 2019 – C-591/17 – ECLI:EU:C:2019:504 – Austria *v.* Germany (Road tolls).

[30] ECJ of 14 Feb. 1995 – C-279/93, ECLI:EU:C:1995:31.

particular the esteemed readers of this journal do not confine themselves to an observant wait-and-see stance, but consider the process necessary for developing and adopting such new rules in the fields of corporate and environmental taxation to be an open one – a process with which it may and indeed needs to engage both critically and constructively, so as to avoid infeasible schemes as well as to help to develop workable schemes.