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# TAX



Newsletter

4<sup>th</sup> Quarter 2020

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## EDITORIAL

After a year heavily influenced by the pandemic, which led to a range of measures being continually adopted to try to reduce infections, it is important to recall what happened in the area of Tax at both a national and international level in the last quarter of 2020.

The quarter began with the government's presentation of the State Budget Law Proposal for 2021, which was discussed in Parliament between October 12 and November 26, 2020, and finally approved. On December 31, 2020, Law 75-B/2020 was published, approving the State Budget for 2021.

The final text of the State Budget for 2021 is more or less faithful to the State Budget Proposal presented by the government, with the following main measures:

1. The introduction of the concept of permanent establishment of services for corporate income tax ("CIT") purposes.
2. The implementation of the "IVAucher" scheme.
3. The property transfer tax ("IMT") taxation on the acquisition of shares of public limited (even if with limited scope).
4. The increase on the tax rates of IMT and municipal property tax ("IMI") concerning real estate owned or acquired by entities directly or indirectly dominated or controlled by entities resident in tax heavens.
5. The inapplicability of the "temporary exemption" of IMI, which is applicable to the purchase of real estate for resale, the purchase of land for construction works, and the sale of property or those foreseen in the urban rehabilitation regime, to real estate held by the entities listed in point 4 above.

Please see our Legal Flash regarding the State Budget for 2021 for a more detailed analysis of its tax measures.

Within the context of the pandemic, the tax calendar for 2020/2021 was adjusted by Order 437/2020-XXII

of the Secretary of State for Tax Affairs, establishing the deferral of several ancillary and payment obligations.

Also, following Law 26/2020 of July 21, which transposes "DAC 6" into Portuguese law, the declaration form "*Modelo 58*" was approved, which relates to compliance of the declarative reporting obligations to the tax authorities of certain fiscally significant internal and cross-border mechanisms.

At an international level, the last quarter of 2020 was characterised by intensive negotiations between the United Kingdom and the European Union on the EU-UK trade and cooperation agreement, which was signed on December 30, 2020. The EU-UK trade and cooperation agreement will be applied as of January 1, 2021.

As the United Kingdom became a third country, the Portuguese tax authorities published several administrative guidelines to clarify the procedures to be adopted regarding the tax representation of individuals and corporations with residence/tax address in the United Kingdom for income tax purposes, VAT, customs regimes and tax on vehicles ("ISV").

Another highlight at an international level was the European Commission's decision on the Madeira Free Zone regime, that considered the regime has disrespected the state aid rules, as the tax reductions set forth in the regime were applied to companies that did not truly contribute to the development of the region, being Portugal now responsible to recover (with interest) the irregularly provided support.

Pursuant to the European Commission's decision, Portugal must determine the amount to be recovered from the regime beneficiaries, by identifying the cases where the conditions established in the Commission's 2007 and 2013 state aid decisions, which approved scheme III for the Madeira Free Zone, were not complied with (i.e., job creation in the region and a link between profits and actual and material activity in Madeira).



This is a theme that we will continue to monitor closely, and which is expected to now undergo a reaction by the Portuguese State to the Commission's decision.

We conclude by inviting you to analyse the matters we have selected for this quarter.

*Diogo Ortigão Ramos*

## I. PORTUGUESE “NETFLIX TAX” – THE FIRST STEP TOWARDS A TAX ON DIGITAL SERVICES?

New tax challenges arise daily as a result of continuous innovation, new technology, and business models that test the boundaries of the tax status quo, some even go beyond it. However, many countries and organizations are trying to be at the forefront of tax innovation by researching and developing mechanisms to address these challenges. Portugal has recently given its first contribution, although small, to this pursuit: a Portuguese “Netflix tax,” a new levy that aims to support Portuguese cinema and audiovisual production with its proceeds.

In this article, we will summarize the main effects of this new levy and focus on how this could be an initial step towards a digital services tax (“DST”) in Portugal.

Last November 19, Law 74/2020 was published, transposing Directive (EU) 2018/1808 of November 14, amending local legislation on the provision of audiovisual media services (Services Directive of Audiovisual Media), to adapt it to the changes in market realities. It will come into force on February 17, 2021.

Among the several amendments to the cinema and audiovisual media services sector, we highlight two relevant amendments for this purpose:

- a) An “advertising tax”: the exhibition levy, which is due on Portuguese commercial advertising broadcasts on several audiovisual platforms such as cinemas and television, is now extended to audiovisual commercial communication included in audiovisual on-demand services or video-sharing platform services (such as YouTube and Amazon Prime Video), even if under the jurisdiction of another Member State, at a standard rate of 4%.
- b) A “Netflix tax”: audiovisual on-demand service operators (such as Netflix and HBO) will be subject to an annual levy corresponding to 1% of their relevant income in Portugal, which will be the main focus of this article.

### Who is subject to these levies?

While the advertising tax, which is already in force for traditional market operators, is extended to audiovisual on-demand services and video-sharing platforms services, the Netflix tax is only levied on audiovisual on-demand service operators.

An “audiovisual on-demand operator” is considered as any natural or legal person in charge of selecting and organizing the content of audiovisual services on demand, in the form of a catalog, and making it available in national territory. These operators will have to pay both levies. Video-sharing platform operators are considered as any natural or legal person who provides a video-sharing platform service.

Therefore, platforms operating “video-on-demand” and streaming services will be subject to both the advertising tax and the Netflix tax, thus signaling the targets of these new levies.

### What is the basis for these taxes?

The advertising tax is calculated over the price paid for the commercial advertising broadcasts and is a burden of the advertiser.



The Netflix tax will be levied over the targeted operator's "relevant income"; i.e., audiovisual commercial communications for television operators and operators of audiovisual on-demand services, or subscriptions for conditional access television operators, as well as other types of income and operators.

However, when it is not possible to assess the value of the service operators' audiovisual on-demand subscriptions' "relevant income", the levy's annual amount is assumed to be €1,000,000.

Because of the inherent difficulties of assessing "relevant income," the situations in which "relevant income" cannot be determined were clarified:

- a) Income does not have to be reported in Portugal, but in other Member States, and the elements made available in those countries do not discriminate revenue by geographical origin, which means it is impossible to determine the share of income obtained in Portugal.
- b) Non-disclosure of the legal documents required to enable the correct assessment of "relevant income."

### Purpose of these levies

As explained above, the purpose of the Netflix tax is to support cinema and audiovisual production, as its proceeds are considered revenue of the Portuguese Institute of Cinema and Audiovisual (ICP), and they will be earmarked to support those productions.

Also, audiovisual on-demand service operators active in Portugal are obliged to make annual investments in developing, producing and promoting European works and works in Portuguese language, as well as independent production works in a given proportion of their "relevant income" in Portugal, capped at €4,000,000. As explained, when the "relevant income" cannot be determined, the annual investment amount is considered to be €4,000,000.

Further to the above, the question remains on whether this could be an initial step towards a DST in Portugal in the near future.

Several countries are taking unilateral measures to tax the digital economy, with some announcing or implementing a DST, which is essentially a tax over the selected gross revenue streams of large digital companies based on the effective locations of users/consumers. For example, in October 2021, our neighbors in Spain approved a tax on certain digital services.

In Portugal, the current question is whether the Netflix tax is an initial step towards something bigger. Is Portugal preparing to unilaterally introduce a fully-fledged DST levied on large digital companies?

Although the Portuguese Netflix tax measures have a targeted and narrow aim, it is likely that Portugal intends to expand it to other dimensions. That said, it is doubtful that Portugal will go rogue on the European Union ("EU") and implement such a mechanism before a consensus-based and standardized solution has been found among the EU Member States.

The COVID-19 pandemic may have encouraged this discussion, as the consumption of these types of digital services increased substantially in 2020, and they may be an interesting source of revenue to fight the economic crisis.

*Tiago Gonçalves Marques  
Diogo Gonçalves Dinis*



## II. E-COMMERCE VAT PACKAGE TO BE TRANSPOSED INTO PORTUGUESE LAW

Through Law No. 47/2020, the Portuguese legislature aims to transpose into Portuguese law Articles 2 and 3 of Council Directive (EU) 2017/2455 of December 5, 2017, and Council Directive (EU) 2019/1995 of November 21, 2019, on the new VAT rules for electronic commerce. However, this law will not enter into force until July 1, 2021, as amended in due course by Law No. 75-B/2020 of December 31, which approved the Portuguese State Budget for 2021.

This postponement gives operators more time to adjust to new concepts (e.g., what it means to “facilitate” through an electronic supply of goods) and to implement internal control and compliance procedures for these new tax obligations. The purposes of the new e-commerce schemes are noble, as they are aimed at modifying the VAT system for cross-border trade between businesses and final consumers, combatting VAT fraud and reducing the tax burden of e-commerce businesses. However, it could initially face “unforeseen” complexities.

For this reason, we summarize the main changes from July 1, 2021, onwards, highlighting the main rules and the difficulties for Member States in monitoring compliance with the new rules and procedures to be reviewed by companies operating in the sector.

The previous regime for intra-EU distance selling has been “redesigned,” as the previous threshold of €35,000 has been revoked and a new threshold of €10,000 has been established. This new threshold also applies to supplies of telecommunication services and services provided electronically.

Although still optional, the scope of the VAT Mini One Stop Shop (“MOSS”) has been widened, and it now covers (i) intra-EU distance sales, (ii) all services provided to non-taxpayers within the EU by taxable

persons not established in the Member State of consumption, and (iii) domestic supplies made through digital markets.

Concerning imports of goods, the VAT exemption for low-value consignments (€22) will be revoked. Therefore, from July 1, 2021, onwards, low-value consignments will be subject to and not exempt from VAT. However, the release for free circulation of goods valued lower than €150 will be exempt from VAT, provided the supplier or “facilitator” opts for VAT payment through MOSS, which is levied directly on the final consumer.

Therefore, although the measures summarized above apply mainly to businesses selling goods online and to service providers to final consumers, in certain circumstances, businesses operating a digital market (e.g., a marketplace) may be liable to pay VAT on transactions in that market.

In theory, these rules are welcome for those market players, as they will be able to consolidate the payment of the VAT due at destination in a single declaration. This measure is expected to reduce the so-called “VAT gap.”

However, a performance report of the European Court of Auditors concludes that “*many challenges of collecting VAT and customs duties remain to be resolved*” as “*tax authorities did not always document controls and registrations of traders*”. Consequently, according to the European Court of Auditors, although there is equality, “*a level playing field is not ensured for EU traders*” which is one of the main objectives of the e-commerce VAT package.

Also, according to the auditors’ report, the majority of “*Member States use web-scraping tools or third-party information to identify traders that should be registered in their jurisdiction because they have exceeded the threshold*”. This does not reduce the risk of non-compliance or avoidance of registration in the EU Member State of consumption. Although the goals of these rules are to increase EU traders’ competitiveness, results may fall short if jurisdictions are not able to efficiently monitor



traders that are most likely to continue creating avoidance situations.

Therefore, EU traders face new rules aimed at tackling VAT fraud and creating a level playing field within the EU market (particularly by revoking the exemption for low-value consignments). However, compliant businesses will continue to face the competition of non-compliant traders if EU Member States are not able to make full use of the widened MOSS scheme by implementing the necessary steps to increase quality controls and monitoring more closely the sales carried out in respective jurisdictions.

Also, the exchange of data between EU Member States is intended to be faster and reliable, particularly to achieve the goal of having a single VAT system.

On another note, the situation caused by the COVID-19 pandemic has created an era of online consumption. As we enter 2021, a significant share of EU trade is conducted and “facilitated” through electronic interfaces. Large digital market operators (e.g., Amazon and eBay) may face an increased administrative tax burden, as the accounting of VAT due on transactions in their digital markets may fall on them.

A taxpayer will be a “facilitator” when (i) they set the terms and conditions for the supply of goods, (ii) participate in approving the collection of payments, or (iii) are involved in the logistical process of the order placed on their digital market.

The purpose of these rules is clear. As digital marketplaces have all the information required to account for the VAT due, to enhance fraud control, jurisdictions will be required to closely monitor the digital marketplaces instead of the several sellers carrying out transactions through their electronic interfaces. Increasing digital marketplaces’ administrative tax burden is nothing more than a trade-off to prevent tax fraud.

To conclude, taxable persons who facilitate transactions through an electronic interface must

anticipate and develop procedures that are adapted to this new reality, not only because they may be forced to live with several different VAT systems (with or without one-stop-shop support), but also because of the potential tax contingencies resulting from insufficient internal audit procedures.

Therefore, it is crucial that these online businesses thoroughly (i) analyze transactions made within the marketplace as a whole, (ii) assess the respective VAT treatment, and (iii) implement adequate internal control procedures.

*Filipe Gomes da Silva  
Diogo Gonçalves Dinis*

## III. LEGISLATION

### European Commission

#### Commission Implementing Regulation (EU) 2020/1577, of September 21

- > Amends the classification of certain goods in the tariff and statistical nomenclature of the Common Customs Tariff.

### European Commission

#### Commission Implementing Regulation (EU) 2020/1369, of September 29

- > Amends and inserts the classification of certain goods in the tariff and statistical nomenclature of the Common Customs Tariff, namely in relation to Annex 1 and Annex 10.

### Ministry of Finance and Environment and Climate Action

#### Ordinance 247-A/2020, of October 19

- > Regulates the application of Item 2.8 of List II annexed to the VAT Code to the supply of electricity for consumption.

### Parliament

#### Resolution no. 88/2020, of November 23

- > Approves the double tax treaty concluded between Portugal and the Republic of Kenya with the aim to prevent tax evasion and tax avoidance.



Presidency of the Portuguese Republic  
Presidential Decree no. 60/2020, of November 23

- > Ratifies the double tax treaty concluded between Portugal and the Republic of Kenya aimed at preventing tax evasion and tax avoidance.

Ministry of Finance  
Ordinance 277/2020, of December 4

- > Sets the additional rate over CO<sub>2</sub> emissions laid down in article 92.<sup>o</sup>A of the Excise Tax Code regarding oil and energy products and the value resulting from applying that rate to each of those products.

Personal Income Tax Department  
Circular 8/2020, of December 4

- > Releases the withholding tax tables for personal income tax (PIT) purposes applicable to Portuguese resident taxpayers with employment or pension income (or both), excluding the Autonomous Regions of Madeira and Azores, to be applied in 2021.

Ministry of Finance and Health  
Ordinance 283/2020, of December 10

- > Approves declaration form “Modelo 56”, applicable to the extraordinary contribution on National Health Service suppliers of medical devices and in vitro diagnostic medical devices and their accessories and respective filing instructions.

Presidency of the Council of Minister  
Decree-Law 102-D/2020, of December 10

- > Approves the general waste management regime and the legal regime of the waste disposal in landfills and amends the specific waste flows management’s regime, that extends the contribution on light plastic bags’ exemption to all very light plastic bags.

Ministry of Finance  
Ordinance 289/2020, of December 17

- > Establishes the average value of construction per square meter at €492, for the purposes of article 39 of the Municipal Property Tax Code, in force in 2021.

Ministry of Finance  
Ordinance 295/2020, of December 21

- > Amends Ordinance 523/2003, of July 4, regarding the form for declaring payment of withholding on PIT and corporate income tax (CIT).

Ministry of Finance  
Ordinance 296/2020, of December 22

- > Approves declaration form “Modelo 25” and its respective filling instructions for entities receiving fiscally relevant donations under the regime foreseen in the Tax Benefits Statute.

Ministry of Finance  
Ordinance 298-A/2020, of December 23

- > Amends the EC Sales list’s filling instructions, in light of Brexit.

Ministry of Finance  
Ordinance 300/2020, of December 24

- > Approves declaration form “Modelo 10” and the respective filling instructions regarding resident taxpayers’ PIT and CIT withholding tax.

Ministry of Finance  
Ordinance 303/2020, of December 28

- > Regulates the submission of the prior authorization request within the VAT regularization procedure associated with bad and doubtful debts, approving the respective forms and filling instructions.

Ministry of Finance  
Ordinance 304/2020, of December 29

- > Approves declaration form “Modelo 58” regarding the fulfilment of the declarative obligations to the tax authorities of certain fiscally significant internal and cross-border mechanisms, arising from the transposition of



DAC 6, and respective general information and filling instructions.

Presidency of the Council of Minister

Decree-Law 109/2020, of December 31

- > Establishes a Stamp Duty exemption on export credit insurance policies, guarantee insurance policies and foreign bank guarantees, in respect to tax events occurring before December 31, 2022.

Parliament

Law 75-B/2020, of December 31

- > Approves the State Budget for 2021.

Ministry of Finance

Ordinance 309-A/2020, of December 31

- > Amends Ordinance 150/2004, of February 13, in its current wording, which approves the list of countries, territories and regions with privileged tax regimes, clearly more favorable, excluding the Principality of Andorra.



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Cuatrecasas has set up a Coronavirus Task Force, a multidisciplinary team that constantly analyzes the situation emerging from the COVID-19 pandemic. For additional information, please contact our taskforce by email [TFcoronavirusPT@cuatrecasas.com](mailto:TFcoronavirusPT@cuatrecasas.com). On our [website](#), you can read our publications or attend webinars on legal issues arising from the pandemic and the measures adopted to mitigate it. You may also find our publications in [Portuguese](#) and [Spanish](#).

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