

Briefing

International review for January

Speed read

December saw the OECD publish its much-anticipated Pillar Two implementation package, although uncertainty regarding the framework remains. Pillar One consultation documents on Amount A and Amount B have also been released. Looking ahead this year, in addition to further work on Pillars One and Two, we can expect to see progress from the EU on its BEFIT, SAFE, DAC 6, ATAD 3, Public CbCR, FASTER and CBAM initiatives.



Tim Sarson

KPMG

Tim Sarson is a tax partner at KPMG and the UK head of tax policy. He has worked in the international tax and transfer pricing field since 1998, in both practice and industry. Email: tim.sarson@kpmg.co.uk; tel: 020 7694 4831.

Pillar Two implementation package published

On 20 December 2022 the OECD/G20 Inclusive Framework (IF) on BEPS released its much-anticipated Pillar Two implementation package. The package includes three documents:

1. Guidance on safe harbours and penalty relief: this is designed to minimise the compliance burden associated with undertaking full GloBE effective tax rate calculations in respect of 'lower risk jurisdictions.' The guidance includes a transitional country-by-country reporting (CbCR) safe harbor that has already been agreed by the IF and a framework for the development of a potential permanent safe harbour. There are also proposals for a transitional penalty relief regime when an MNE has taken 'reasonable measures' to correctly apply the GloBE rules. It is noteworthy that one of the most requested safe harbours during the April public consultation was a qualified domestic minimum top-up tax (QDMTT) safe harbour. Although no such safe harbour was included in the December announcement, this proposal is being considered as part of the IF's future work.
2. Public consultation document on the GloBE information return (GIR): this seeks public input on the data requirements associated with complying with the GloBE rules, the exchange of the information return, and related issues. The consultation closes on 3 February 2023. The drafting of the document hints at the expectation that the GIR should include all the data points tax administrations would require to evaluate a taxpayer's application of the GloBE rules. This would impose a significant compliance burden on taxpayers, something I expect will come across loud and clear in the consultation responses. The onerous data requirements contemplated in the GIR also underline the need for well-designed safe harbour rules.
3. Public consultation document on tax certainty for the GloBE rules: this outlines and seeks public input on various mechanisms for achieving tax certainty under the GloBE rules, including dispute prevention and resolution. This consultation also closes on 3 February 2023.

The package provides some welcome guidance for taxpayers preparing for Pillar Two implementation; however, much uncertainty remains. For example, the nature of data that will need to be supplied when using a safe harbour, and how relevant dispute prevention and resolution mechanisms will be overseen. Further Administrative Guidance is expected to be issued on a rolling basis, with the first tranche expected in late January/early February 2023. Work is also underway on the subject to tax rule and implementing the multilateral instrument.

Pillar One consultations

In December 2022, the OECD published two Pillar One consultations. The first consultation covers the last 'building block' of Amount A (the new taxing right for market jurisdictions over the residual profits of the world's largest MNEs), and provides a framework for the removal of digital services taxes (DSTs) and other similar measures. These must cease to apply from the date the multilateral convention (MLC) comes into effect, which is not expected to be until 2024 at the earliest.

Interestingly, the provisions do not propose to prevent jurisdictions from implementing revised DSTs or similar measures going forward, reflecting perceived political and legal constraints on the ability of governments to commit not to do something in future. This consultation closes on 20 January 2023.

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The second consultation relates to Amount B, the rules to simplify the application of the transfer pricing rules for 'baseline' or 'routine' marketing and distribution activities. The consultation covers four areas: scope, pricing methodology, documentation requirements and tax certainty, and the deadline for responses is 25 January 2023.

It is helpful to see how IF members envisage Amount B could operate as it has the potential to deliver significant benefits to both taxpayers and tax administrations if scoped, priced and administered appropriately. However, it will be more interesting to see responses highlighting the various areas where improvements could be made.

What to expect in 2023

December also saw a flurry of activity from the EU, particularly agreement on the EU Pillar Two Directive, which has removed doubts that Pillar Two might not happen. So what highlights can we look forward to in 2023?

Q1 2023

US Inflation Reduction Act 2022: Recent talks between Brussels and Washington have had some success in alleviating the EU's concerns that the Inflation Reduction Act 2022 (that offers businesses generous subsidies and tax credits for green investment in the US) discriminates against EU companies. However, the EU is clear more

needs to be done to protect its industrial base. Look out for further reaction from the EU, which may include relaxing state aid rules to enable targeted subsidies and tax incentives.

Pillar One: Experience tells us to expect further 'rolling' consultations after the current consultations close. Finalisation of the Amount A rules are expected to take priority given the OECD's aim that an MLC be open for signature in the first half of 2023.

Pillar Two: We expect to see the next tranche of Pillar Two implementation guidance released for comment early in the year.

With EU member states being required to transpose the Pillar Two Directive into domestic law by 31 December 2023, we will likely see draft legislation appearing. The French and German Ministries of Finance have announced their intention to produce draft law for discussion in early 2023, and other member states will follow suit shortly afterwards. The Netherlands and Ireland, which have already conducted public consultations could be obvious first movers.

Momentum is also building in non-EU jurisdictions such as Switzerland, Japan, Australia, New Zealand and Canada. In December 2022, Korea passed Pillar Two into law, with the rules becoming effective for periods beginning on or after 1 January 2024. The UK is expected to include Pillar Two legislation in the Spring Finance Bill.

One exception to the trend will be the US which is unlikely to keep pace with other jurisdictions. It will be interesting to see how the US responds when its tax revenues are impacted by more countries implementing the under tax payments rule in the years to come.

EU – BEFIT: The BEFIT (business in Europe: framework for income taxation) consultation, which was covered in my November 2022 update, closed on 26 January 2023. The EC plans to adopt a legislative proposal in the third quarter of 2023. Watch carefully to see what respondents to the consultation have to say; there is good reason why previous attempts to introduce an EU wide tax system failed. In practice, the rules would be incredibly complex and could outweigh any perceived benefits.

EU – DAC 8: On 8 December 2022, the EC issued a consultation on DAC 8, the exchange of information on crypto-assets, that is set to run for eight weeks, but with rolling extensions to the deadline until the proposal is available in all EU languages. DAC 8 is an amalgamation of provisions that will vastly impact different stakeholders. Crypto-asset service providers and operators that provide services to EU clients will need to understand the impact of the rules.

Q2 2023

New OECD tax policy director: Following the recent departure of Pascal Saint-Amans, Manal Corwin will take up the post of director of the OECD Centre for Tax Policy and Administration from 3 April 2023. Ms Corwin has more than 30 years experience in international tax policy and will lead the work of the Centre across all areas, including Pillars One and Two, BEPS, the tax transparency agenda, and the Centre's participation in the OECD's new Inclusive Forum on carbon mitigation approaches.

EU – SAFE: The EC's SAFE (securing the activity of framework enablers) proposal aims to tackle tax evasion and aggressive tax planning by addressing the role of certain intermediaries (enablers) who create

complex and non-transparent structures. The EC held a public consultation on the proposals in the second half of 2022, with responses expressing concern about the wide scope of the rules, which may lead to increased due diligence obligations for tax advisers, including in-house advisors, operating in the EU. The latest indicative timing for adoption of the proposal is the second quarter of 2023.

EU – ATAD 3: The proposed deadline for member states to implement ATAD 3 (the 'Unshell' Directive proposing to prevent the misuse of shell entities) into domestic law is 30 June 2023, with the provisions of the Directive applying as of 1 January 2024. While most member states support the initiative the necessary unanimity has not yet been achieved. Discussions on the design of rules and the tax consequences are ongoing and may delay the proposed timetable.

EU – public CbC reporting: EU member states have until 22 June 2023 to transpose the public CbCR Directive into domestic legislation. The rules will apply, at the latest, from the commencement date of the first financial year starting on or after 22 June 2024.

Individual member states can opt for an early adoption of the rules and, as the Directive represents a minimum standard, can also extend the scope. Romania has already introduced the rules for accounting periods starting on or after 1 January 2023. Hungary has indicated it may extend the scope and require additional disclosures. These aspects will add additional complexity for MNEs.

Taxpayers outside of the EU will be monitoring the risk of 'contagion'. Australia, for example, has already indicated its desire to introduce new public reporting of tax information by MNEs.

EU – Pillar One: To address reservations raised by Poland regarding the adoption of the Pillar Two Directive independent of Pillar One, a specific provision was added to the Directive text requiring the EC to submit a progress report on the implementation of Pillar One by 30 June 2023.

The EC has previously committed to putting forward a proposal by the end of 2023 if international agreement on a Pillar One solution is not reached. This could include resurrecting the 2018 proposal for a digital permanent establishment, harmonisation of unilateral DSTs in the EU or the introduction of an EU only Pillar One regime.

UAE – new federal corporate income tax system: Qualifying businesses operating in the UAE will be subject to corporate tax from the beginning of their first financial year that starts on or after 1 June 2023. It's still unclear how the rates of tax (0% and 9%) will interact with the global minimum tax rate of 15%, which the UAE has indicated it will adopt in 2024, so impacted businesses should monitor developments closely.

EU – FASTER: Last year the EC launched a faster and safer tax excess refund (FASTER) consultation on a new initiative that would introduce a common EU-wide system for withholding tax on dividend and interest payments. The EC is aiming to adopt the proposal in the second quarter of 2023, as part of a 'taxation package' alongside SAFE.

Q3 2023

EU – Pillar Two: Member state activity to produce domestic legislation will be in full force, with national legislators able to make key implementation decisions such as whether to introduce the optional QDMTT, and which items of the OECD commentary and GloBE

Implementation Framework to incorporate into domestic law. Member states with no more than 12 ultimate parent entities (such as Bulgaria, Romania and Poland) can use their deferral option to delay implementation of the rules (up to 31 December 2029).

Q4 2023

EU – ‘CBAM’: On 13 December 2022 provisional agreement was reached on the EU carbon border adjustment mechanism (CBAM). This would be gradually implemented, beginning on 1 October 2023, but with a transitional phase requiring only reporting until 2026.

The provisional deal is dependent on an agreement on the reform of the EU emissions trading system, which we know from past experience has not proved an easy process.

Watch for the ripple effects of a successful EU CBAM: it’s hard to imagine that a similar measure would not become inevitable in the UK for example.

Pillar Two: To close out the year, the income inclusion rule will apply to accounting periods beginning on or after 31 December 2023 in the EU and UK. I expect to be adding quite a few other countries to this list throughout 2023, and I look forward to keeping you up to date each month on the twists and turns in the international tax world. ■