Briefing

International review for June

Speed read

As we approach the mid-point of the year, there is plenty of change in the international tax world, but the pace varies. Pillar Two is steadily gathering momentum with announcements this month from nine territories. A little over a year from when it was first announced, Brazil's new OECD-aligned transfer pricing regime has now been implemented into law. In the long running saga of EC state aid cases, the advocate general has opined in the taxpayer's favour in *Amazon*. Elsewhere in Europe, DAC 8 has been finalised in record time; but as Sweden passes the baton of presidency of the Council of the EU to Spain, it passes along with it the unfinished Unshell, BEFIT and FASTER files. Finally, Denmark and Germany are the latest member states to implement the EU public country-by-country reporting directive.

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 update

On 15 May 2023, the Czech Republic launched a consultation on draft legislation to implement the EU Minimum Tax Directive. The draft closely follows the text of the Directive and also incorporates certain items subsequently released by the OECD Inclusive Framework. The consultation closed on 12 June 2023.

On 19 May 2023, the governments of Guernsey, Jersey, and the Isle of Man issued a joint statement outlining their intention to implement an income inclusion rule (IIR) and a domestic minimum tax (DMT) regime from 2025 for large multinational enterprises (MNEs) with worldwide revenues of at least €750m per annum. The islands' 0%/10% corporate tax regimes will continue to apply to out of scope entities.

On 18 May 2023, New Zealand published the May 2023 Tax Bill which included Pillar Two legislation. Perhaps of most interest is the fact that the rules will only come into force at a date set by future government regulation, when the government determines that a critical mass of countries has adopted the Pillar Two rules. It is not clear what will constitute a 'critical mass' for these purposes, and whether Australia's commitment to implement the rules in its Federal Budget earlier in May will be significant in this regard. In any event, the government has confirmed that the application date will not be earlier than 1 January 2024 for the IIR and 1 January 2025 for the undertaxed profits rule (UTPR).

On 24 May 2023, the Bahraini government announced it is considering the introduction of a corporate tax in light of its commitment to implement Pillar Two. According to the Minister of Finance, studies are currently being conducted in this respect and the results will be presented to the Parliament once available.

On 25 May 2023, the Swiss Federal Council published an amended draft of the ordinance to implement Pillar Two. The latest tranche of amendments includes administrative and procedural provisions regarding the operation of the top up tax. Following a successful public referendum on 18 June 2023, Pillar Two implementation will now proceed in Switzerland.

On 31 May 2023, the Netherlands became the first EU member state to submit a bill to transpose the EU Minimum Tax Directive into national law. A number of amendments have been made to the text of the previous draft to incorporate recent OECD release, including transitional safe harbour rules and provisions for a permanent safe harbour.

On 6 June 2023, Norway issued a public consultation on its draft legislation to implement the EU Minimum Tax Directive. The consultation ends on 1 August 2023.

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Brazil: OECD-aligned transfer pricing rules passed by Senate

I first reported in April 2022 that Brazil was considering a seismic shift from its unique historical transfer pricing system, which relied on standard fixed gross margins or markups, to an arm's length standard largely consistent with the 2022 OECD transfer pricing guidelines. At that time no clear timeline for implementation was given. Indeed, the political landscape in Brazil threw doubt on any progress being made, at least in the short term.

Fast forward a little over a year, and on 10 May 2023 the Brazilian Federal Senate unanimously passed Provisional Measure No. 1,152/Conversion of Bill No. 8 (the Bill), to implement these changes to the Brazilian transfer pricing system. The text of the Bill is in line with previous versions of the legislation, albeit there have been some changes regarding royalties, commodities and the tax authority's ability to conduct secondary transfer pricing adjustments. On 14 June 2023, the Brazilian President signed the bill into Law No.14,596.

Taxpayers must apply the new transfer pricing rules to their Brazilian intercompany transactions for periods beginning on or after 1 January 2024. The law allows taxpayers to make an irrevocable election to apply the new rules early for the 2023 tax period. Such an election must be made in September 2023.

MNEs with Brazilian operations must now carefully navigate the transition period as they move to the new regime. In particular the Brazilian tax authorities do not intend to allow grandfathering of financial transactions executed under the historic regime, meaning all existing Brazilian intercompany financial transactions will need to be reviewed and, if necessary, repriced, before MNEs become subject to the new rules.

The Brazilian tax authorities will shortly issue detailed guidance, probably after some public consultation. Although this new guidance should not change the content of the law, its importance cannot be underestimated: MNEs operating in Brazil have a short space of time to get ready for a major change in approach.

Amazon: AG opinion on Luxembourg transfer pricing ruling

On 8 June 2023, Advocate General (AG) Juliane Kokott of the CJEU delivered her opinion in *Amazon* (Case 457-21 P).

The case concerns the validity of a decision issued by the European Commission (EC), which found a transfer pricing ruling granted by the Luxembourg tax authorities in connection with an intra-group license agreement to be incompatible with European Union (EU) state aid rules.

The AG concluded that the reference system – the OECD Transfer Pricing Guidelines, which had not been implemented into Luxembourg law – relied on by the EC was incorrect. The AG also concluded that the EC failed to demonstrate that the tax ruling conferred an economic advantage to the taxpayer. As a result, the AG has recommended that the court uphold the General Court's judgment from 2021, which annulled the EC's decision.

The current AG decision is the latest in a string of cases related to EC state aid investigations into individual tax rulings granted by member states. Given the similarity of the issue under dispute with *Fiat* (joined cases C-885/19 P and C-898/19 P), which also dealt with the role of the OECD's arm's length principle and guidelines in the context of state aid reviews, the AG's conclusions are not surprising.

The AG reiterated the court's previous decisions that, when determining the reference system for the purposes of the selectivity analysis, the EC must consider the legislative choices of a member state and the version of the arm's length principle codified in domestic law, rather than an international standard. In the alternative line of reasoning, the AG applied the revised standard of review, as outlined in the recently published opinion in *Engie* (joined cases C-451/21 P and C-454/21 P), summarised in my May update ('International review', *Tax Journal*, 26 May 2023). AG opinions are non-binding on the CJEU, so it will be very interesting to see if the CJEU adopts the same line of reasoning, i.e. that only tax rulings which are manifestly erroneous in favour of the taxpayer could constitute a selective advantage.

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ECOFIN Council progress report

On 16 June 2023, the final scheduled meeting of the Economic and Financial Affairs Council of the EU (ECOFIN Council) under the Swedish Presidency of the Council took place. During the meeting a report to the European Council was approved that provided an update on progress of a range of direct tax measures during the first half of 2023, most notably DAC 8 and the proposed 'Unshell' Directive.

DAC 8: reporting and exchange of information on crypto-assets and cross-border rulings to certain individuals

The report notes that a compromise text on DAC 8 was approved at ECOFIN level on 16 May 2023. The agreed text is largely in line with the initial proposal issued by the EC, albeit a key amendment has been to remove a common system of minimum penalties for serious non-compliance offences that would have been applicable to both existing and proposed disclosure requirements.

The DAC 8 Directive will be formally adopted once the European Parliament has given its non-binding opinion on the final text. Member states will need to transpose the Directive by 31 December 2025 with the rules becoming applicable as of 1 January 2026 (with some exceptions).

Similar to DAC 7, DAC 8 was approved in record time – six months from the publication of the EC's initial proposal. The Directive significantly expands the scope of reporting and automatic exchange of information in the EU and impacted taxpayers should familiarise themselves with the final text of the Directive.

Unshell Directive

Since the legislative proposal for rules to prevent the misuse of shell entities was issued on 22 December 2021, the text has been subject to discussions in the Council working groups. The report notes that during the term of the Swedish presidency further partial compromise texts and background notes for certain elements of the proposal were prepared and discussed in a number of working group meetings. It is also noted that progress was made on several issues, such as scope, substance criteria, tax consequences, tax residency certificates and reporting deadlines. While a full compromise text was reportedly circulated in March, the report notes that further discussions will be needed in order to find compromise solutions on certain outstanding issues.

Sweden will be succeeded by Spain in holding the presidency of the Council of the EU in the second half of 2023. Spain has not yet published a list of priorities and it is currently unclear how the snap general elections in July may influence the work program of the Spanish presidency. However, it is anticipated that the Council working groups will continue to work on Unshell to find compromise solutions on the outstanding issues. In addition, the Spanish presidency will likely start technical discussions with member states on a Commission proposal for a common withholding tax relief and refund framework (FASTER) once that file has been released (expected to be late June) and a public consultation on the file has ended. It is also expected that the Spanish presidency will look to progress a new common EU corporate tax system (BEFIT) in the second half of this year.

Denmark and Germany: public CbCR legislation passed

Finally, on 1 June 2023, Denmark implemented the EU public country-by-country reporting (CbCR) Directive into national law. Germany followed suit on 16 June 2023 when its Parliament approved draft German legislation. Both territories domestic rules are generally aligned with the EU Directive both in terms of content and timeline for implementation (applying to financial years starting on or after 22 June 2024).

EU member states had until 22 June 2023 to implement the Directive into domestic legislation. As of the date of publication of this article, six member states have implemented their domestic legislation: in addition to Denmark and Germany, Hungary, Romania, Slovakia and Spain. Several others have published draft legislation or gone through a related public consultation. Given that the deadline has now passed, we would expect to see an increase in activity from the rest of the EU in the coming months. ■

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- Pillar Two: the consequences of staggered global implementation (A Greenbank & R Kinghall Were, 24.5.23)
- State aid and tax rulings: latest developments (G Peretz KC, 6.7.21)