

Briefing

International review for July

Speed read

It's the pre-summer holiday rush for BEPS 2.0 with the OECD working hard to secure the Pillar One deal, as well as preparing much needed guidance on Pillar Two. This month has seen Pillar Two developments in the Czech Republic, Denmark, Germany, Gibraltar and Norway. Harmonized withholding tax procedures in the EU have taken a leap forward with the EC issuing a proposed FASTER Directive. Public country-by-country reporting continues to dominate the international tax landscape with more EU countries implementing the rules, and Romania issuing clarifications on its existing regime. In a welcome development for MNEs, Australia has delayed implementation of its regime for 12 months and is reconsidering the scope of its rules. Finally, Brazil has issued much needed guidance on its new transfer pricing regime.



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BEPS 2.0 outcome statement

On 12 July 2023, the OECD released an *Outcome statement on the two-pillar solution to address the tax challenges arising from the digitalisation of the economy*. The outcome statement describes the status of the OECD/G20 Inclusive Framework (IF) base erosion and profit shifting (BEPS) 2.0 project. Key points to note from the statement are as follows.

Amount A of Pillar One

The IF has delivered a text of the multilateral convention (MLC) to implement Amount A of Pillar One. A few jurisdictions have expressed concern on certain issues and efforts are underway to resolve these. Once resolved, the text of the MLC will be published and will be open for signature in the second half of 2023. The MLC should enter into force during 2025.

Readers may remember that IF members agreed to refrain from imposing newly enacted digital services taxes (DSTs) before 31 December 2023, to buy time for successful Pillar One negotiations. With that deadline rapidly approaching, IF members agreed in the outcome statement to extend the ban on imposing DSTs or relevant similar measures on any company before 31 December 2024, or the entry into force of the MLC if earlier, provided the signature of the MLC has made sufficient progress by the end of the year.

However, five countries (Belarus, Canada, Pakistan, Russia and Sri Lanka) have refused to support this extension. Canada has issued a statement confirming that it does not disagree with the substance of the proposed MLC; indeed, it fully supports it. However, it says it cannot support an extended ban on DSTs without any firm and binding multilateral timeline to implement Pillar One. To do so would 'put Canada at a disadvantage relative to

countries which have continued collecting revenue under their pre-existing DSTs'. As it stands, Canada's domestic DST is due to take effect on 1 January 2024.

Amount A is at a critical juncture. The OECD will be working tirelessly over the next few months to complete construction of the pillar, repairing the fractures (the proliferation of unilateral DSTs, subsequent trade wars, knock on impact if the US fails to ratify the MLC) that threaten to break the deal altogether.

Amount B of Pillar One

Further work on Amount B is planned for completion by the end of the year. This will be launched in mid-July 2023 with a public consultation running to 1 September 2023. The IF plans to approve a final report on Amount B and incorporate key content into the OECD transfer pricing guidelines by January 2024. Due consideration will be given to the needs of low-capacity jurisdictions and the interdependence with the MLC.

Subject to tax rule (STTR)

A STTR model provision and commentary will be released in mid-July 2023 which will outline the defined set of 'intra-group' payments to which the STTR applies. The STTR seeks to lift the nominal tax rate to 9% on these payments. A multilateral instrument and explanatory explanation will be released and open for signature from 2 October 2023.

Canada says it cannot support an extended ban on DSTs without any firm and binding multilateral timeline to implement Pillar One

Pillar Two implementation update

Implementation of the EU Minimum Tax Directive (the Directive) by member states is gathering speed with the Czech Republic and Denmark issuing public consultations on their proposed domestic legislation in June 2023. Germany published a ministerial draft bill to implement the Directive on 10 July 2023 for public consultation until 21 July 2023.

On 6 June 2023, Norway issued a public consultation on its draft Pillar Two legislation that runs until 1 August 2023. The proposed rules are largely consistent with the EU Directive but adapted to a number of Norwegian conditions.

On 11 July 2023, Gibraltar issued the 2023 Budget Speech, which reaffirmed its commitment to implement Pillar Two no earlier than for accounting periods beginning on or after 31 December 2024. As part of this, the government plans to implement new incentives as well as a distinct new regime for companies within the scope of Pillar Two.

The interaction of tax incentives and Pillar Two was also a topic of conversation at the European Parliament's Subcommittee on Tax Matters public hearing on 27 June 2023. Key points raised from a Pillar Two perspective were that tax incentives can still be used as a policy tool for MNEs in the scope of the GloBE rules, but there are now limits to their use. In particular, an OECD official noted that incentives such as tax holidays that are very generous and broadly targeted will be heavily affected by the GloBE rules.

It has always been clear that Pillar Two will end the traditional ‘race to the bottom’ on headline tax rates by jurisdictions seeking to attract investment. Only relatively recently has the impact on the use of tax incentives begun to be discussed in detail. Location selection will become increasingly complex for MNEs in the future, as the most optimal jurisdiction from a tax perspective will be fact pattern dependant. On the upside, businesses with the ability to quickly make such assessments should find plenty of attractive investment options on offer.

EC new rules on withholding tax: FASTER

On 19 June 2023, the European Commission (EC) issued a proposal for a Council Directive providing for the ‘faster and safer relief of excess withholding taxes’ (FASTER) initiative. The aim of the proposal is to make withholding tax (WHT) procedures in the EU more efficient and secure for investors, financial intermediaries and local tax authorities.

The draft Directive gives member states a choice between implementing a quick refund system, a relief at source system or a combination of the two, as well as the introduction of additional registration and reporting requirements for financial intermediaries. The proposal is open to a public consultation, which will run for an eight-week period starting from 19 June 2023, but extended every day until the proposal is available in all EU languages.

The current FASTER proposal represents a significant step forward in the pursuit of a streamlined EU WHT procedure. However, FASTER was originally intended to be part of a ‘taxation package’ alongside the EC’s ‘securing the activity of framework enables’ (SAFE) proposal, aimed at tackling tax evasion and aggressive tax planning by addressing the role of certain intermediaries (enablers) who create complex and non-transparent structures.

At an exchange of views on 28 June 2023, Commissioner Gentiloni confirmed that a SAFE proposal should not be expected before an agreement is reached on the proposed Unshell Directive that is currently being discussed at European Council level. Interestingly the Commissioner stressed that Unshell should not be a controversial proposal and that he failed to comprehend the reason behind the Council’s delay.

It will be interesting to see if Spain can progress these files when it takes the reins of the EU Council presidency in the second half of 2023.

Public country-by-country reporting (CbCR) update

In welcome news for MNEs, on 23 June 2023 the Australian government announced a 12 month delay in the implementation of its public CbCR rules from 1 July 2023 to 1 July 2024. The delayed start date is intended to better align with the commencement of the EU’s public CbCR Directive and to allow more time for consultation on the new Australian regime.

The government also released a summary of consultation outcomes that provides further details on the direction of the proposed CbCR reporting changes. Of particular note is the removal of the additional data requirements proposed in the original public CbCR legislative draft, which were in excess of requirements for other global tax transparency regimes.

MNEs will no doubt be keen to input into the further consultation process to ensure greater alignment of the Australian rules with global transparency frameworks to achieve a better balance between potentially significant

compliance costs and the public benefit of deviations from global standards.

Meanwhile in the EU, France, Ireland and Lithuania have now published laws to transpose the EU Public CbCR Directive (the Directive) into domestic law. On 29 June 2023, Romania amended Order No. 2048/2022, which implemented the Directive into domestic law. The key amendments are:

- Only Romanian entities with an ultimate parent company established in a non-EU member state need to report under the EU directive.
- Any reference to entities located in the EU includes entities established in countries which are part of the European Economic Area (Norway, Iceland and Lichtenstein).
- For purposes of reporting under the directive, the reporting format to be used is that applicable according to EU Directive 2013/34.

While the amendments clarify certain important aspects of the application of the rules in Romania – which chose to adopt the Directive early – there is still complexity for group’s subject to the rules in this territory. For example, the EC may draft forms for public CbCR that differ to those used by Romania. This could lead, at least in the first reporting period, to non-uniform reporting and a subsequent lack of comparability between reports submitted by the same MNE groups in different jurisdictions.

On 4 July 2023, the Liechtenstein government launched a consultation on a draft bill to implement measures aligned to the EU Public CbCR Directive. The consultation period ends on 29 August 2023.

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Brazil: guidance published on new transfer pricing regime

Finally, the Federal Revenue of Brazil (RFB) has published a draft Normative Instruction (IN) for public consultation on Brazil’s new transfer pricing rules. The consultation ends on 25 July 2023. Key points to note in the IN include:

- the election period of the new regime may be shifted from September to November which allows taxpayers more time for analysis and preparation; and
- confirmation that the OECD transfer pricing guidelines can be used to interpret the new Brazilian rules.

The RFB has also committed to providing future guidance on transactions involving intangibles, intra-group services, cost-sharing agreements, business restructuring and financial transactions.

Given the high degree of subjectivity of the new Brazilian regime, this publication brings some much-needed clarification regarding the RFB’s stance on the application of the arm’s length principle. The legal certainty associated with Brazil’s older transfer pricing regime is gone for good. ■

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