Briefing

International review for November

Speed read

November's update is filled by developments in Europe. The ECOFIN Council has reiterated the EU's political support for BEPS 2.0 and has confirmed that the OECD's safe harbour rules are compatible with the EU Minimum Tax Directive. Local implementation of Pillar Two is progressing with developments in Barbados, Estonia, Germany, Hungary, Ireland, Lithuania, Malaysia, Malta and the Netherlands. In the latest twist in high profile EU state aid cases, the advocate general has recommended that the General Court review its annulment of the EC decision in the Apple case. Recent developments in Italy, the Netherlands and Portugal may mark a trend of countries scaling back advantages under expatriate tax regimes. The EU has updated its list of non-cooperative jurisdictions with several changes to Annex I and the 'grey list'. Finally, the DAC 8 Directive has been formally adopted by the EU.

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BEPS 2.0 update

ECOFIN statements endorse progress on two pillars

At the 9 November 2023 meeting of the Economic and Financial Affairs Council of the EU (ECOFIN Council), EU member states approved statements reconfirming their political support for Pillars One and Two and also confirming that the safe harbour rules and the administrative guidance agreed by the OECD/G20 Inclusive Framework (IF) are compatible with the EU Minimum Tax Directive ('the Directive').

Readers may remember that the EC previously committed to putting forward its own proposal by the end of 2023 if sufficient progress had not been made on Pillar One at an international level. The current EC work program does not indicate any upcoming releases in this respect, and the statements approved by ECOFIN seem to focus on finalising and adopting the Amount A Multilateral Convention (MLC) that was released by the OECD in October 2023. However, as I have outlined in previous updates, successful implementation of the Amount A MLC depends on the US being a signatory. The US political landscape makes this unlikely to happen in the short term at least. If progress on the MLC continues to stall in 2024, it will be interesting to see if the EU proposes an alternative such as an EU digital permanent establishment or an EU digital Levy. Without some kind of action the risk of unilateral responses to the lack of Pillar One will increase.

In terms of Pillar Two, an increasing number of member states are taking steps to transpose the Directive into domestic law by the deadline of 31 December 2023 (more on this below). However, the Directive is not expected to be updated in the short term to reflect the various supplementary rules and clarifications agreed by the IF this year as part of the GloBE implementation framework, administrative guidance and GloBE information return. A question therefore arises as to how this additional guidance should be treated as part of the domestic transposition process. In particular, regarding the interaction between the existing EU qualifying domestic minimum top-up tax (QDMTT) safe harbour and the OECD QDMTT safe harbour released in July 2023. It was also not clear whether the references in the Directive to the OECD materials served as sufficient legal basis for EU member states to introduce and apply the transitional country-by-country reporting (CbCR) safe harbour and the transitional under taxed profits rule (UTPR) safe harbour.

The ECOFIN statement provides welcome assurance that the IF supplementary guidance is compatible with the Directive and should therefore assist member states with domestic transposition.

Pillar Two national implementation update

Europe: Despite the 31 December 2023 transposition deadline, Pillar Two implementation status across the EU is varied.

Estonia, Lithuania and Malta have this month indicated they will make use of article 50 of the Directive. As a reminder, this provides the option to defer the application of the income inclusion rule (IIR) and the under taxed profits rule (UTPR) up to 31 December 2029, where a maximum number of 12 ultimate parent entities are based in an EU member state. However, none of these countries have confirmed when they intend to start applying the IIR and UTPR (e.g. after 31 December 2029 or earlier).

Some countries are still going through public consultations, albeit such consultations tend to run on tight deadlines. Hungary for example launched a public consultation on its draft Pillar Two bill that opened on 17 October 2023 and closed on 25 October 2023.

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Other countries are more advanced in the legislative process. Ireland's Finance (No. 2) Bill 2023, containing detailed Pillar Two legislation, was published on 19 October 2023. This is expected to be signed into law by the president in December 2023. On 27 October 2023, the Lower House of the Dutch Parliament adopted the Minimum Profit Tax Act 2024. The Act will now move onto the Upper House of Parliament, where it will be debated then voted upon in mid-December 2023. On 10 November 2023, the lower house of the German Parliament passed its Pillar Two legislation. The legislation must now pass the upper house of the German Parliament and be promulgated to become effective.

It is unlikely that the 31 December 2023 deadline will be met across the EU. From a practical perspective, companies will have to monitor developments closely: finalisation of legislation will have an impact on financial statement disclosures. However, more important will be the content of final domestic legislation. With some member states unable to incorporate dynamic interpretation under domestic legal systems, it may be some years before we see something resembling consistency in approach to the implementation and application of the rules across Europe.

Rest of world: Malaysia released Finance (No.2) Bill on 7 November 2023 which included legislation for Pillar Two, largely aligned with the GloBE Model Rules.

On 7 December 2023, Barbados announced its details of its Pillar Two rules that will take effect for periods beginning on or after 1 January 2024. From this date corporation tax will be charged at a flat rate of 9%, replacing the existing rates ranging from 1% to 5.5%. The new rate will represent a significant increase for some taxpayers, although there will be several new refundable tax credits and exemptions available.

Ireland: AG opinion on tax rulings in the *Apple* case

On 9 November 2023, the advocate general (AG) of the CJEU issued an opinion proposing that a judgment of the General Court of the EU in *European Commission v Ireland and others* (Case C-465/20 P) ('the Apple case'), regarding tax rulings issued by Ireland, be set aside.

In 1991 and 1997, Ireland issued two tax rulings to two Apple group companies approving the method by which the companies proposed to determine the chargeable profits deriving from the activity of the group's Irish branches. In 2016, the European Commission (EC) considered that the tax rulings constituted unlawful state aid that must be recovered. In 2018, Ireland collected €13.4bn in back taxes and interest from the group.

In 2020, on the application of Ireland and the taxpayer, the General Court annulled the EC's earlier decision. The EC subsequently lodged an appeal with the CJEU asking it to set aside the judgment of the General Court.

The AG's opinion concludes that the General Court committed a series of errors in law when it ruled that the EC had not shown to the requisite legal standard that the IP licenses held by the companies and related profits (generated by the sales of products outside the United States) had to be attributed for tax purposes to the Irish branches. The AG is also of the view that the General Court failed to correctly assess the substance and consequences of certain methodological errors that, according to the EC decision, impaired the validity of the tax rulings. In the AG's opinion it is therefore necessary for the General Court to carry out a new assessment.

The AG's opinion is not binding on the CJEU. Apple will not be the only taxpayer anxiously awaiting the CJEU's decision: multinational groups, particularly those with EU state aid cases pending, will be watching developments closely.

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Changes to European expatriate tax regimes

As the year draws to a close, we are seeing the shoots of an emerging trend in Europe in respect of the future of tax advantaged schemes for expatriates (expats).

In October 2023, Portugal announced the end of its non-habitual residents regime (NHR) with effect from 1 January 2024. Although the change is not yet definite, it is considered highly likely to proceed as planned when Parliament votes on the Budget Law on 29 November 2023. The announcement has been justified by the Prime Minister on the grounds that action was required to address the lack of affordable housing in Portugal following a surge in property prices, believed to be at least partially driven by increased demand from international buyers. For those currently utilising the NHR regime, it will remain available for the remainder of the 10-year period envisaged when they initially opted to make use of it, subject to certain conditions.

This follows a recent announcement by the Netherlands that it will further limit the scope of its tax advantaged expat regime commonly known as the '30% ruling', which exempts qualifying individuals from paying tax on up to 30% of their salary for a period of up to five years. Under new proposals the ruling will be scaled back over five years commencing on 1 January 2024, such that it will ultimately become a '10% ruling'. Again, challenges in the Amsterdam property market have been cited as the rationale for the changes.

Finally, in late October 2023, Italy published the text of a Legislative Decree introducing changes to its expat tax regime from 1 January 2024, significantly reducing the available tax advantages. Unlike Portugal and the Netherlands, it has been reported that the key driver for this change is the need to increase tax revenue after lower than expected growth in 2023.

It will be interesting to see if this trend spreads within Europe in 2024. Observers closer to home will also be monitoring developments on the UK's non-dom regime, which is expected to be a key tax battleground between the Conservatives and Labour in the run up to the general election.

Update to the EU list of non-cooperative jurisdictions

On 17 October 2023, the ECOFIN Council adopted conclusions on the EU list of non-cooperative jurisdictions. The list is a result of an in-depth screening of non-EU countries that are assessed against criteria for tax good governance, and is part of the EU's fight against harmful tax competition and aggressive tax planning. The list comprises Annex I and Annex II (the 'grey list'). The grey list is used for jurisdictions that have made commitments to improve tax governance in light of the EU's assessment of their tax regime, and are subject to ongoing monitoring to assess whether they execute these commitments.

EU member states have committed to implement defensive measures against countries on Annex I. The approach of member states to countries on the grey list varies, but these too could be subject to local defensive measures. Defensive measures may take the form of, for example, non-deductibility of costs, CFC rules, increased WHT or limitation of participation exemptions. The list is also relevant for DAC 6 EU mandatory disclosure rules and it has a direct impact on EU Public CbCR obligations.

Following the Council's revisions Annex I includes 16 jurisdictions: American Samoa, Anguilla, Antigua and Barbuda, the Bahamas, Belize, Fiji, Guam, Palau, Panama, the Russian Federation, Samoa, the Seychelles, Trinidad and Tobago, Turks and Caicos Islands, the US Virgin Islands and Vanuatu.

The grey list now includes 14 jurisdictions: Albania, Armenia, Aruba, Botswana, the British Virgin Islands, Costa Rica, Curaçao, Dominica, Eswatini, Hong Kong (SAR), Israel, Malaysia, Turkey and Vietnam.

DAC 8 formally adopted

Finally, on 17 October 2023, the EC announced that EU finance ministers have adopted new tax transparency rules for all service providers facilitating transactions in cryptoassets for customers resident in the EU, as an update to the directive on administrative cooperation (DAC8). The Directive has also been extended to include additional reporting obligations for financial institutions. The agreed Directive requires member states to transpose the rules into domestic lay by 31 December 2025. The rules would become applicable as of 1 January 2026 (with some exceptions). ■

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