Briefing

International review for January

Speed read

December 2023 saw a flurry of activity across the international tax world, setting the scene for an eventful 2024. The OECD published its third tranche of Pillar Two Administrative Guidance and released a statement on the timeline for Pillar One. It also announced a new role for the UK's Tim Power. The EC released frequently asked questions on the EU Minimum Tax Directive, and European Member States lead the list of countries advancing Pillar Two implementation. The CJEU has rejected the EC's findings of State aid in the *Engie* and *Amazon* cases. The United Nations is seeking more influence in international tax policy making, with the passage of a new tax resolution in December 2023. Finally, I take a look ahead at what to expect on the international tax landscape in 2024.

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Administrative Guidance for Pillar Two and update on Pillar One timeline

On 18 December 2023, the Inclusive Framework (IF) released its third tranche of Administrative Guidance on the Global Anti-Base Erosion (GloBE) Model Rules. The guidance principally covers the application of the Transitional Country by Country Reporting (CbCR) Safe Harbour (TCSH), in particular when purchase pricing accounting adjustments do and do not need to be excluded from a MNE's group's qualified CbCR. It also addresses issues such as the allocation of blended CFC taxes (notably US GILTI) and filing deadlines for groups with short reporting periods.

On the same day, the OECD released a statement on the timeline for the multilateral convention (MLC) under Amount A of Pillar One. Recognising that work to complete the technical architecture of Amount A will continue in 2024 (as will the standstill on new Digital Service Taxes and other relevant similar measures), IF members reaffirmed their commitment to achieve a consensus-based solution and to finalise the text of the MLC by the end of March 2024, with a view to hold a signing ceremony by the end of June 2024.

New appointment: Tim Power

The OECD's Committee on Fiscal Affairs (CFA) has elected the UK's Tim Power, Deputy Director for Business and International Tax in HMT, as the chair of the committee beginning on 18 December 2023. The CFA is the main forum for the OECD's discussions on taxation, covering both international and domestic tax issues and tax policy and administration. As chair of the CFA, Mr Power will also serve as co-chair of the IF, alongside Ms Marlene Nembhard-Parker of Jamaica.

EC FAQs on the interpretation and transposition of Pillar Two

On 22 December 2023, the EC published frequently asked questions (FAQs) on the interpretation of the EU Minimum Tax Directive (the Directive). Although non-binding, the FAQs will be welcomed as they reinforce that the Directive is to be applied and interpreted by Member States in accordance with OECD Commentary and Administrative Guidance – even where issued after the adoption of the Directive. The FAQs also include clarifications regarding EU specific issues such as the deferral option under article 50 of the Directive.

Pillar Two national implementation update

December 2023 was a hive of activity for Pillar Two implementation, as can be seen from the summary below of countries that, at the date of writing, have passed or approved domestic legislation. The brackets indicate the month the legislation was passed or approved:

- Austria (December 2023)
- Belgium (December 2023)
- Bulgaria (December 2023)
- Croatia (December 2023)
- Czech Republic (December 2023)
- Denmark (December 2023)
- Finland (December 2023)
- France (December 2023)
- Germany (December 2023)
- Hungary (November 2023)
- Ireland (December 2023)
- Italy (December 2023)
- Japan – IIR (March 2023)
- Korea (December 2022)
- Liechtenstein (December 2023)
- Luxembourg (December 2023)
- Malaysia (December 2023)
- Netherlands (December 2023)
- Norway (January 2024)
- Romania (December 2023)
- Slovakia (December 2023)*
- Slovenia (December 2023)
- Sweden (December 2023)
- Switzerland – DMTT (December 2023)
- United Kingdom (June 2023)
- Vietnam (December 2023)

Below lists the countries that, at the date of writing, have published draft legislation:

- Canada (August 2023)
- Cyprus (October 2023)
- Estonia (October 2023)*
- Latvia (December 2023)*
- Lithuania (October 2023)*
- New Zealand (May 2023)
- Spain (Dec 2023)

*Note that these EU Member States have taken advantage of the Directive's deferral option and will not implement the rules until 31 December 2029. Note also that Malta has announced it will defer implementation, but has not yet released draft legislation.

Elsewhere in the world, on 21 December 2023 Hong Kong launched a Pillar Two consultation that closes on 20 March 2024. Also on 21 December 2023, Korea enacted amendments to its Pillar Two rules, including postponement of the effective date of the Undertaxed Profits Rule (UTPR) to financial years beginning on or after 1 January 2025. The updates also incorporate certain elements of recent OECD Administrative Guidance.

CJEU state aid cases: *Engie* and *Amazon*

December saw the CJEU (or the court) decide appeals in two high profile State aid cases, *Engie* (Joined Cases C-451/21 and C-454) and *Amazon* (Case C-457/21) In a further blow to the EC's crackdown on favourable tax deals between Member States and MNEs, in both cases, the court agreed with previous Advocate General (AG) non-binding opinions that the EU erred in concluding there was State aid. The CJEU's rulings are final and cannot be appealed against. A full analysis of these cases is outside the scope of this article, but the key points are set out below.

As covered in my June 2023 update, *Amazon* concerned the transfer pricing treatment of an intra-group license agreement. In 2017, the EC issued a decision that Luxembourg's tax authorities endorsement of the agreement constituted unlawful State aid. The taxpayer and Luxembourg's appeal against this decision was upheld by the General Court of the EU in 2021. The EC then appealed to the CJEU.

In deciding the EC's appeal on 14 December 2023, the CJEU found that, although the General Court erred in applying the arm's length principle and the OECD Transfer Pricing Guidelines as the correct 'reference system' for determining State aid, the EC also incorrectly relied on those principles and thus its finding of State aid must be annulled.

It will be interesting to see the extent to which the court's decision in *Engie* will be reflected in the outcome of UK CFC Finco Exemption case

Given the court's conclusions in previous case law (for example, *Fiat* (Case C-898/19 P), it is not surprising it reiterated that rules that are external to the national tax system (such as non-binding OECD principles that have not been incorporated into EU law) should only be considered in defining the reference system (for the purposes of assessing the existence of a selective advantage) when explicitly referenced within the national tax system.

The ruling means Amazon does not need to pay €250m in back taxes to Luxembourg. Apple will be one of the MNEs watching this development with great interest. Its own €14bn State aid case will be heard by the CJEU this year, and it will be hoping for a similar outcome.

As I set out in my May 2023 update, unlike *Amazon* and other tax-related State aid cases, where the focus of the EC was on allegedly unjustified transfer pricing or allocation of profits, *Engie* dealt with internal mismatches and a supposed inconsistent application of national law, leading to double non-taxation.

In the appeal brought before it by the taxpayer, the CJEU concluded on 5 December 2023 that the General Court was wrong to confirm the EC's approach in determining the reference system. Finding that the selectivity analysis was invalidated, the CJEU set aside the General Court's judgement and annulled the EC's Decision.

It will be interesting to see the extent to which the court's decision in *Engie* will be reflected in the outcome of UK CFC Finco Exemption case (Case C-555/22 P), currently under appeal in front of the CJEU. In previous proceedings, the General Court rejected the plaintiffs' claims that the EC erred in law by selecting a narrow reference system, i.e. the UK's CFC rules, instead of the general CIT system in the UK.

United Nations (UN)

In December 2023 the UN General Assembly passed a tax resolution entitled 'Promotion of inclusive and effective international tax cooperation at the United Nations'.
The resolution follows a report published by the UN secretary-general Antonio Guterres in summer 2023. This said OECD initiatives did not adequately address the needs and priorities of developing countries and called for a greater role for the UN to make international tax co-operation 'fully inclusive and more effective'. The resolution establishes an intergovernmental committee, mandated to develop draft terms of reference for a UN framework convention on international tax cooperation.

Although some tax commentators disputed the contents of letter, it is nonetheless a further indication of the UN's determination to play a greater role in tax policy

Matters escalated further in late December when a group of UN experts, with special mandates to investigate human rights violations, issued a formal communication to the OECD. In it, they warned that the OECD's Two Pillar solution could significantly reduce the amount of tax Global South countries can collect from MNEs and 'could have a discriminatory impact on the grounds of gender, ethnicity and race'. The communication calls on the OECD to demonstrate that it has assessed the human rights impacts of their proposals. Although some tax commentators disputed the contents of letter, it is nonetheless a further indication of the UN's determination to play a greater role in tax policy.

What to expect in 2024

After such a busy December, what can we expect to see in 2024?

OECD

Pillar One: Even if the text of the Amount A MLC is approved by March 2024, in order for it to enter into force in 2025, it must be ratified by at least 30 countries accounting for at least 60% of the UPEs expected to be in scope of Amount A. The US is a key signatory in achieving this threshold. The difficulty in passing tax legislation through Congress – particularly in an election year – casts doubt over the success of Amount A in 2024. Although the EC recently expressed its support in delivering the MLC, the proliferation of unilateral Digital Services Taxes (DSTs) and other similar measures is a real threat to Amount A, with Canada and New Zealand already progressing their own alternatives.

No timescale for the completion of Amount B (the simplified and streamlined application of the arm's length principle to in-country baseline marketing and distribution activities) has yet been provided. Although we expect some progress in 2024, the pace and extent is likely to depend on the success or otherwise of Amount A.

More Pillar Two Administrative Guidance: It is expected the IF will release further Administrative Guidance in the first half of 2024, covering the application of deferred tax liability recapture rules and the allocation of deferred taxes relating to cross-border taxes such as CFC tax regimes.

Remote and hybrid working: Expect international discussions on the tax treatment of remote and hybrid workers to gather pace this year. Permanent Establishment (PE) risk is likely to be the main area of focus for the OECD, with consideration of possible PE safe harbours. Further public input may be requested by the OECD in the Spring.

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EU

EU direct tax initiatives: Belgium took over the Presidency of Council of the EU on 1 January 2024. Addressing the burden of cross-border investors is one of its priorities for early 2024. The Faster and Safer Tax Excess Refund (FASTER) file, which aims to make withholding tax procedures in the EU more efficient and secure, is therefore one area of EU direct tax policy where we may see progress in early 2024. Other key files such as Unshell (Preventing the misuse of shell entities), SAFE (Securing the Activity of Framework Enablers) and BEFIT (Business in Europe: Framework for Income Taxation) are included in the work programme of the presidency, but not specifically classed as priorities. Discussion on these files will continue in 2024, but these are likely to be slower burners – particularly given the European Parliamentary elections in June 2024.

EU public CbCR: Look out for activity in the run up to mid-year as those Member States who have not yet adopted the public CbCR Directive hurry to meet the commencement date of 22 June 2024.

UN

The intergovernmental committee mentioned above will report its recommendations for draft terms of reference in August 2024. Based on previous comments by the UN Secretary General, such a mandate may include a greater role in preventing tax evasion and illicit financial flows. In the meantime, expect developing countries to use their voice in the UN to seek greater input into OECD and EU tax initiatives.

With around 49% of the world's population heading to the polls for national elections in over 60 countries– including the US and UK – this year, it is difficult to do too much crystal ball gazing. What is certain is that 2024 will be a big year for international tax policy – and one with many surprises. ■

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