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Briefing

International review for February

Speed read

In a rare month of respite from BEPS 2.0, this month the OECD released its first statistics on International Compliance Assurance Programme (ICAP). In the EU, the ECON Committee has made non-binding recommendations on the draft text of the FASTER Directive; the EC has sent letters of formal notice to nine Member States who have failed to transpose the EU Minimum Tax Directive; and the General Court of the CJEU has annulled the approval by the EC of €3.4bn of State Aid from the Netherlands to the taxpayer KLM. US bipartisan tax extenders legislation proposes changes to business taxation, although the success of the Bill remains uncertain. Australia has published its revised draft public Country by Country Reporting legislation for consultation and the United Nations progresses its work on a framework convention on international tax cooperation.

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OECD update

On 29 January 2024, the OECD released the first aggregated statistics from the International Compliance Assurance Programme (ICAP). ICAP is a voluntary risk assessment and assurance programme to facilitate open and co-operative multilateral engagements between MNE groups and tax administrations in jurisdictions where they have activities.

The process supports the effective use of transfer pricing documentation, including the MNE's Country-by-Country report, providing a more efficient route to improved multilateral tax certainty. ICAP should reduce the resource burden for businesses and tax administrations, meaning fewer disputes requiring resolution through mutual agreement proceedings.

The statistics cover all cases completed by October 2023, including the two ICAP pilots, and provide an overview of the jurisdictions and topics covered by the completed risk assessments, the time taken to complete a risk assessment, and aggregated data on risk assessment outcomes. They also consider the relationship between ICAP and other routes to tax certainty such as Advance Pricing Arrangements (APAs) and Mutual Agreement Procedures (MAPs), including how these tools complement each other and can be used together by an MNE group to manage its tax risk and increase tax certainty.

Key takeaways from the statistics include:

- 20 ICAP cases were completed by October 2023, with more currently in progress;
- the average time taken from the start of an ICAP process to the issuing of risk assessment outcomes to an MNE was 61 weeks, which is higher than the maximum target timeframe of 52 weeks, in part due to the impact of Covid-19 on the second pilot;
- for 40% of MNE groups, all the main covered transfer pricing risk areas were considered low risk by all tax administrations that included them in the scope of the risk assessment; and
- the risk area that received the highest proportion of low-risk outcomes was permanent establishments (PEs) (considered low risk in 95% of instances where the topic was included in the scope of a tax administration's risk assessment), followed by tangible property (90%), intragroup services (88%), financing (76%), and intangible property (IP) (75%).

MNEs can apply to participate in the program, by contacting the tax administration in their headquarter location. Where that jurisdiction does not currently participate in ICAP, the MNE can contact the OECD directly. Applications are accepted at one of the two annual deadlines: 31 March and 30 September.

EU update

ECON Committee adopts report on FASTER proposal

On 23 January 2024 the European Parliament's Committee on Economic and Monetary Affairs (ECON Committee) adopted its report on the Faster and Safer Relief of Excess Withholding Taxes (FASTER) Directive proposal. The initial proposal, issued by the EC on 19 June 2023, aims to establish more efficient and secure withholding tax procedures in the EU.

Whilst the report generally supports the Commission's proposed text, it recommends further exploration of specific elements including, amongst other things, examination of the universal application of a relief at source system in all Member States and exploration of additional measures to facilitate self-processed withholding tax claims for small investors.

The report will be voted on during a plenary session of the European Parliament, at which point (if agreed) it would represent the Parliament's opinion on the Directive. However, note that the Parliament's opinion is not binding on the Council of the European Union, i.e. it would remain up to the 27 EU Member States to agree on the final text of the Directive.

Infringement procedures regarding minimum tax directive

On 25 January 2024, the European Commission (EC) sent letters of formal notice to nine Member States (Estonia, Greece, Spain, Cyprus, Latvia, Lithuania, Malta, Poland and Portugal) that had not transposed the EU Minimum Tax Directive into domestic legislation by the due date of 31 December 2023. The deadline for the Member States concerned to reply to the letters of formal notice and complete their transposition is two months. As reported in my January 2024 article, Estonia, Latvia, Lithuania and Malta are among those Member States that have opted to defer application of Pillar Two under Article 50 of the Directive. These Member States were nevertheless required to legislate for the Directive by the deadline above.

State Aid proceedings

On 7 February 2024, General Court of the CJEU annulled the approval by the EC of State Aid from the Netherlands to the taxpayer KLM, amounting to €3.4bn (*Ryanair v Commission* (Case T-146/22)).

In 2020, the EC approved Netherlands State Aid to the taxpayer consisting of a guarantee for a bank loan and a loan, amounting to €3.4bn of aid. The objective was to provide the taxpayer with temporary liquidity in the context of the Covid-19 pandemic. However, in 2021, the court annulled the EC's decision for failure to state reasons for the determination of the beneficiary of the aid (Case T-643/20). In July 2021, the EC adopted a new decision, in which it found that the aid was compatible with the internal market and that the taxpayer and its subsidiaries were the sole beneficiaries of the aid, to the exclusion of the other companies in the taxpayer's broader multinational group.

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In the action brought before it by another airline (Ryanair), the court again annulled the approval of the aid, finding that the EC erred in excluding as beneficiaries of the aid other companies in the taxpayer's broader multinational group.

The court examined the capital, organic, functional, and economic links between the group companies and the contractual framework under which the aid was granted to conclude that other group companies were capable of benefiting, at least indirectly, from the advantage granted by the aid. The press release accompanying the judgment stated: 'Where there are grounds to fear the effects on competition of an accumulation of State aid within the same group, the onus is on the Commission to exercise particular vigilance in examining the links between the companies belonging to that group.'

US bipartisan tax extenders legislation

On 31 January 2024 the US House of Representatives passed H.R. 7024, the Tax Relief for American Families and Workers Act of 2024 (TRAFWA or the Bill). This bipartisan legislation addresses, amongst other things, scheduled changes in business taxation under the Tax Cuts and Jobs Act (TCJA), with a view to boosting growth and American competitiveness.

Whilst the enhancements to Child Tax Credit under the Bill are being given prominence in the press, the proposed legislation includes the following business measures:

- **Temporary expensing for domestic R&D costs:** The TCJA put in place R&D amortisation, requiring companies incurring R&D in tax years beginning after 31 December 2021 to spread the expenditure over five years for domestic R&D costs or 15 years for R&D conducted outside the US. To encourage American innovation and improve the US's competitive position, the TRAFWA proposes temporarily restoring full expensing for domestic R&D only, applying retroactively for the 2022 and 2023 tax years, and continuing until the end of 2025. The Bill, in its current form, would provide elective transition rules to help taxpayers apply the retroactive provisions in previous years tax returns. However, taxpayers would still have the option to capitalise domestic R&D expenditure if they wished.
- **Extension of allowance for depreciation, amortisation or depletion in determining the limitation on business interest:** For tax years beginning before 1 January 2022, the computation of adjusted taxable income (ATI) for the purposes of the limitation on deduction of business interest was determined by reference to 30% of earnings before interest, taxes, depreciation and amortization (EBITDA). A tighter limitation based on 30% of earnings before interest and tax (EBIT) took effect from 2022. To provide continued flexibility for businesses forced to borrow at higher interest rates to meet their payroll obligations and expand their operations, the proposals would extend the application of EBITDA to taxable years beginning after 31 December 2023 (and, if elected, for taxable years beginning after 31 December 2021) and before 1 January 2026.
- **Temporary extension of 100% bonus depreciation:** The TCJA introduced a gradual phasing out of 100 bonus percent depreciation for short lived assets. The bill would extend 100 percent bonus depreciation for investments in machines, equipment and vehicles. This would be generally effective for tax years beginning between 31 December 2022 and 1 January 2026.
- **Increase in limitations on expensing of depreciable businesses assets:** This is generally effective for property placed in service in tax years beginning after 31 December 2023.

While the progress of the Bill through the House has been encouraging, it remains uncertain whether the Bill will be passed by the Senate where opposition has arisen and 60 votes are needed for passage. The Senate is scheduled for recess from 10–25 February and is not expected to consider the Bill until after it returns at the earliest. Any amendments to the Bill, either in committee or on the floor, could complicate its final passage and would, at least, require re-passage by the House.

Australia publishes draft public CbCR legislation

I reported in July 2023 that Australia had taken on board public feedback and announced a 12 month delay in implementation of the public CbCR rules. On 12 February 2024, the government released revised exposure draft legislation and explanatory materials implementing public CbCR for reporting periods beginning on or after 1 July 2024.

This latest draft takes into consideration stakeholder feedback from the April 2023 draft legislation on three important matters:

- removal of Australian-specific data requirements (for example, details of intangibles, lists of tangible assets and Pillar Two effective tax rates), bringing the information requirements more closely in line with the private OECD CbCR requirements;
- allowing aggregation of required data for all foreign jurisdictions that are not on a list of 41 specified jurisdictions closely aligned to the International Dealings Schedule specified jurisdictions list (but excluding those in the EU); and
- application of de minimis threshold to MNE groups such that a CbC reporting parent is not subject to a reporting obligation if less than A$10m of the group's global income for the income year is Australian-sourced income.

Whilst the revised proposal's attempts to more closely align with OECD CbCR and GRI 207 are welcome, the challenge nevertheless remains of having to report under another set of standards, with relatively little time to prepare before the proposed implementation date. Consultation on these measures will run to 5 March 2024.

UN webpage on framework convention

As I reported in my January 2024 article, the UN recently passed a resolution to establish an ad hoc intergovernmental Committee mandated to develop draft terms of reference for a UN framework convention on international tax cooperation. The UN has now published a dedicated webpage that will provide an update on the progress of the Committee, which is due to finalise its work by August 2024. Key points of note from the website as at the date of writing are:

- chairs of the UN regional groups were invited to transmit up to four nominations per group to the secretariat until 25 January 2024, with the aim of forming a bureau of 20 members; and
- substantive sessions with member jurisdictions are tentatively set in New York from 26 April to 8 May 2024 and from 29 July to 16 August 2024, pending approval by the Committee during an organisational session in February. ■

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▶ EU withholding tax: will things move FASTER? (P Radcliffe, R Devisscher & R Bashir, 26.7.23)