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Briefing

International review for September

Speed read

Ireland has been dealt a blow in its long running legal battle with the ECJ ruling that it provided unlawful state aid via transfer pricing rulings. The United Nations Ad Hoc Tax Committee has approved draft Terms of Reference for a framework convention on tax that has potential to significantly impact international businesses over the long term. As the US Presidential election campaign intensifies, the candidates are setting out different visions for the future of US tax policy. Finally, a new OECD report notes that to date around 40 jurisdictions have already implemented or are planning to implement the global minimum tax with effect from January 2024 or 2025.

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ECJ overturns the General Court's decision in the Irish State Aid case

A decision eight years in the making, on 10 September 2024 the European Court of Justice of the CJEU (ECJ) set aside an earlier judgment of the General Court and confirmed that Ireland did indeed grant unlawful state aid totalling €13bn via transfer pricing rulings granted to a multinational enterprise (MNE) group.

In 2020 the General Court annulled the European Commission (EC) 2016 finding that Ireland had granted unlawful state aid to the MNE group. The EC appealed this decision and in November 2023 the Advocate General (AG) issued an opinion concluding that the General Court's ruling was flawed and should be set aside.

In line with the AG's opinion, the ECJ found that the General Court committed a series of errors in law when it concluded that the EC had not shown the requisite legal standard that the intellectual property (IP) held by the two plaintiffs was attributable to their Irish branches. In particular, the ECJ held that the General Court erred when it ruled that the EC's primary line of reasoning was based on erroneous assessments of normal taxation under Irish tax law, and when it upheld the complaints raised by the plaintiffs regarding the EC's factual assessments of the activities of the Irish branches and those of the head offices.

This is the final judgment in the case at hand and has been received as a major – and unexpected – win by the EC, following a series of cases in which the ECJ has overturned EC decisions and ruled in favour of the taxpayer. In particular, in its judgment in the joined cases (Case C885/19 P and Case C898/19 P) upon appeal the ECJ annulled the EC's decision, concluding that the General Court was wrong to confirm the EC's approach to apply a version of the arm's length principle not codified in Luxembourg domestic law.

In response to the judgment, the Irish Department of Finance published a statement saying its position has always been that no favourable tax treatment to any companies or taxpayers was provided by Ireland. It noted that the judgment is now of historical relevance only as the two tax rulings at stake are no longer in force, and Ireland has since introduced changes to the relevant corporate tax laws involved. In a press conference on 10 September, the EU Competition Commissioner, Margrethe Vestager, picked up this thread stating that the decision should be viewed in light of the bigger picture, which is that this and other EC investigations have created a mindset shift amongst Member States, triggering or accelerating regulatory and legislative reforms.

Work will now begin to transfer the back taxes that have been held in escrow to the Irish state, a process expected to take several months.

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UN revised draft terms of reference on international tax cooperation

In my June review (*Tax Journal*, 23 June 2024), I reported on the United Nations (UN) Ad Hoc Tax Committee's publication of the zero draft Terms of Reference (ToR) for a Framework Convention on international tax cooperation (the Framework Convention).

On 18 July 2024, the Ad Hoc Tax Committee released revised draft ToR, which formed the basis of further deliberations from 29 July to 16 August 2024. The revised draft contained relatively minor changes, mainly to strengthen wording regarding the Framework Convention's alignment with international human rights law.

Unlike the OECD that generally operates through consensus, the UN operates through majority decision making. On 16 August 2024, the Ad Hoc Tax Committee adopted the ToR, with 110 countries voting in favour, eight against (including the UK and the US) and 44 abstentions (including EU Member States). In a joint explanation of the vote, the EU representative expressed concerns that the final draft did not adequately address key issues, particularly the need for broad consensus to ensure inclusivity and effectiveness.

The ToR will be submitted to a formal vote by the UN General Assembly during its 79th session this month. Assuming the document is approved, an intergovernmental negotiating committee will work towards a treaty to be ready for signature in Q4 2027.

There has been much debate in the business community regarding what practical impact this initiative will ultimately have on the international tax landscape. My view is its importance should not be underestimated for two reasons. Firstly, the priorities set out in the ToR suggest that UN negotiations are likely to lead to an increase in withholding taxes on cross-border services; this is in contrast to the OECD that has historically tried to reduce

double taxation on cross border trade. This will have a significant impact on business, particularly in the US, given the US's limited treaty network with developing countries. Secondly, as set out in Philip Baker's recent excellent article ('Reform of the international tax architecture: the UN fails to reach consensus', *Tax Journal*, 6 September 2024), the developments at the UN highlight the divide between the objectives of the Global South and the Global North in relation to international taxation, as well as the increasing battle for power between the UN and the OECD in terms of leading on international tax frameworks.

> The importance [of the draft Terms of Reference for the UN Framework Convention] should not be underestimated for two reasons

Tax policy and the US election

With less than two months to go until the US elects its 47th President, the Harris and Trump campaigns are setting out their different visions for the future of US tax policy.

Central to tax policy in the campaign is how the candidates would deal with the Tax Cuts and Jobs Act (TCJA) 2017. The Act, enacted by President Trump in 2017, includes a broad range of temporary tax cuts, mainly for individuals. $4 trillion worth of these tax cuts are set to expire at the end of 2025, in what has been dubbed a 'tax cliff edge' that, if left unaddressed, would see the tax bills of millions of individuals rise overnight.

Vice President and Democratic nominee Kamala Harris's campaign website confirms her focus is firmly on tax cuts for middle-class families, to be funded by ensuring 'the wealthiest Americans and large corporations pay their fair share'. Harris's pledge to ensure no one earning less than $400,000 a year will pay more in taxes indicates that she wants to extend at least some of the TCJA 2017 provisions for certain taxpayers.

On tax rises, the website currently sets out Harris's plans to:

- quadruple the tax on stock buybacks (from 1% to 4%);
- enact an unspecified 'billionaire minimum tax'; and
- raise the long-term capital gains tax rate from 20% to 28% for those earning $1m a year or more.

> Trump also indicated that he would terminate the 'Green New Deal'. This seems to be a reference to repealing the Inflation Reduction Act

Although it has been widely reported in the press, at the time of writing the campaign website does not specifically state that Harris supports the various revenue raising proposals in the official FY 2025 tax plan of the Biden-Harris administration (the 'Green Book'). Further details on the Green Book proposals can be found in my March review (*Tax Journal*, 22 March 2024). Notably, there is no mention of her campaign's previous comments that she would support Biden's proposals to raise the corporation tax rate from 21% to 28%.

Central to former President and Republican nominee Donald Trump's campaign is his pledge to extend all of the expiring TCJA 2017 tax cuts. In a speech to the Economic Club of New York on 5 September 2024, Trump set out his vision to reduce the corporation tax rate from 21% to 15% – but only for companies that make their products in America. No further detail was given on how this policy would be implemented in practice.

In contrast to Harris, Trump would pay for his tax cutting agenda by imposing tariffs on foreign-made goods. In his 5 September speech, Trump also indicated that he would terminate the 'Green New Deal'. This seems to be a reference to repealing the Inflation Reduction Act, which offers $370bn of tax credits, loans and grants to incentivise domestic manufacturing.

We can expect to hear more on tax policy from the candidates as we draw closer to the vote on 5 November. However, winning the White House does not guarantee a President's ability to implement their tax agenda: success ultimately rests upon the political make-up of Congress – and it is too early in the process to predict what that might be.

Pillar Two update

On 25 July 2024, the OECD published the *OECD Secretary General Tax Report to the G20 Finance Ministers and Central Bank Governors,* describing key developments in international tax reform since February 2024. Key amongst these is the two-pillar solution.

The report offers little new insight into Pillar One, but on Pillar Two it notes that to date around 40 jurisdictions have already implemented or are planning to implement the global minimum tax with effect from January 2024 or 2025. 60% of large MNEs will be in-scope of the global minimum tax by the end of 2024 through the Income Inclusion Rule alone, and 90% by 2025 when the Undertaxed Profits Rule comes into effect.

The report also notes that the first high-level ceremony for the Multilateral Convention to facilitate the implementation of the Subject-to-Tax Rule (STTR) will take place in Paris on 19 September 2024. By way of reminder, the STTR takes priority over the GloBE rules and is designed to help developing Inclusive Framework members protect their tax base. The STTR MLC allows relevant bilateral tax treaties to be amended to include the STTR in a synchronised and efficient manner.

Many countries are now refining their existing Pillar Two rules, but there are three jurisdictions where first steps to implementation have been made:

- on 14 August 2024 draft legislation was presented to Jersey's Parliament, with debate scheduled for 1 October 2024 (similar legislation is expected in Guernsey and the Isle of Man in due course);
- on 22 August 2024, separate pieces of legislation implementing Pillar Two passed the Australian House of Representatives with Senate approval now required; and
- on 1 September 2024, Bahrain became the first Gulf country to implement Pillar Two, by introducing the 15% Domestic Minimum Top-up Tax. ■

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- What does the future hold for US adoption of the OECD's two-pillar proposals? (D Korb & A Solomon, 19.9.24)
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