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Euro Tax Flash from KPMG's EU Tax Centre

Revised proposal for an EU Minimum Tax Directive: No agreement in April 5 ECOFIN Council

BEPS 2.0 – Pillar Two – GloBE Model Rules – Commentary – GloBE Implementation Framework – Minimum Tax – EU implementation – EU Directive – Compromise Text – Unanimity

The Economic and Financial Affairs Council of the EU (ECOFIN) did not reach political agreement on the revised compromise text for an EU Minimum Tax Directive in its April 5, 2022 meeting, due to reservations from Poland.

The revised compromise text (dated March 28, 2022) builds on the March 12 text, and addresses the remaining concerns raised by four Member States during the ECOFIN meeting on March 15, 2022. The March 28 compromise text extends to six years the maximum deferral period that Member States can opt for. Member States where no more than twelve (previously ten) Ultimate Parent Entities of in-scope groups are located can therefore choose to not apply the Income Inclusion Rule (IIR) and the Undertaxed Payment Rule (UTPR) until December 31, 2029.

Despite the French Presidency's proposal to commit to the successful accomplishment of the OECD's Pillar One solution by way of a joint Council statement, Poland restated its request for a legally binding link on the implementation of both Pillar One and Pillar Two and therefore did not express support for the revised compromise text. Accordingly, the EU Minimum Tax Directive will be added to the agenda for the next ECOFIN meeting on May 24, 2022 and the French Presidency continues to pursue the goal to find consensus among all EU Member States.

Background

The European Commission published the initial minimum tax proposal on December 22, 2021 after the OECD had published its Model Rules for the Global Anti-Base Erosion Rules (GloBE Rules) two days before on December 20, 2021. Following technical discussions in the Council working groups, a compromise text was published on March 12, 2022 in advance of the March 15 ECOFIN meeting and provided for several amendments in order to make reference to the ongoing work of the OECD and to rectify areas of discrepancy between the Model Rules and the initial text.

Under consideration of concerns raised by Member States in respect of the short implementation timeline, the March 12 compromise text referred to a transposition deadline of December 31, 2023 and an option for Member States to defer the application of the IIR and the UTPR until December 31, 2025, where no more than ten Ultimate Parent Entities (UPEs) of in-scope MNE Groups are located in those Member States (optional IIR and UTPR deferral) (for more details on the March 12 compromise text please refer to Euro Tax Flash issue 468).

At the ECOFIN Council meeting on March 15, 2022, the majority of Member States supported the compromise text proposed by the French Presidency. However, Estonia and Malta requested a broader scope and time frame in respect of the optional IIR and UTPR deferral. Poland restated its concerns regarding the adoption of the Directive independent of Pillar One, while Sweden maintained a parliamentary scrutiny reservation. Those four Member States were therefore not able to express support for the general approach proposed by the French Presidency.

The April 5 ECOFIN

On April 5, 2022, Finance Ministers of EU Member States discussed the new compromise text, which, according to a note to the Council from the Permanent Representatives Committee (note to the Council), includes the following updates aimed at addressing reservations raised by the four Member States that were not previously in a position to support the initiative:

a) Adjustments and clarifications in respect of the optional IIR and UTPR deferral

In light of Estonia's and Malta's request to broaden the parameters of the deferral option, the March 28 compromise text extends the application period of the deferral to six years (previously five years as per discussions on March 15) and increases the maximum number of UPEs in a Member State to twelve (previously ten).

The March 28 compromise text also includes a new recital in the preamble providing clarifications on the scope of the obligations to be laid down in the national law of those Member States that make use of that deferral election. According to this new recital, Member States that opt to defer the application of the IIR and the UTPR should transpose the EU Minimum Tax Directive in a manner that allows the application of the UTPR in other Member States and third country jurisdictions. To facilitate the UTPR application, those Member States opting for the deferral shall require domestic constituent entities to share the relevant information within the MNE Group.

In addition, the French Presidency note suggests a further amendment to Article 47a to clarify the reporting obligations in situations where the UPE of an MNE Group is located in a Member State that opts for the IIR and UTPR deferral. In that case, the UPE shall be exempted from the GloBE filing obligation but would be asked to nominate a designated filing entity in another Member State (that has not made use of the deferral election) or in a third country jurisdiction (that has a qualifying competent authority agreement in effect with the UPE jurisdiction). The UPE would also be required to provide the designated filing entity with information necessary to file the GloBE returns on its behalf.

b) European Commission empowered to determine a list of qualified IIR regimes

To support legal certainty and the efficiency of the GloBE rules, the March 28 compromise text empowers the Commission to determine, by way of delegated acts, a list of third country jurisdictions that have implemented a legal framework in their domestic law which is considered by the EU to be a qualified IIR. It is noted that the assessment prepared by the Commission should refer to the assessment of IIR regimes carried out at OECD level. As a result, the Council's authorization to determine such a list by way of implementing acts, which was an amendment to the EC's initial proposal and would have required unanimous votes by all Member States, was removed.

c) Link between Pillar One and Pillar Two

According to the note to the Council, the French Presidency maintains its proposal that the agreement on the EU Minimum Tax Directive should be accompanied by a Council statement confirming the Council's full commitment to the successful accomplishment of the OECD's Pillar One solution, within the agreed timeline.

Next Steps

Due to the objections of Poland in respect of the missing legal link between the EU Minimum Tax Directive and the OECD Pillar One solution, further discussions are required, with a view to reaching agreement on the general approach during the ECOFIN meeting scheduled for May 24, 2022.

EU Tax Centre comment

Despite the reservation raised by Poland, the French Presidency and the Commission remain committed to reaching political agreement. However, during the press conference following the ECOFIN meeting on April 5, the French Minister of Finance noted that EU law does not allow making the EU Minimum Tax Directive contingent on the entry into force of the multilateral convention implementing Pillar One – an international instrument, as this would undermine European sovereignty. It therefore remains to be seen how the Presidency will solve this stalemate.

As highlighted in KPMG's response to the EU public consultation on the proposed minimum tax Directive, it is important that the Pillar Two rules become effective in the participating jurisdictions at the same time, in order to avoid additional complexities for in-scope groups. While the EU proposes a general application of the IIR on or after December 31, 2023 (December 31, 2024 in respect of the UTPR), it is not yet clear whether other Inclusive Framework members tend to follow that path (also under consideration of a possible delay in implementation in the United States) or whether they might envisage to apply the rules sooner. The guidelines currently developed as part of the GloBE Implementation Framework might be an appropriate measure to ensure a harmonized and simultaneous implementation of the GloBE rules.

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.

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