Euro Tax Flash from KPMG's EU Tax Centre

EU direct tax initiatives: 2024 mid-year state of play

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Key Summary:

At the mid-year point for 2024 and following the transition the Presidency of the Council of the EU from Belgium to Hungary, KPMG's EU Tax Centre took the opportunity to look back on some of the highlights of the first half of the year in the EU and international tax world.

As this period was particularly eventful from a tax perspective, this special edition of Euro Tax Flash highlights the most important tax developments recorded during the first half of 2024 and notes some of the initiatives that should be paid attention to in the upcoming months.

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European Commission – ECOFIN Council – BEPS 2.0 – Minimum Tax Directive – Anti-tax avoidance – Unshell – SAFE – BEFIT – DEBRA – Public Country-by-Country Reporting – DAC7 – DAC8 – Withholding tax framework – FASTER – Foreign Subsidies Regulation

EU Minimum Tax Directive (Pillar Two)

EU Minimum Tax Directive (Pillar Two)

EU Minimum Tax Directive at a glance

As previously reported, the EU Minimum Tax Directive (2022/2523) entered into force on December 23, 2022 and required Member States to transpose the rules into domestic law by December 31, 2023.

Member States were generally required to start applying:

- the Income Inclusion Rule (IIR) for fiscal years beginning on or after December 31, 2023, and
- the Undertaxed Profits Rule (UTPR) for fiscal years beginning on or after December 31, 2024.

The Directive allows Member States to defer the application of the IIR and the UTPR up to December 31, 2029, where a maximum number of 12 UPEs are based in that EU Member State. It is important to keep in mind that Member States that do not defer the application for the charging provisions will be required to apply the UTPR with respect to constituent entities resident in deferring jurisdictions.

In addition, the EU Directive provides the option for Member States to implement a qualified domestic top-up tax (QDMTT), without specifying an application date.

Following the entry into force of the EU Minimum Tax Directive, the Inclusive Framework published a number of additional rules and clarifications that supplement the OECD GloBE Model Rules. In response, EU Member States approved a Council statement on November 9, 2023, reconfirming their political support for Pillar One and Pillar Two of the OECD's BEPS project. The Council statement and the accompanying statement from the European Commission (EC) also confirm the compatibility of the Safe Harbour rules and the February, July and December 2023 Administrative Guidance agreed by the OECD/G20 Inclusive Framework with the EU Minimum Tax Directive.

This position was further confirmed in non-binding FAQs published by the European Commission on December 22, 2023. On June 17, 2024, the OECD/G20 Inclusive Framework (IF) released an agreed fourth tranche of Administrative Guidance. The new guidance provides detailed recapture rules for deferred tax liabilities (DTL), new rules on deferred tax assets and liabilities where there are divergences between GloBE rules and accounting carrying values, the allocation of cross-border current and deferred taxes, the allocation of profits and taxes in structures involving flow-through entities, and the treatment of securitization vehicles.

Status

On May 23, 2024, the European Commission sent reasoned opinions to Cyprus, Latvia, Lithuania, Poland, Portugal and Spain for failing to transpose the Directive into domestic legislation within the deadline set by the Directive.

In the meantime, Latvia and Lithuania have finalized their partial implementation of the Directive by making use of the option to defer the application of the IIR and UTPR by up to six years (the same applies to Estonia, Malta and Slovakia). As at the date of this publication, the state of play in the other EU jurisdictions can be summarized as follows:

- Cyprus published draft legislation in October 2023. It is expected that the law takes effect from 2024 – with the caveat that the QDMTT in Cyprus was previously set to start from 2025 (similar to the UTPR).
- In Poland, draft legislation was published for public consultation at the end of April 2024. The IIR, UTPR and DMTT would apply for financial years starting on or after December 31, 2024. The timeline is therefore deferred by one year compared to the EU Directive requirements. However, Polish draft legislation provides for an option for groups to make an irrevocable election to apply the IIR and DMTT earlier (i.e., from January 1, 2024).
- In Portugal, draft legislation was previously expected to be issued by the end of May 2024 – however, no further developments have been reported.
- Spain published a revised version of the draft law in June 2024 that provides for the application of the IIR and DMTT for financial years starting on or after December 31, 2023, and the UTPR for financial years starting on or after December 31, 2024.

A number of EU Member States (including Belgium, Denmark, Luxembourg and Sweden) have already completed or are currently in the process of amending their minimum tax legislation to incorporate additional elements of the Administrative Guidance (e.g., Safe Harbour provisions, anti-hybrid arbitrage rules, elections, etc.) and/or to correct elements from the previously adopted rules.

For more details, please refer to the dedicated KPMG BEPS 2.0 tracker in Digital Gateway, which provides an overview on the status of Pillar Two implementation not only within the EU but globally. The tracker further indicates some of the variations in terms of how countries incorporate the GloBE rules in their domestic legislation, including the application of the different GloBE Safe Harbours, the applicable accounting standard for DMTT purposes, different registration, filing and payments requirements as well as deadlines.

What to keep in mind

Taxpayers operating in the EU will want to monitor how EU Member States incorporate the GloBE rules in their domestic legislation. Key design decisions that are left to national legislators include the operation and design of the DMTT as well as the administration of the rules, including registration and filing requirements:

- *DMTT:* in-scope MNEs should keep track of whether countries make use of QDMTT design options that are permitted under OECD Guidance (e.g., carve-out for certain types of entities, no application of substance-based income exclusion or de-minimis exclusion). Note that stricter criteria apply as per OECD Guidance released in July 2023 for a QDMTT to be eligible for the Safe Harbor. In particular, it should be monitored which countries generally require the use of a local accounting standard as a basis for the QDMTT assessment (subject to conditions), rather than allowing the QDMTT obligations to be based on the consolidation standard, as approaches are not harmonized across the EU.
- *Administration:* in-scope MNEs should keep track of their local registration, filing and tax payment requirements that may differ across GloBE jurisdictions (e.g., requirement to file local self-assessment returns for IIR, UTPR and DMTT purposes in addition to the GloBE Information Return (GIR), setting filing and payment deadlines (including potential advance payment requirements) and providing for centralized group filing and payment). As a first step in this context, in-scope groups will need to focus on the different registration obligations in different jurisidctions. Whilst some Member States require registration within the same deadline as for the GIR, others require (certain) local Constituent Entities to register with local administration or to notify their status for GloBE / DMTT purposes already in 2024 (Belgium) or 2025 (e.g., Denmark, France, Germany). In addition, the information required for registration may also differ significantly. Whilst some countries may only require the registration and identification of the designated filing entity, other countries request data about the group and ownership structure including a characterization of the parent entities, as well as information relating to the financial accounts (e.g., Belgium).

In-scope groups should also carefully monitor approaches taken by GloBE jurisdictions in terms of incorporating and applying elements of the OECD Commentary and Administrative Guidance in their legislation. In this context, it is important to note that work is ongoing at the level of the Inclusive Framework on future tranches of Administrative Guidance, which are expected to be released later in 2024. In addition, MNEs need to track additional clarifications and interpretations by individual countries that in certain instances go beyond what is provided by the OECD materials (e.g., Austria, Italy, Luxembourg).

Taxpayers will also need to monitor the outcomes of the IF peer review for a common assessment of the "qualified" rules status of jurisdictions' implementation of the DMTT, IIR and UTPR. The IF has recently issued a Q&A document confirming that such assessment will also address the question whether a jurisdiction's QDMTT meets the additional criteria to be eligible for the QDMTT Safe Harbour in a foreign jurisdiction. The Q&A clarify that a transitional (simplified) self-assessment procedure will apply initially, whereby an implementing jurisdiction can self-certify the status of local rules by providing information on the main features of their legislation to the OECD Secretariat. Depending on the assessment of such information, the country will be awarded a transitional qualified status, which is to be respected by all other countries until a full legislative review is completed. This process will likely provide some comfort for groups having to assess in which countries top-up tax needs to be calculated and potentially paid under the different collection rules. It is expected that the results of the transitional assessment will be released in the coming months.

It is also worth noting that the EC announced its intention to expand the scope of the Directive on Administrative Cooperation to facilitate the exchange of information in relation to minimum taxation rules under Pillar Two (referred to as “DAC9”). A draft proposal is expected once further progress has been made on this workstream at the level of the OECD Inclusive Framework.

EU implementation of Pillar One

EU implementation of Pillar One

Amount A of Pillar One at a glance

On October 11, 2023, the OECD released the text of a new Multilateral Convention to Implement Amount A of Pillar One (MLC) to reallocate profits of multinational enterprises to market jurisdictions. The October 2023 MLC reflected the consensus achieved among members of the Inclusive Framework at that date. Key elements include:

- Amount A applies to MNEs with global revenues above EUR 20 billion and a pre-tax profit margin greater than 10 percent.
- Amount A reallocates 25 percent of the profit in excess of a 10 percent profit threshold to market jurisdictions (defined as the jurisdiction where the end-user is located).
- Under the so-called Marketing and Distribution Safe Harbour the allocation is adjusted where the market jurisdiction already taxes a portion of the profit.
- A formula identifies jurisdiction(s) obliged to relieve double taxation through either the exemption method or a foreign tax credit.
- The MLC provides that certain withholding taxes (including taxes withheld on interest, royalties and technical fees) are included in the Amount A profit determination and can reduce the profits allocated to a market jurisdiction under Amount A.
- The MLC includes a list of local Digital Service Taxes and relevant similar measures that would need to be removed and outlines criteria to prevent the introduction of such measures in the future.

The MLC was accompanied by an explanatory statement as well as an updated estimate of the economic impact of Amount A. In addition, the MLC was accompanied by an explanatory document, which contains further details on the application of tax certainty for Amount A.

Status

Importantly, the OECD release noted that work will continue to reach agreement on specific outstanding areas (e.g., the treatment of withholding taxes).

According to an IF statement published on December 18, 2023, the work to resolve remaining differences continues in 2024, including on the standstill on new Digital Service Taxes. In addition, a public statement made by the Co-Chairs of the IF in May 2024 reaffirmed the commitment to reaching a final agreement on the text of a Multilateral Convention (MLC) for Amount A in time to open the MLC for signature by the end of June. This deadline was not met, and it has been reported that negotiations continue. A revised timeline has, however, not been communicated by the IF.

The MLC is aimed to enter into force in 2025, once it has been ratified by at least 30 countries accounting for at least 60 percent of the ultimate parent entities (UPEs) of businesses expected to be in scope for Amount A.

On June 17, 2024, the OECD published additional guidance on key definitions related to Amount B of Pillar One, which aims at simplifying and streamlining the application of the arm's length principle to baseline marketing and distribution activities.

The OECD have noted that work on an Amount B framework (i.e., political agreement on which jurisdictions will implement Amount B) remains ongoing as part of the broader work on the Pillar One package. Pending the finalization and implementation of any such agreement, Amount B remains optional for jurisdictions.

For more information, please refer to a dedicated KPMG report.

What to keep in mind

The EC has previously committed to putting forward, if appropriate, a proposal by the end of 2023 if agreement at international level on a Pillar One solution is not reached. There have been no further official announcements from the EC on an EU-own initiative in this respect. However, a Council statement published on November 9, 2023, noted that it is of paramount importance to ensure that Pillar One is implemented, taking into account the interests of all Member States. In addition, a statement published by the EC on the same day confirms the EC's intention to work towards ensuring a successful delivery in the EU and calls on Member States to swiftly sign and ratify the Amount A Multilateral Convention. Nevertheless, it is important for taxpayers to monitor developments in relation to potential alternative solutions at both EU and EU Member State level. According to a public letter submitted to the Dutch Parliament in October 2023, a Dutch tax official noted that a multilateral digital services tax should be considered as an alternative, if countries are unlikely to reach a global agreement and the current moratorium on digital services taxes would not be extended (i.e., agreement to refrain from imposing newly enacted DSTs or relevant similar measures on any company). The European Commission had previously proposed a Digital Permanent Establishment or the introduction of an EU digital levy as a new own resource for the EU, as an alternative. However, these proposals have not been explored further recently.

Please note that the current agreement on a moratorium on digital services taxes applies for the period between January 1, 2024, and the earlier of December 31, 2024, or the date of entry into force of the MLC. In addition, Austria, France, Italy, Spain and the United Kingdom signed an agreement with the US on existing DSTs in 2021, which was extended in February 2024 from December 31, 2023 to June 30, 2024. Based on the agreement, the respective DSTs can be maintained until Pillar One enters into force. Nevertheless, in case DST liabilities accrued exceed an amount equivalent to the tax due under Pillar One in the first full year of its implementation, the excess will be creditable against certain future Pillar One "Amount A" liabilities. In return, the US has terminated its trade retaliation measures in relation to the DSTs listed above.

For an overview of currently applied Digital Services Taxes, please refer to KPMG's summary of the taxation of the digitalized economy.

Proposal to prevent the misuse of shell entities (Unshell)

Unshell at a glance

On December 22, 2021, the EC issued a proposal for a Directive aimed at fighting the use of shell entities and arrangements for tax purposes (Unshell). The Unshell proposal sets out a list of features, referred to as gateways, to filter entities at risk of being misused for tax purposes. High-risk entities would then be required to report on a series of substance indicators through their annual tax return. Companies failing to meet the substance indicators would be deemed to be 'shell' entities, potentially triggering the denial of certain tax benefits that would have otherwise been available under double tax treaties and EU Directives.

Status

The text of the proposal has been subject to lengthy discussions in the Council working groups. As previously reported, several compromise texts were submitted, but Member States have not yet been able to reach consensus on the initiative.

The June 2024 ECOFIN report notes that, in principle, most delegations supported the objectives of the proposal, but were of the view that further important technical work was necessary before an agreement could be feasible. Among the most discussed issues, the report lists: tax consequences, links with domestic anti-abuse legislation, excluded entities, minimum substance, rebuttal of the presumption and reduction of administrative burden, tax residency certificate and exchange of information.

According to the report, the Belgian Presidency of the EU Council presented a possible way forward at the High Level Working Party (HLWP) on June 11, 2024, which will be subject to further discussions to find compromise solutions on outstanding issues.

Hungary's work programme for its Presidency of the EU Council in the second half of 2024 includes advancing the discussions on the tax files currently on the agenda, and fighting tax evasion has been set as a high priority. However, the Unshell file is not specifically classified as a priority and is not expected to be discussed until the second half of the term.

What to keep in mind

Nearly two years since its release, the proposal is still under negotiations among EU Member States, with its final text and date of application remaining unclear. It can be inferred from the latest progress reports published by the ECOFIN that the final text will very likely differ from the initial proposal, possibly substantially.

Taxpayers operating in the EU will want to monitor progress on the Unshell proposal and its implementation timeline. Although the risk assessment steps and substance indicators initially proposed by the EC will likely change as a result of the technical work in the Council working groups, the EC's December 2021 proposal may still serve as a good starting point for an initial assessment of the impact on existing structures.

It is furthermore important to continue to monitor trends regarding the approach of tax administrations across the EU, as well as decisions by national courts in EU Member States on issues related to beneficial ownership and substance, as well as local anti-treaty and anti-directive shopping measures. Key insights from KPMG on this topic are available here.

Securing the Activity Framework of Enablers (SAFE)

SAFE

SAFE at a glance

On July 6, 2022, the EC launched a public consultation on the SAFE initiative following previous statements on its intention to address the behavior of certain intermediaries (enablers) that engage in unacceptable behavior. According to the call for evidence for an impact assessment, three policy options were considered:

- requirement for all enablers to carry out dedicated due diligence procedures;
- prohibition to facilitate tax evasion and aggressive tax planning, combined with due diligence procedures and a requirement for enablers to register in the EU;
- code of conduct for all enablers.

Status

The EC noted that it is important to reach agreement on the proposed Unshell Directive before tabling a proposal in relation to the SAFE initiative. Accordingly, the timeline remains unclear and subject to progress on the Unshell proposal.

What to keep in mind

The European Parliament has repeatedly called for action in this respect, as well as to address the broader issue of the behavior of a minority of intermediaries engaged in unacceptable practices. It will therefore be important to monitor whether or how this translates into further initiatives that may lead to increased due diligence obligations for tax advisors operating in the EU, whether operating as part of a professional services firm or in-house.

EU Public Country-by-Country (CbyC) Reporting

Public CbyC Reporting at a glance

The EU Public CbyC Reporting Directive entered into force on December 21, 2021, and introduced a timeline for the adoption of rules that will require multinational groups operating in the EU and that exceed certain size thresholds to publish a set of data, including information on taxes accrued and taxes paid.

EU Member States were required to transpose the Directive into domestic legislation by June 22, 2023. The rules apply, at the latest, from the commencement date of the first financial year starting on or after June 22, 2024. Individual Member States could nevertheless opt for an early adoption of the rules.

Status

On May 23, 2024, the European Commission decided to send reasoned opinions to six Member States that had failed to completely transpose the Directive into domestic legislation. These Member States are Austria, Belgium, Cyprus, Italy, Finland and Slovenia. The six Member States have two months to reply and take the necessary measures. In the absence of a full communication of all national implementing measures, the Commission may decide to refer the Member States to the CJEU. Several Member States have either enacted or issued draft implementing bills in the interim. To the best of our knowledge, the current implementation status across the EU as of the date of this publication is as follows:

- twenty-three Member States have adopted legislation: Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden,
- two Member States have released draft legislation: Austria, Italy, and
- two Member States have not formally initiated the transposition process: Cyprus, Slovenia.

What to keep in mind

In-scope taxpayers – whether part of groups with an EU or non-EU parent, are advised to monitor closely when and how individual Member States decide to implement specific provisions of the Directive. The EU Public CbyC Reporting Directive is a minimum standard – Member States may therefore expand the scope of the rules by, for example, requiring additional data points. The Directive has several opt-in clauses, which would lead to differences in the way the provisions are transposed into domestic law. There may also be differences in the size thresholds applied by each Member States (either due to currency translations or to options available under the EU Accounting Directive). It is therefore important for MNEs to check the exact thresholds applied by each EU jurisdiction in which they operate with respect to the group, as well as to subsidiaries and branches.

These options and potential scope extensions will impact in particular non-EU headquartered groups, which generally have reporting obligations in each EU country where they have a qualifying presence. Such MNEs should therefore also consider how to achieve consistent disclosures that meet the requirements of each of the countries where they have an obligation and should monitor developments in each EU jurisdiction.

An additional layer of complexity was brought by the fact that several Member States have opted for early adoption (Romania – January 1, 2023, Croatia – January 1, 2024, Sweden – May 31, 2024) or for early reporting deadlines (Hungary – five months after end of financial year, Spain – six months after end of financial year).

The EU public CbyC disclosure rules are not the only note-worthy development in terms of tax-related disclosures. On June 5, 2024, in the Australian federal government introduced legislation to the Australian Parliament that proposes to implement for reporting periods that start on or after July 1, 2024 public CbyC reporting for multinational enterprises that goes beyond the scope of the EU requirements. In parallel, the Financial Accounting Standards Board in the US adopted, on December 14, 2023 significant changes to income tax disclosure and reconciliation requirements.

In addition to these targeted tax-related disclosures, information on a group's tax position will also be relevant in the context of the EU Corporate Sustainability Reporting Directive (CSRD). Under CSRD, companies operating in the EU will need to prepare extensive sustainability reports as part of their management reports. The CSRD is intended to ensure that companies report reliable and comparable sustainability information necessary for stakeholders to evaluate companies' non-financial performance, with the main goal of improving transparency for all stakeholders. For tax, this will likely represent a step beyond the quantitative data required under EU public CbyC Reporting and towards a focus on qualitative information. Further details on Tax under the CSRD can be found in KPMG's article on Tax Transparency.

For more details on EU public country-by-country reporting as well as on how it relates to other, similar, initiatives, please refer to the KPMG's EU Tax Centre dedicated webpage.

BEFIT

Business in Europe: Framework for Income Taxation (BEFIT)

BEFIT at a glance

On September 12, 2023, the EC issued a proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT draft Directive or BEFIT proposal), which provides common rules for determining the corporate tax base for EU-based entities that are part of a group with global consolidated revenues above a certain threshold. Groups not meeting the threshold requirements could opt into the regime.

According to the proposal, BEFIT group entities would have to calculate their preliminary individual tax result by making several adjustments to their financial accounts. These results would then be aggregated into a single tax base and allocated among the members of the BEFIT group.

During the first seven fiscal years post-implementation, the allocation would be made based on the respective average preliminary taxable results in the prior three fiscal years of the BEFIT group members. The EC notes that this transitional approach could pave the way for a permanent method based on formulary apportionment. Once allocated, EU countries may apply further local adjustments (e.g., base increases, deductions, incentives) to the allocated portion of the BEFIT tax base.

The proposal provides for a one-stop-shop system, where the ultimate parent entity would file a single information return for the BEFIT group with its own tax administration. BEFIT group members would then file an individual tax return with their own tax administration, essentially to reflect the local adjustments. In addition, the proposal would introduce the concept of a 'BEFIT Team' to reach consensus on the completeness and accuracy of the BEFIT Information among those tax administrations where the BEFIT group operates in the EU.

Status

In February 2024, several EU Member States submitted reasoned opinions to the European Commission or adopted statements raising concerns with respect to the BEFIT proposal. Key concerns include potential conflict with the principles of subsidiarity and proportionality, concerns about the impact on sovereignty of EU countries in the field of direct taxation, concerns about the potential impact on national future tax revenue as well as an increase of the administrative burden for both taxpayers and tax administrations.

In addition, the June 2024 ECOFIN report to the European Council mentions that, whilst Member States generally support the overall objectives of simplifying corporate taxation rules in the EU and reducing the administrative burden for businesses and tax authorities, multiple concerns were expressed during the Council working group meetings on whether the Directive, as proposed by the Commission, would successfully achieve these goals. According to the report, the concerns focused on the interplay of the BEFIT rules with existing tax legislation (including national corporate tax rules, Pillar Two rules, EU anti-abuse measures) and also on the scope and determination of the preliminary tax result of in-scope groups.

The report also mentions that some Member States called for a political discussion and acknowledges that further reflection and technical work will be required to determine the next steps in these negotiations during the Hungarian Presidency (second half of 2024).

What to keep in mind

Whilst the Hungarian Presidency has not explicitly mentioned the BEFIT initiative in its work program, the draft agendas for Council meetings during the second semester of 2024 include possible deliberations on the file for the ECOFIN meeting on November 5, 2024.

As such, taxpayers operating in the EU may want to monitor the progress on the BEFIT proposal and contribute to the discussions where appropriate.

Transfer Pricing Directive

Transfer Pricing Directive at a glance

Transfer Pricing Directive

The Transfer Pricing (TP) Directive proposal was released together with the BEFIT initiative and aims at achieving a common method of applying the arm's length principle (ALP) and increase legal certainty for taxpayers by harmonizing the interpretation of the OECD TP Guidelines.

The EC proposed to incorporate the OECD arm's length principle and a reference to the 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' into EU law, so that their application is harmonized across the EU. The TP Directive would also provide for the gradual development of common approaches in the EU to the practice of applying TP rules, including rules on primary and corresponding adjustments, the application and selection of appropriate TP methods and TP documentation requirements. In addition, the TP Directive proposal would allow the EC to propose common binding rules to provide for additional visibility for taxpayers regarding what Member States consider acceptable for specified transactions, and safe harbour provisions.

Status

Members of the European Parliament adopted on April 10, 2024, a resolution in support of the TP Directive proposal including several suggested amendments to the initial EC proposal. However, resolutions adopted by the European Parliament with regard to proposals based on Article 115 of the TFEU do not have a binding effect on the Council.

Meanwhile, according to the June 2024 ECOFIN report to the European Council, three technical working group meetings (Council plus the EC) took place in January, February and April 2024. The report notes that, whilst Member States expressed their general support of the objectives of the proposal, they also raised general concerns about the inclusion of transfer pricing rules into an EU Directive. According to the report, specific concerns were also raised about the risk of possibly creating a double standard in the field of transfer pricing (i.e., at the OECD level and at the EU level), as well as about the loss of flexibility available to Member States in negotiating and applying the OECD Transfer Pricing Guidelines. As a result, the report notes that the proposal will not be supported by Member States in its current form.

Instead, the ECOFIN report indicates that Member States favor a soft law approach in form of establishing a new EU Transfer Pricing Platform, which would be (to a certain degree) comparable with the Joint Transfer Pricing Forum (JTPF).[1]

What to keep in mind

With the Belgian Presidency reporting that the proposal cannot be supported by Member States in its current form, it remains to be seen whether any progress could be made in the coming months.

The draft agendas for Council meetings during the second semester of 2024 (under the Hungarian Presidency) include possible deliberations on the file for the ECOFIN meeting on November 5, 2024.

Based on the June ECOFIN report, this may include further discussions on the preferred "soft law" approach, including decisions on the composition of the Platform (membership), its institutional set-up (in relation to Member States and Council), its mandate (scope, duration, competence, deliverables), its governance (chairmanship chair function (elected or appointed), voting rules and secretariat services), as well as other relevant aspects of substance and/or process (such as public access to documents.

As such, taxpayers operating in the EU may want to monitor closely progress on the TP proposal and contribute to the discussions where appropriate.

Proposal for a debt-equity bias reduction allowance (DEBRA)

DEBRA at a glance

On May 11, 2022, the EC issued its proposal for a Directive on a debt-equity balance reduction allowance (DEBRA). The rules would apply to taxpayers that are subject to corporate income tax in an EU Member State and would provide for an allowance in respect of equity increases in a given tax year. In addition, the Directive proposed the introduction of a new limitation on interest deductibility, which would need to be applied alongside the interest limitation rules under ATAD.

[1] The JTPF was established in 2002 and operated until 2019. It worked within the framework of the OECD Transfer Pricing Guidelines and proposed to the Commission, on the basis of consensus, non-legislative solutions to practical problems posed by transfer pricing practices in the EU.

DEBRA

Status

At the ECOFIN meeting on December 6, 2022, it was agreed that the examination of the DEBRA proposal should be suspended until other proposals in the area of corporate income taxation announced by the EC have been put forward. It had been understood that these other proposals relate to the BEFIT initiative. While the Explanatory Memorandum of the BEFIT proposal notes that BEFIT is in line and complements a number of previous EC proposals, DEBRA (or equivalent provisions to address the debt-equity bias) has not found its way into the BEFIT proposal.

During the first half of 2024, the Belgian Presidency did not relaunch the DEBRA initiative and no reference to the file was made in the June 2024 ECOFIN report.

What to keep in mind

It appears that the DEBRA proposal has been on hold since the end of 2022, and it is uncertain whether the initiative could be relaunched in a near future.

In the meantime, Italy (as from 2024) and Belgium (as from 2023) have repealed their Notional Interest Deduction (NID) regimes. Furthermore, the Portuguese NID regime was amended in the 2023 Budget law taking into account proposed DEBRA elements.

Reporting obligations for platform operators (DAC7)

DAC7

DAC7 at a glance

On March 22, 2021, the Council of the European Union adopted rules revising the Directive on administrative cooperation in the field of taxation (DAC). Council Directive (EU) 2021/514 (DAC7) allows member states' tax authorities to collect and automatically exchange information on income earned by sellers on digital platforms, from 2023 onwards.

The rules impact both EU platform operators, as well as non-EU entities, if facilitating either reportable commercial activities of EU sellers/providers or rental of immovable property located in the EU. Reportable activities comprise of personal services, the sale of goods, as well as the rental of any means of transport and the rental of immovable property.

The reporting obligations apply with respect to cross-border and local commercial activities. Platform operators falling within the scope of DAC7 are required to collect and verify information from sellers/providers operating on their online platform, in line with certain due diligence procedures. Subsequently, certain items of information will be further reported to the sellers/providers and to the relevant tax authority. Such information includes, inter alia, an overview of amounts paid to sellers from the reportable activities, platform fees and commissions incurred.

Status

Member States had until January 1, 2023, to implement DAC7 into national law.

On January 27, 2023, the EC sent letters of formal notice to fourteen Member States that had not notified or only partially notified the national measures transposing DAC7 into domestic legislation. This step was followed by reasoned opinions sent on July 14, 2023 to Belgium (partial transposition), Cyprus, Greece, Spain, Poland and Portugal (lack of transposition). The infringement procedure against Portugal and Greece were closed on December 20, 2023 and May 23, 2024, respectively.

As at the date of this publication, all EU Member States had transposed DAC7 into their legislation. Some Member States have also provided technical and procedural guidance in respect of the application of the rules in practice.

Furthermore, on May 23, 2024, the European Commission sent letters of formal notice to Germany, Hungary, Poland and Romania for failing to exchange timely information on income earned on digital platforms, as required under DAC7. The Directive provides for a first reporting deadline of January 31, 2024, for in-scope digital platform operators. Member States were required to exchange the received information within one month, i.e., by February 29, 2024. However, several Member States extended the reporting deadlines for DAC7 purposes.

What to keep in mind

With DAC7 reporting now live in all EU Member States, qualifying platform operators will need to keep track of the different reporting procedures in EU countries and monitor carefully whether potential differences in local implementation and interpretation of the rules will impact their local compliance obligations.

Non-EU platform operators should also consider differences between DAC7 and similar reporting regimes in their country of residence (e.g., based on the OECD's Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy). To eliminate double reporting, DAC7 contains rules providing relief from the reporting obligations for non-EU platform operators where the EC has determined that Member States receive equivalent information from non-EU countries that apply similar reporting regimes. In this context, the EC adopted an implementing regulation on April 13, 2023, establishing the criteria for determining whether the information exchanged under an agreement between the tax authorities of Member States and a non-EU country is equivalent to that specified in DAC7. As at the date of this publication, the following decisions were published in this context:

- following a request by *Finland*, the European Commission decided in September 2023 that the information that is required to be automatically exchanged between the competent authorities of *Finland* and the *United Kingdom* pursuant to the 'Multilateral Competent Authority Agreement on automatic exchange of information on income derived through digital platforms' (DPI-MCAA) should be deemed to be equivalent to that specified in DAC7.
- following a request by *New Zealand*, the European Commission further decided in December 2023, that certain limited information that is required to be automatically exchanged between the competent authorities of *New Zealand* and *Belgium, Bulgaria, Croatia, Cyprus, Estonia, Finland, Ireland, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden* pursuant to the signed DPI-MCAA should be deemed to be equivalent to that specified in DAC7.
- following a request by *Canada*, the European Commission further decided in February 2024, that the information that is required to be automatically exchanged between the competent authorities of *Canada* and *Belgium, Bulgaria, Croatia, Cyprus, Estonia, Finland, Ireland, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden* pursuant to the signed DPI-MCAA should be deemed to be equivalent to that specified in DAC7.

The decisions note that the determination of equivalence applies to the same agreement between the competent authorities of any other Member State and the United Kingdom, New Zealand, or Canada, respectively. It is further noted that the determination of equivalence should only apply provided that the exchange relationship between the non-EU country and the signatory Member States is activated.

Extending the scope of reporting and information exchange in the EU (DAC8)

DAC8 at a glance

On October 17, 2023, the Council of the European Union adopted amendments to the Directive on Administrative Cooperation (DAC) to introduce, amongst others, provisions for the exchange of information on crypto-assets, as well as amendments to the rules for the exchange of information on tax rulings for individuals (DAC8).

DAC8

In the case of crypto-assets, DAC8 includes rules on due diligence procedures and reporting requirements for crypto-asset service providers, based on the OECD's Crypto-Asset Reporting Framework (CARF). The rules are aligned with the definitions included in the Markets in Crypto-Assets (MiCA) Regulation, that regulates the issuance and trading of crypto-assets within the EU. In-scope crypto-asset service providers would be required to collect and verify information from EU clients, in line with specific due diligence procedures. Subsequently, certain information would be reported to the relevant competent authorities. This information would then be exchanged by the tax authorities of the recipient Member State with the tax authorities of the Member State where the reportable user is tax resident. The aim is to increase the ability of tax authorities to determine whether income derived from crypto-asset transactions is correctly declared.

DAC8 further aims to extent the scope of the exchange of information on cross-border rulings to those involving the tax affairs of high-net-worth individuals.

Other changes brought by DAC8 include the extension of the automatic exchange of information to cover non-custodial dividend income and requirements to report the Tax Identification Number (TIN) for certain elements where this was not previously prescribed – including, inter alia, for certain categories of income and capital under DAC1, advance cross-border rulings and advance pricing agreements (DAC3), CbyC reports (DAC4) and reportable cross-border arrangements (DAC6).

Furthermore, DAC8 includes a provision aimed at ensuring the effective use of the information acquired through the reporting and exchange of information under the DAC. Member States are required to put in place effective mechanisms to ensure the use of such data.

Status

The Directive was published in the EU Official Journal on October 24, 2023. With the exception of the provisions related to the TIN, Member States would need to transpose the Directive by December 31, 2025. Some Member States have initiated the process to implement DAC8 into their legislation (e.g., Czechia, Slovakia). The rules would become applicable as of January 1, 2026 (with some exceptions). This timeline is aligned with the CARF.

Furthermore, on January 17, 2024, the Commission adopted a recommendation for a Council decision to open negotiations for amendments to five agreements on the automatic exchange of financial account information. Those agreements concern exchanges with the Swiss Confederation, the Principality of Liechtenstein, the Principality of Andorra, the Principality of Monaco, and the Republic of San Marino.

In the recommendation, the Commission explains that, due to the upcoming changes in the OECD Common Reporting Standards (CRS), which will be implemented in the EU through DAC8 from January 1, 2026, it is necessary to align those agreements accordingly so that a smooth automatic exchange of financial account information is ensured with the referenced countries. According to the EC, the exchanges are also of relevance for the interaction between the CRS and the Crypto-Asset Reporting Framework (CARF), also included in DAC8, and for developments in respect of data protection in the EU.

What to keep in mind

DAC8 is an amalgamation of provisions that will impact vastly different stakeholders. Crypto-asset service providers and operators (that provide services to EU clients) should assess whether they are in scope of the new rules and consider how their information collection and reporting systems and processes will need to be updated to meet the new due diligence and reporting obligations.

Faster and safer tax excess refund (FASTER)

FASTER

FASTER at a glance

On June 19, 2023, the EC issued a proposal for a Council Directive providing for the “Faster and Safer Relief of Excess Withholding Taxes (FASTER)”, which aims to make withholding tax procedures in the EU more efficient and secure for investors, financial intermediaries, and local tax authorities. The text of the FASTER proposal was subject to lengthy discussions in the Council working groups and on May 14, 2024, the ECOFIN reached agreement (general approach) on a compromise text. Key features include:

- a common EU digital tax residence certificate (eTRC), with common content, regardless of the issuing Member State;
- two fast-track procedures complementing the existing standard refund procedure in each Member State, including: (i) a relief at source system, and (ii) a quick refund system. In-scope Member States will be required to implement one of the two systems (or a combination of both);
- the introduction of National Registers for financial intermediaries that will be able to facilitate the fast-track procedures. Such financial intermediaries will be subject to additional due diligence and common reporting requirements.

Status

Whilst the Belgian Presidency was able to facilitate an agreement (general approach) on the FASTER proposal, the Directive has not yet been formally adopted. During the ECOFIN meeting on May 14, it was clarified that the final text of FASTER would be sent to the Council for formal adoption after legal linguistic revisions have been finalized and once a revised opinion is issued by the European Parliament on the final text. In light of the recent EP elections, it is expected that the formal legislative process will not be completed before early 2025.

Once formally adopted, Member States will need to transpose the Directive by December 31, 2028. The rules will become applicable as of January 1, 2030.

What to keep in mind

Chapter III of the FASTER Directive, which includes provisions regarding national registers of CFIs and the fast-track procedures, amongst others, will not be binding on all Member States. In brief, Member States that meet two cumulative conditions – i) existence of a comprehensive relief at source system (with regards to dividends from publicly traded shares) and ii) low market capitalization, would be allowed to maintain their current withholding tax relief systems. Based on the Belgian Presidency's explanatory note, ten Member States had a market capitalization ratio above the minimum threshold in 2022: Germany, France, Sweden, the Netherlands, Spain, Italy, Ireland, Denmark, Belgium, and Finland. Therefore, all FASTER provisions could be mandatory for them. Since the market capitalization ratio might fluctuate before the rules become effective, the list could be subject to further changes.

The FASTER Directive leaves it up to Member States to determine certain features, such as penalties for non-compliant certified financial intermediaries (CIF)s and related civil liability. It therefore remains to be seen how Member States choose to structure the penalty system, in particular where penalties differ depending on the type of procedure chosen. In addition, the safeguards implemented by Member States around the CIFs liability should be addressed proportionally, so that smaller intermediaries are not discouraged from applying for CIF status.

The Commission has been tasked with developing and adopting multiple implementing acts – including standardized and computerized common template for the eTRC, statement to be obtained from the registered owners, as well as reporting form. Interested stakeholders should continue to monitor developments and contribute to the process where possible.

Foreign Subsidies Regulation (FSR)

Foreign Subsidies Regulation (FSR)

FSR at a glance

On November 28, 2022, the Council of the European Union adopted a Regulation on foreign subsidies distorting the internal market (Foreign Subsidies Regulation – FSR). The Regulation gives the EC powers to investigate financial contributions received in non-EU countries by groups operating in the EU internal market. The Regulation aims to restore fair competition between all undertakings in the EU internal market, complementing the EU State aid rules. Contributions that may be subject to investigation include tax exemptions granted to an undertaking where these are limited, in law or in fact, to one or more undertakings or industries.

Foreign subsidies under the FSR are deemed to exist where a non-EU country provides a financial contribution which generates a benefit for private or public EU-undertakings, whereby the benefit must be limited to one or more undertakings or industries. In this respect, a financial contribution confers a benefit to an undertaking engaging in an economic activity in the internal market, if it could not have been obtained under normal market conditions. The existence of a benefit is to be determined based on comparative benchmarks.

The FSR entails three different tools enabling the EC to investigate financial contributions granted by a public authority in a non-EU country:

- a notification-based tool to investigate concentrations (mergers and acquisitions),
- a notification-based tool to investigate bids in public procurements, and
- a general market investigation tool for investigating all other market situations as well as lower-value mergers and public procurement procedures.

Undertakings in scope will have to notify the EC of:

- mergers and acquisitions where at least one of the merging parties has an EU turnover of at least EUR 500 million and there is a foreign financial contribution of at least EUR 50 million;
- tenders in public procurement procedures, where the estimated contract value is at least EUR 250 million and the bid involves a foreign financial contribution of at least EUR 4 million per non-EU country.

Status

The FSR became applicable on July 12, 2023, and the notification obligation entered into force on October 12, 2023.

On June 6, 2023, the EC published non-binding Questions and Answers with respect to the application of the FSR, which have been updated on November 22, 2023.

In February 2024, the Commission published a policy brief offering insights into the first 100 days of the obligation to notify. During that period, the Commission services (DG Competition) had received case team allocation requests and engaged in pre-notification talks with the notifying parties in 53 cases. These cases covered a wide range of sectors, from basic industries to fashion retail and high technologies. Out of these 53 cases, 14 have been formally notified, and 9 have been fully assessed.

The FSR continues to produce effects. On April 2, 2024, the Commission launched two in-depth investigations under the FSR in the solar photovoltaic sector. The investigations relate to the potentially market distortive role of foreign subsidies given to bidders in a public procurement procedure. The Commission will assess whether the economic operators concerned did benefit from an unfair advantage to win public contracts in the EU. On June 10, 2024, the Commission opened an in-depth investigation to assess, under the FSR, the acquisition of a European telecommunication operator. Based on the EC's press release, the preliminary investigation indicated that there were sufficient indications that the acquiring group had received foreign subsidies distorting the EU internal market.

By January 2026, guidance from the EC is expected on how to determinate the existence of a distortion of the internal market, on how the balancing test functions, how the EC applies its power to request for notification for initially non-notifiable deals and bids and how the distortion in public procurement is assessed.

What to keep in mind

Undertakings that operate on the EU single market and that benefit from subsidies in third countries should assess the impact of this Regulation, in particular in light of the EC's power to examine ex officio subsidies granted in the five years prior to the date of application of the rules. During its investigations, the EC may request information and conduct inspections inside and outside the EU. Also note that, where the EC suspects that foreign subsidies distorting the internal market exist, it may initiate a dialogue with the third country concerned and explore options for ending or modifying the relevant subsidies.

In-scope entities should also take note of the notification obligations that may arise on transactions entered into with respect to mergers and acquisitions and public tenders.

Other direct tax initiatives

EU list of non-cooperative jurisdictions

In February 2024, the Council agreed to remove the Bahamas, and Turks and Caicos Islands from the list of non-cooperative jurisdictions (Annex I). In addition, Belize and the Seychelles were moved from Annex I to Annex II. Furthermore, the Council agreed to remove six jurisdictions from Annex II (the grey list), as they had fulfilled their previous commitments - Albania, Aruba, Botswana, Dominica, Israel, and Hong Kong (SAR), China. Based on this latest revision, the current lists include the following jurisdictions:

- Annex I include the following twelve jurisdictions: American Samoa, Anguilla, Antigua and Barbuda, Fiji, Guam, Palau, Panama, the Russian Federation, Samoa, Trinidad and Tobago, the US Virgin Islands and Vanuatu.
- Annex II includes the following ten jurisdictions: Armenia, Belize, the British Virgin Islands, Costa Rica, Curaçao, Eswatini, Malaysia, the Seychelles, Türkiye and Vietnam.

The next update of the EU list of non-cooperative jurisdictions is expected to take place in October 2024. According to the June 2024 Code of Conduct Group (CoCG) report to the ECOFIN Council, a key focus will be on how jurisdictions addressed deficiencies in relation foreign source income exemption (FSIE) regimes (criterion 2.1), implementation of substance requirements in no or only nominal tax jurisdictions (criterion 2.2), and implementation of CbyC Reporting (criterion 3.2).

In addition, the Group is currently focusing on the design of the additional criterion 1.4 on the exchange of beneficial ownership information. Whilst the scope and application of this criterion have not yet been agreed upon at EU level, the EC is considering a reference to the Anti-Money Laundering (AML) listings, and ratings by the Global Forum on Tax Transparency and Exchange of Information for Tax Purposes. According to previous statements by the Chair of the CoCG, the EU listing approach may also link to the Inclusive Framework's Pillar Two peer-review results once the GloBE rules have been implemented locally.

The June 2024 CoCG report includes a questionnaire for the annual monitoring of tax defensive measures and indicates that the first monitoring exercise will take place in 2025 with respect to the application of the measures in 2021. In addition, the report notes that work on the extension of the geographical scope of the EU listing exercise continues with Brunei Darussalam, Kuwait and New Zealand recently being added to the scope. According to the report, the Group will reflect on the most appropriate indicators to select additional jurisdictions for future extensions of the geographical scope of the EU list.

DAC evaluation

In May 2024, the European Commission launched a public consultation concerning Directive 2011/16/EU on administrative cooperation (DAC). This consultation forms part of a comprehensive evaluation aimed at assessing the effectiveness, efficiency, and ongoing relevance of the DAC and its subsequent amendments (DAC2 to DAC6). The evaluation covers the functioning of the DAC during the period spanning from 2018 to 2022 (this assessment excludes DAC7 and DAC8 as a result).

The consultation is split into two sections: a call for evidence on the impact of exchange of information under DAC and a targeted questionnaire which seeks input from stakeholders on the overall assessment of the DAC: its relevance, its contribution to its objectives and its functioning. In particular with regard to the mandatory disclosure rules under DAC6, the evaluation includes an assessment of the hallmarks for reportable cross-border arrangements.

Feedback on the consultation can be submitted by July 30, 2024.

ETC Comment:

The EU Tax Centre team would like to take this opportunity to wish you a relaxing summer holiday.

Additional relevant links

Pillar Two

- KPMG's BEPS 2.0 tracker in Digital Gateway
- KPMG's observations regarding the GloBE Implementation Framework, GloBE Information Return and Administrative Guidance releases
- E-News 196 - Reasoned opinion sent to six Member States for incomplete transposition of EU Minimum Tax Directive into national law
- Euro Tax Flash 535 – State of play of domestic Pillar Two implementation in the EU
- Euro Tax Flash 533 – EU Pillar Two FAQs
- Euro Tax Flash 527 – ECOFIN Council and European Commission endorse progress made by the Inclusive Framework in respect of Pillar One and Pillar Two

Pillar One

- KPMG's observations regarding the OECD releases on Amount A and Amount B of Pillar 1
- E-News 191 - OECD/G20 Inclusive Framework Agreement on BEPS 2.0 – digital services taxes update

Unshell

- Unshell – On a page
- KPMG's Unshell Proposal Quick Check

FASTER

- Euro Tax Flash 541 - Council agrees on new rules for harmonized withholding tax procedures in the EU (the FASTER Directive)

Public CbyC Reporting

- KPMG public CbyC Reporting tracker
- KPMG's dedicated public Country-by-Country Reporting webpage
- Australian public country-by-country reporting

DAC7

- KPMG's DAC7 Impact & Readiness Quick Check
- E-News 196 - Letters of formal notice sent to Member States for failure to exchange information required under DAC7
- E-News 190 – Certain Member States decide to extend DAC7 reporting deadlines
- E-News 189 – European Commission closes infringement procedures regarding DAC7 transposition
- Euro Tax Flash 513 – EU reporting requirement for platform operators – state of play of domestic implementation of

DAC7 (update as at May 2023)

DAC 8

- Euro Tax Flash 512 -. DAC 8: reporting and exchange of information on crypto-assets and cross-border rulings to certain individuals agreed by the Council

BEFIT

- BEFIT – On a page
- Euro Tax Flash 542 - Conclusions of June 21 ECOFIN meeting
- E-News 191 – Member States issue formal opinions on the BEFIT Directive proposal
- Euro Tax Flash 536 - KPMG responds to European Commission public consultation on BEFIT proposal
- Euro Tax Flash 521 - European Commission publishes BEFIT and Transfer Pricing proposal

TP Directive

- Euro Tax Flash 542 - Conclusions of June 21 ECOFIN meeting
- E-News 194 – European Parliament resolution on Transfer Pricing Directive adopted
- Euro Tax Flash 534 - KPMG responds to European Commission public consultation on Transfer Pricing proposal
- Euro Tax Flash 521 - European Commission publishes BEFIT and Transfer Pricing proposal

DEBRA

- DEBRA – On a page
- E-News 190 – European Parliament resolution on DEBRA proposal adopted
- Euro Tax Flash 475 – European Commission proposes a Directive providing for a debt-equity bias reduction allowance

EU list of non-cooperative jurisdictions

- KPMG's analysis of defensive measures against non-cooperative jurisdiction
- Euro Tax Flash 538 – February 2024 update of the EU list of non-cooperative jurisdictions

Foreign subsidies regulation

- Euro Tax Flash 495 - Approval of Regulation on foreign subsidies distorting the internal market

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Key links
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