Euro Tax Flash from KPMG's EU Tax Centre

EU direct tax initiatives: 2023 year-end state of play

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

With the end of 2023 approaching, KPMG's EU Tax Centre took the opportunity to look back on some of the highlights of the year in the EU and international tax world. As this was a particularly eventful year from a tax perspective, this special edition of Euro Tax Flash highlights the most important tax developments recorded during 2023 and notes some of the initiative that should be paid attention to in 2024.

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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 requires Member States to transpose the rules into domestic law by December 31, 2023.

Member States are 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 UTPR with respect to constituent entities resident in deferring jurisdictions.

In addition, the agreed text provides the option for Member States to implement a qualified domestic top-up tax (QDMTT), without specifying an application date. Based on (draft) legislation released to date, most EU countries do intend to implement a Domestic Minimum Top-up Tax (DMTT) from 2024 – an exception might be Cyprus where the latest draft bill proposed a DMTT applicable from 2025.

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 and July Administrative Guidance that were agreed by the OECD/G20 Inclusive Framework with the EU Minimum Tax Directive.

Status

To the best of our knowledge, as at December 20, 2023, the state of play of the local implementation process across the EU can be summarized as follows:

- *Legislation fully enacted:* Denmark, Hungary, Ireland, Sweden.
- *Legislation approved by parliamentary bodies (subject to completion of further steps – e.g. presidential assent, publication in official journal for full enactment):* Austria, Belgium, Bulgaria, Czech Republic, Germany, Ireland, Luxembourg, Netherlands, Romania, Slovakia, Slovenia.
- *Legislation submitted to and under review by national Parliaments:* Finland, France.
- *Draft legislation published:* Croatia, Cyprus, Estonia, Italy, Latvia, Lithuania, Spain.
- *No (draft) legislation published:* Greece, Malta, Poland, Portugal.
- *Option to defer exercised:* Estonia, Latvia Lithuania, Malta, and Slovakia (as per EC notice published on December 12, 2023).

For more details, please refer to KPMG’s dedicated Pillar Two State of Play tracker.

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:

- whether to only include a reference to the OECD Commentary, GloBE Implementation Framework and Administrative Guidance as a source of interpretation and implementation (similar to the reference made in the preamble to the Directive) or whether to incorporate (certain items) of the OECD documents into domestic law (e.g. safe harbor provisions);
- how to define or clarify, based on the domestic legal framework, terms that are not specific to the EU Directive, but which are relevant for its application (e.g. the term 'Investment Fund');
- whether to 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. It will be up to each Member State to consider whether to design the QDMTT such that it meets these additional requirements. Note, however, that the use of a local accounting standard as a basis for the QDMTT assessment is permitted (subject to conditions). It will therefore be important to monitor which jurisdictions make use of this option, rather than allowing the QDMTT obligations to be based on the consolidation standard, as approaches are not harmonized across the EU;
- how to establish a local registration, filing and tax payment framework (e.g. setting filing and payment deadlines, providing an option for centralized group filing, requiring advance payments, making all group members jointly and severally liable for GloBE charges). It is important to keep in mind that filling and payment deadlines for the purposes of QDMTTs will not be aligned across EU Member States and that separate QDMTT filings will be required by some jurisdictions, in addition to the filing of the GloBE Information Return. In-scope MNEs should therefore keep track of their obligations in each relevant Member State.

The assessment of whether the domestic implementation of the GloBE rules meets the agreed criteria (e.g. whether a DMTT is qualified or whether a QDMTT meets the stricter standards for the Safe Harbor, whether the IIR mechanism is qualified, etc.) will be conducted through a peer review process at the level of the OECD Inclusive Framework. This process is currently under development, meaning that there will be a period of uncertainty as to whether a Member States's implementation is acceptable by the international forum. This step is important to ensure that jurisdictions that introduce the GloBE rules are able to apply the appropriate offset mechanisms so that top-up tax is not collected multiple times with respect to a low-taxed entity. It is yet to be clarified whether – in the interest of timely certainty, jurisdictions will be subject to an initial high-level assessment, to be confirmed following a fully-fledged peer review process.

In addition to the options available with respect to the implementation of the GloBE rules, Member States may also consider whether or how to reform certain local anti-abuse provisions (e.g. amend existing CFC legislation to allow for a credit for QDMTT suffered with respect to a low-taxed jurisdictions, specific extension of the General Anti-Abuse Rule to Pillar Two legislation or clarification that local GAARs apply in this respect) and local tax incentives to ensure alignment with the GloBE rules.

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. 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 is 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 the MLC reflects the current consensus among the Inclusive Framework (IF) members and that work needs to continue to reach agreement on specific outstanding areas (e.g. on the treatment of withholding taxes). According to an IF statement published on December 18, 2023, the work to resolve remaining differences will need to continue in 2024, including discussions on the standstill on new Digital Service Taxes. In addition, the statement reaffirms the IF members' commitment to achieve a consensus-based solution and to finalise the text of the MLC by the end of March 2024, with a view to hold a signing ceremony by the end of June 2024.

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.

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 keep on working 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, in particular in a scenario where members of the Inclusive Framework cannot agree on an extension of the agreement to refrain from imposing newly enacted DSTs or relevant similar measures on any company (currently agreed for the period between January 1, 2024 and the earlier of December 31, 2024 or date of entry into force of the MLC). For example, according to a recent public letter submitted to the Dutch Parliament, 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 (agreed until end of 2023) would not be extended. Note that the EC 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.

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 Directive has been subject to lengthy discussions in the Council working groups. Throughout 2023, several compromise texts were proposed by the Swedish and Spanish Presidencies of the Council, yet Member States were unable to reach an agreement on the initiative.

Based on the December 8 ECOFIN report[1], the latest developments include a compromise text proposed in September, outlining a two-stage approach:

- *First step*: automatic exchange of information based on a set of agreed hallmarks, that would take place together with the application of domestic tax consequences, where considered appropriate.
- *Second step*: best practices on applying tax consequences to be exchanged between Member States and evaluated. A new Unshell proposal, including tax consequences, could be launched at that stage, if considered appropriate.

Based on the December ECOFIN report, it seems that, whilst the principle of a two-stage approach was welcomed to some extent, concerns arose that the approach would not provide a resolution on elements of the proposal that are still subject to discussions among Member States. Therefore, according to the ECOFIN report, it was considered that further analysis is required. An alternative text, based on a minimum standard and including a toolbox of consequences, was subsequently drafted in November following a suggestion made by the EC. However, no agreement was reached.

[1] On December 8, 2023 the ECOFIN Council approved a report to the European Council (the ECOFIN report), which provides an overview of the progress achieved in the Council on a range of direct tax measures. For more details, please refer to Euro Tax Flash Issue 529.

Discussions will continue in 2024. Whilst the file is included in the work programme of the Belgian Presidency, it is not specifically classified as a priority.

What to keep in mind

Nearly two years since its release, the proposal is still under negotiation among EU Member States, with its final text and date of application remaining unclear. It can be inferred from the progress report 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 trend 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 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 recently noted that it is important to reach agreement on the proposed Unshell Directive before tabling a proposal in relation to the SAFE initiative. Whilst the work programme of the Belgium Presidency notes support for this file, 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.

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.

For more details, please refer to Euro Tax Flash Issue 521.

Status

Based on the December 8 ECOFIN report, three Council working party meetings were held under the Spanish Presidency (second half of 2023) to analyse the proposals published on September 12, 2023.

Meanwhile, interested parties are asked to provide feedback and comments by January 24, 2024. If the proposal were to be adopted as it currently stands, Member States would be required to transpose the rules into domestic law by January 1, 2028, with the provisions of the Directive applying as of July 1, 2028.

What to keep in mind

Some EU Member States (e.g. the Netherlands and Finland) have already publicly raised concerns about the proposal, emphasizing that the timing is not ideal in view of the current changes to the international tax system. In addition, these Member States have expressed concerns about the potential impact on national future tax revenue and the administrative burden triggered by the co-existence of three parallel profit tax systems (local tax regime, Pillar Two and BEFIT). The proposal is therefore likely to be subject to in-depth discussions in Council working groups, on the timing, the merits, and the technicalities of the initiative. Note that unanimity is required for the proposal to be adopted.

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

Transfer Pricing Directive

Transfer Pricing Directive at a glance

The Transfer Pricing (TP) Directive proposal was released together with the BEFIT initiative and aims at implementing common TP rules into EU law, in accordance with OECD principles. Note that, unlike the BEFIT proposal, the TP Directive applies to all EU-based companies and permanent establishment, irrespective of the size of the MNE group to which they belong or the size of the group's operations in each Member State. The Directive does, however, propose a definition for associated enterprises.

The EC proposes 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 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.

For more details, please refer to Euro Tax Flash Issue 521.

Status

As noted above, based on the December 8 ECOFIN report, three Council working party meetings were held under the Spanish Presidency (second half of 2023) to analyse the proposal. However, no further details on the outcome of those discussions have been made public yet.

Interested parties are asked to provide feedback and comments by January 3, 2024. If the proposal were to be adopted as it currently stands, the rules would need to be implemented into domestic law by December 31, 2025, with application as of January 1, 2026.

What to keep in mind

Some EU Member States (e.g. Finland and Sweden) have publicly questioned the need for such a Directive and have raised concerns that the rigid codification of the arm's length principle at EU level may limit flexibility and hinder the ability of EU countries to reach mutual agreements with third countries. The proposal is therefore likely to be subject to in-depth discussions and potential amendments as a result of Council working group discussions. Note that unanimity is required for the proposal to be adopted.

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

Head Office Tax System for SMEs (HOT)

HOT at a glance

On September 12, 2023, the EC issued, alongside the BEFIT and TP proposals, a Directive proposal on establishing a Head Office Tax (HOT) system for micro, small and medium sized enterprises (SMEs).

The Directive would allow certain EU-based standalone SMEs that operate in other EU Member States only through permanent establishments (PEs) to make a five-year election to determine the taxable results of the PEs according to the rules of the Member State of their head office. The taxable results of the PEs would nevertheless remain subject to the tax rate of the Member States in which they are located.

Where SMEs choose to apply the HOT system, they would file a single tax return with the tax administration of the head office Member State. This return would then be shared with other Member States where the PEs are located. Any resulting tax revenues would be transferred from the head office Member State to the PE Member State(s).

For more details, please refer to Euro Tax Flash Issue 522.

Status

As noted above, based on the December 8 ECOFIN report, three Council working party meetings were held under the Spanish Presidency (second half of 2023) to analyse the proposal.

The EC conducted a public consultation until December 21, 2023 and will now examine the different contributions. If the proposal were to be adopted as it currently stands, the rules would need to be implemented into domestic law by December 31, 2025, with application as of January 1, 2026.

What to keep in mind

The Netherlands have publicly raised concerns about technical and administrative aspects of the proposal, including the compatibility with double tax treaties, domestic policy choices being disregarded, lack of anti-abuse measures, and possibilities to verify information filed in different countries. For more information, please refer to E-News Issue 187.

As part of the consultation responses, business associations advocated for a broader scope by way of removing the maximum turnover condition and including SME groups that have subsidiaries in other Member States. Responses also raised concerns about the lack of harmonization amongst Member States of what constitutes a permanent establishment.

The proposal is therefore likely to be subject to in-depth discussions and amendments as a result of Council working group discussions. Note that unanimity is required for the proposal to be adopted.

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. For more information, please refer to Euro Tax Flash Issue 475.

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.

What to keep in mind

Stakeholders that would potentially benefit from the proposed allowance or that would be impacted by the proposed interest limitation rules should monitor closely whether the Council may restart the examination of the proposal in 2024 with a view to adopt the DEBRA proposal as separate file.

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 until June 22, 2023. The rules will apply, at the latest, from the commencement date of the first financial year starting on or after June 22, 2024. Individual Member States can nevertheless opt for an early adoption of the rules.

Status

Although EU Member States had until June 22, 2023, to implement the Directive into domestic legislation, several jurisdictions have not yet adopted the public disclosure rules. To the best of our knowledge, the current implementation status across the EU is as follows:

- Fourteen Member States have adopted legislation: Croatia, Greece, Denmark, France, Germany, Hungary, Ireland, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Spain, Sweden, Latvia
- Four Member States have released draft legislation: Belgium, Czech Republic, Netherlands, Poland
- Nine Member States have not initiated the transposition process.

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. In Australia, a proposal intended to apply starting July 2024 would introduce additional qualitative disclosures (the proposal is currently being redrafted as a result of feedback received during a public consultation carried out earlier in 2023). 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.

Reporting obligations for platform operators (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 was followed by reasoned opinions sent on July 14, 2023 to Belgium (partial transposition), Cyprus, Greece, Spain, Poland and Portugal (lack of transposition). Since then, Cyprus, Greece and Portugal have published/adopted DAC7 implementing legislation. The infringement procedure against Portugal was closed on December 20, 2023.

As such, as at the date of this publication, all EU Member States (except Poland and Spain[2]) had finalized the internal legislative process required for implementation of DAC7. Some Member States have also already provided technical and procedural guidance in respect of the application of the rules in practice.

For more details, please refer to Euro Tax Flash Issue 513.

What to keep in mind

Whilst first reporting of data will be required by January 31, 2024, qualifying platform operators might already be required to register with local tax administrations. As such, platform operators should consider whether they fall within scope of DAC7 and to what extent the corresponding reporting obligations and due diligence requirements become relevant with respect to their business conduct.

Where platform operators have a presence in multiple EU Member States, or where an election of where to register needs to be made for a non-EU platform operator, careful consideration should be given to the registration and choice of an EU Member State where ultimately the required information will be reported to the local tax authorities.

Non-EU platform operators should also consider differences between DAC7 and similar reporting regimes that may apply 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 of 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.

[2] The effective application of the Spanish DAC7 rules is still pending approval of the draft reporting forms as well as the implementing regulations for the new reporting obligation. Nevertheless, it is expected that reporting platform operators will be required to submit the first information returns under DAC7 by January 1, 2024.

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).

In the case of crypto-assets, DAC8 includes rules on due diligence procedures and reporting requirements for crypto assets 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 involving 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.

For more information, please refer to Euro Tax Flash Issue 512.

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. The rules would become applicable as of January 1, 2026 (with some exceptions). This timeline is aligned to the CARF.

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 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)" initiative and published a call for public feedback regarding the proposed Directive, which closed on September 18, 2023.

The aim of the proposal is to make withholding tax procedures in the EU more efficient and secure for investors, financial intermediaries, and local tax authorities.

The draft Directive gives Member States a choice between implementing a quick refund system, a relief at source system or a combination of the two, as well as the introduction of additional registration and reporting requirements for financial intermediaries.

For more information on the initiative, please refer to Euro Tax Flash Issue 517.

Status

Based on the December 8 ECOFIN report (see note 1), during the Spanish Presidency of the EU in the second semester of 2023, four compromise texts were discussed, providing for several amendments to the initial text proposed by the EC, including:

- amendments to the rules in respect of issuance of the digital tax residence certificate;
- new provisions allowing certified financial intermediaries to assume the position of non-certified intermediaries, to facilitate the application of the relief and complete the information that must be reported to the tax administrations;
- amendments to the scope of information to be reported by certified financial intermediaries and other related provisions;
- clarification of the conditions under which Member States may reject the requests for quick refund, reducing the possibilities for fraudulent claims;
- new special provisions governing indirect investments;
- amendments to the provisions on late payment interest, liability, personal data protection and on evaluation of the future Directive.

Certain Member States requested the possibility of maintaining their current systems of relief at source from the withholding tax, the Spanish Presidency proposed to contemplate such a possibility, under specific conditions.

What to keep in mind

Addressing the burden of cross-border investors is mentioned as a priority by Belgium for its Presidency during the first semester of 2024. It may therefore be the intention of the Presidency to progress work on the FASTER initiative to reach agreement before the end of the term. The timeline for application of the new rules (currently January 1, 2027) may change depending on the speed of progress at Council level, where unanimity is required for approval. It is therefore advisable for stakeholders to monitor such progress and engage with decision makers where appropriate.

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.

For more information, please refer to Euro Tax Flash Issue 495.

Status

The FSR rules 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.

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 bits 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

New own resources

On June 20, 2023, the EC published a proposal for a next generation of own resources. The initiative adjusts and supplements the first basket of proposed own resources put forward in December 2021. The proposal included:

- a new temporary statistical-based own resource related to company profits, utilizing national accounts statistics under the European system of accounts. This contribution would not constitute a new tax on companies. Instead, Member States would be required to transfer to the EU budget, on a monthly basis, an amount of 0.5 percent of the gross operating surplus statistics recorded for the sector of financial and non-financial corporations. This measure was intended to be temporary solution until a contribution tied to the EC's BEFIT initiative was proposed and unanimously agreed upon by all Member States;
- adjustments to the Emissions Trading System (ETS) own resource proposal;
- adjustments to the Carbon Border Adjustment Mechanism (CBAM) own resource proposal;
- Pillar One based resource (previously proposed in 2021 and mentioned as a proposal in the current version).

For more details, please refer to Euro Tax Flash Issue 518.

The most recent progress report presented by the Spanish Council presidency during the ECOFIN Meeting in December 2023 expressed general scepticism on this proposal due to initial reservations by Member States on the added value of the new own resource based on company profits. The progress report further notes that the majority of EU countries considered positively the potential introduction of the contributions based on receipts generated by the CBAM. In addition, reference was made to some Member States that are open to further discussions on the EU ETS parameters and on those new own resources that represent real "fresh money" (e.g. ETS2).

As a side note, regarding the financial transaction tax (FTT), the EC acknowledged in a working document of June 2023 related to the own resource proposal that no substantial discussions have occurred on a possible EU since February 2021. Consequently, the EC noted in that document that the FTT is unlikely to materialize in the short term.

ETR disclosure

A proposal for rules requiring the annual publication of the effective corporate tax rate was initially expected in the first quarter of 2022. Based on the EC's Communication on "Business Taxation for the 21st Century", the rules would apply to certain large companies operating within the EU and would build on the methodology agreed upon for the Pillar Two effective tax rate (ETR) calculation.

It remains to be seen whether this initiative will be back on the agenda with the EU Minimum Tax Directive now being transposed by Member States. A key question concerns the legal basis for such a proposal, i.e. whether the

ETR disclosure requirement would be framed as a tax initiative (subject to unanimous approval) or as a non-tax file, such as an amendment to EU public CbyC reporting rules (requiring qualified majority voting in the Council and agreement with the European Parliament).

State aid

The Court of Justice of the European Union (CJEU) continued in 2023 their string of decisions in cases related to the EC's State aid investigations into individual tax rulings granted by Member States.

On September 20, 2023, the General Court of the Court of Justice of the European Union (General Court or the Court) gave its decision on the Belgian "excess profit" tax ruling system case (T-131/16 RENV). The General Court ruled that the EC was correct to conclude that the Belgian tax rulings represented unlawful State aid. The General Court also dismissed 29 separate appeals brought by the beneficiaries of the excess profit rulings against the EC's State aid decision.

Later in the year, the CJEU upheld[3] its previous case law according to which an autonomous arm's length principle cannot be applied in State aid investigations independently of how the principle was codified in domestic law. The joined cases C-451/21 P and C-454/21 P also marked the first occasion for the CJEU to address whether the misapplication or non-application of a general anti-abuse rule in national tax law constitutes State aid under the Treaty on the Functioning of the European Union (TFEU). The Court noted that the EC could only conclude that the non-application of that general anti-abuse provision in national law by the tax authorities (in the tax ruling request) resulted in a selective advantage if that non-application was a departure from the national case-law or administrative practice relating to that provision.

Another landmark case is still pending before the CJEU, namely, C-465/20 P. In an opinion dated November 9, 2023, the Advocate General (AG) on the case recommended that the CJEU sets aside the judgment and refer the case back to the General Court for a new decision on the merits. AG opinions are not binding on the Court – it therefore remains to be seen if the CJEU follows these recommendations.

For more details on these cases please refer to our Euro Tax Flash webpage.

Code of Conduct (Business Taxation)

The Chair of the Code of Conduct Group (CoCG) recently informed Members of the European Parliament that the CoCG will start assessing tax measures of general application in EU Member States from January 1, 2024, with a focus on measures enacted or modified on or after January 1, 2023 (in accordance with agreed revision of the Code of Conduct in November 2022). According to the Chair, tax features of general application could include tax incentives for research or other broadly applied tax breaks.

EU list of non-cooperative jurisdictions

In October 2023, the Council agreed to add Antigua and Barbuda to the list of non-cooperative jurisdictions (Annex I). In addition, Belize and the Seychelles were moved from the grey list (Annex II) to Annex I. While the British Virgin Islands, Costa Rica were moved from Annex I to Annex II, the Marshall Islands were removed completely from the EU list. In addition, the Council agreed to remove four jurisdictions from the grey list, as they had fulfilled their previous commitments (Jordan, Montserrat, Qatar and Thailand). Based on this latest revision, the current lists include the following jurisdictions:

[3] Ruling of December 5, 2023, in joined cases C-451/21 P and C-454/21 P and of December 14, 2023 in case C-457/21 P.

- Annex I includes the following sixteen jurisdictions: American Samoa, Anguilla, Antigua and Barbuda, the Bahamas, Belize, Fiji, Guam, Palau, Panama, the Russian Federation, Samoa, the Seychelles, Trinidad and Tobago, Turks and Caicos Islands, the US Virgin Islands and Vanuatu.
- Annex II includes the following fourteen jurisdictions: Albania, Armenia, Aruba, Botswana, the British Virgin Islands, Costa Rica, Curaçao, Dominica, Eswatini, Hong Kong (SAR), China, Israel, Malaysia, Türkiye and Vietnam.

For more details, please refer to Euro Tax Flash Issue 526.

The next update of the EU list of non-cooperative jurisdictions is expected to take place in February 2024. According to the December CoCG report to the ECOFIN Council, a key focus will be on how jurisdictions addressed deficiencies in relation to compliance with the automatic exchange of information (AEOI) and exchange of information on request (EOIR) standard (criterion 1.1 and 1.2), foreign source income exemption (FSIE) regimes (criterion 2.1), implementation of substance requirements in no or only nominal tax jurisdictions and for Collective Investment Funds (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 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 recent 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.

In addition, the CoCG is currently reviewing the effective implementation of defensive measures applied by EU Member States against non-cooperative jurisdictions.

Additional relevant links

Pillar Two

- KPMG's Pillar Two implementation tracker
- KPMG's observations regarding the GloBE Implementation Framework, GloBE Information Return and Administrative Guidance releases
- Euro Tax Flash 527: ECOFIN Council and European Commission endorse progress made by the Inclusive Framework in respect of Pillar One and Pillar Two

Public CbyC Reporting

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

Other

- KPMG's Unshell Proposal Quick Check
- KPMG's DAC7 Impact & Readiness Quick Check
- KPMG's analysis of defensive measures against non-cooperative jurisdiction
- EU Tax Centre – Euro Tax Flash
- EU Tax Centre – E-News

ETC Comment

The EU Tax Centre team would like to take this opportunity to wish you a joyous holiday season and a wonderful New Year! We look forward to continuing to provide updates and insights on EU and international tax developments in 2024, which promises to be another interesting year from a tax perspective.

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