EU Finance Ministers do not reach unanimous support for proposed Pillar Two Directive – will try again 5 April

15 March 2022

In brief

Today the EU Finance Ministers met to debate and ultimately vote on a compromise text covering the introduction of a minimum taxation by the EU Member States. While there was broad support for the compromise text, available here, it was not supported unanimously. The date on which Member States would transpose the Directive and make it effective had been changed from 1 January 2023 to 31 December 2023 in the compromise text. The UTPR is pushed out to 31 December 2024 under this compromise text. Estonia, Malta, Poland and Sweden still have reservations. Unanimous agreement is required under the special legislative procedure.

Noting the importance of this proposal to France, which holds the Presidency of the EU Council, the French Minister for the Economy and Finances, Bruno Le Maire, conceded that there was some time before the next ECOFIN meeting of 5 April 2022 to try to resolve the outstanding issues expressed by Estonia, Malta, Poland and Sweden. He suggested the proposal will be added to the agenda of April's ECOFIN meeting and expressed hope that the proposal could be approved at that meeting.

In detail

On 12 March 2022, the French Presidency of the EU proposed a revised text of the Draft Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union. The original draft Directive had been proposed by the EU Commission on 22 December 2021 (see our previous Tax Policy Alert). It provides a mechanism by which the 27 EU Member States would implement the Pillar Two GloBE rules proposed by the OECD Inclusive Framework.

There were some notable changes in the 12 March draft Directive:

1. The date on which Member States must transpose the Directive and make it effective has been changed from 1 January 2023 to 31 December 2023. The UTPR is pushed out to 31 December 2024 under this compromise text.

2. There is an exception to the above in Article 47a in the event that a Member State has no more than 10 ultimate parent entities (UPEs) of in-scope MNE groups (i.e. €750 million revenue or more). Such Member States can elect not to apply the IIR & UTPR for the accounting periods beginning 31 Dec 2023 - 31 Dec 2025. However, Member States that have not made such an election (or do not qualify because they have too many UPEs in-scope) must ensure that constituent entities in the non-electing/ non-qualifying Member State are subject to the UTPR top-up tax amount allocated to that Member State for accounting periods beginning 31 December 2023.
3. Article 15 now includes deferred taxes in the definition of 'net taxes expense.'
4. Article 51 of the compromise text provides that in determining whether non-EU jurisdictions have a Qualified IIR (QIIR), the Commission will propose an 'implementing act' of equivalent regimes and that the EU Council will vote on this implementing act (rather than being decided by the Commission). The Council will need to vote unanimously on this proposed act in order to ratify it.

Decision of the European Finance Ministers regarding the compromise text

The representative Finance Ministers of the EU Member States were asked to comment on the compromise text that had been shared earlier in the week and indicate their State's position.

The Member States broadly expressed support for the proposal, the work done by the French Presidency in driving forward the draft Directive, and the work done by the OECD inclusive Framework to date. However, a number of reservations were raised by the following States with regards to varying issues:

1. Poland: Pillars One and Two should be regarded as a package and the development of Pillar Two should not proceed without Pillar One moving at the same pace;
2. Malta: Further extension on implementation of the rules is required, along with an expansion of the number of UPEs a Member State can have while availing of the derogation from applying the IIR and UTPR;
3. Sweden: while expressing general support, takes the position that it is too early to agree on the general approach of the Directive without further work on Pillar Two implementation;
4. Estonia: indicated that further technical work needs to be done and noted the need to prevent a disproportionate impact of the rules on multinationals.

The lack of a unanimous vote means that the proposal cannot move forward at this time. However, in closing off the discussion, Bruno Le Maire expressed hope that they could address these concerns in the coming weeks, such that the proposal might achieve unanimous approval at the next ECOFIN meeting, scheduled for 5 April 2022.

The takeaway

The lack of unanimous agreement on the compromise text is not surprising on the whole but it raises the question as to how the French Presidency expects to resolve the fundamental issues raised most particularly by Poland and Malta – not least because the first round of the French presidential election on 10 April will take up increasing French bandwidth in the next three weeks.

On the substance, realigning the timelines of Pillars One and Two is not easily achievable, notwithstanding the promise that Pillar One will progress via an EU Directive later this summer. Additionally, extending the timeline for implementation of the rules beyond 31 December 2023 would not likely appease other Member States, who would prefer a swift implementation. While the former request may be managed by way of political assurances on Pillar

One through a reinforced statement of intent, the landing point for transposition and entry into effect of the rules could prove a difficult balancing act for the French Presidency.

Postponing the implementation of the new rules to 31 December 2023 would enhance the possibility of proper implementation of these very complicated rules, both by taxpayers and tax administrations (and note that there is a technical issue to be clarified on the application of these rules on the last day of many business' tax years). It would also mitigate the risk of divergence between the OECD Model Rules and the EU rules, particularly with respect to safe harbours on which the OECD will probably not publish guidance before the end of this year.

Let's talk

For a deeper discussion of how the EU Directive or OECD two-pillar approach might affect your business, please contact:

Tax policy leadership

Stef van Weeghel, *Amsterdam*
+31 0 88 7926 763
stef.van.weeghel@pwc.com

Will Morris, *Washington*
+1 202 213 2372
william.h.morris@pwc.com

Edwin Visser, *Amsterdam*
+31 0 88 7923 611
edwin.visser@pwc.com

Regional tax policy leaders

Stewart Brant, *United States*
+1 (415) 328 7455
stewart.brant@pwc.com

Giorgia Maffini, *London*
+44 0 7483 378124
giorgia.maffini@pwc.com

Tax policy editors

Phil Greenfield, *London*
+44 0 7973 414 521
philip.greenfield@pwc.com

Chloe O' Hara, *Dublin*
+353 87 7211 577
chloe.ohara@pwc.com

Keetie van der Torren-Jakma
Netherlands
+ 31 (0) 618 5659 73
keetie.van.der.torren-jakma@ pwc.com

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