EU Finance Ministers fail again to reach political agreement on proposed Pillar Two Directive

17 June 2022

In brief

Today the EU Finance Ministers met to agree a new compromise text covering the introduction of a minimum taxation proposal by the EU Member States. No political agreement to the text has been reached, on the basis that unanimous approval for the proposal was not forthcoming. According to the French Finance Minister Bruno le Maire, and agreed by Poland, who until today remained the only country to oppose the proposal, all conditions were met to reach unanimous support. However, as was widely anticipated in the days before the meeting took place, Hungary declined to approve the compromise text, thereby revoking its previous support for the proposal.

In detail

The original proposal and two subsequent compromise texts

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

On 12 March 2022, and again on 28 March 2022, the French Presidency of the EU proposed revised texts of the original proposal (generally referred to as the first and second compromise texts accordingly).

The first and second compromise texts featured a number of changes, including:

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.

2. There is an exception to the above in Article 47a in the event that a Member State has no more than 12 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 six consecutive fiscal years beginning 31 December 2023. 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 provides that the Commission is empowered to adopt delegated acts in order to determine the list of third country jurisdictions that have implemented a legal framework in their domestic law, which can be considered equivalent to a qualified IIR. A delegated act adopted pursuant to Article 51 shall enter into force only if no objection has been expressed by the Council within a period of two months of notification of that act to the Council or if, before the expiry of that period, the Council has informed the Commission that it will not object. Article 290(2)(b) TFEU indicates that the Council can do so only with a qualified majority. Effectively this puts the decision whether a country's tax system contains an equivalent to a qualified IIR in the hands of the Commission, with qualified majority voting control by the Council. However, Article 290, paragraph 1 TFEU limits the delegation to non-legislative acts to supplement certain non-essential elements of the legislative act. One could debate whether the qualification of equivalent regimes is indeed a non-essential element.

June 2022 compromise text

A third compromise text was published on 16 June 2022. In addition to the changes included in the first and second compromise text, the third compromise text includes a new recital 14b and adds two elements to article 47a, para 2. Member States that choose to defer implementation (for up to six years) because they have no more than 12 in-scope UPEs located in their state, face an information sharing requirement. This would mean that UPEs located in Member States which have chosen to defer implementation must nominate a designated filing entity in another Member State or, in case no constituent entity is located in another Member State, an entity in a third country jurisdiction that has a competent authority agreement in effect with the Member State must be nominated. The designated filing entity must file a top-up tax information return and the constituent entities will provide information to the designated filing entity.

To minimise the administrative burden for tax administrations of Member States electing deferred implementation, recital 14b contains the possibility of entering into a discussion with the EC on the transposition of the Directive into national law.

Joint declaration on progression of Pillars One and Two

The basis on which the Polish government reserved its support for the Pillar Two proposal was a fear that Pillar One was developing more slowly, and may not end up being agreed at all. Poland had sought legal linkage between the two pillars, such that Pillar Two could not progress at the EU level without legally being linked to the development of Pillar One. This is challenging from an EU perspective, as to legally tie the two measures would bind the EU to a proposal for which only limited details are yet known.

The compromise reached was a statement, read at today’s meeting by Paolo Gentiloni (EU Commissioner for Economy) which will be attached to the minutes of the meeting:

> “*When it comes to Pillar 1, we have always stressed that we will remain fully committed to put forward a legislative proposal to ensure harmonised implementation of Pillar 1 at the EU level once the work at the OECD level is mature enough. We also want to reassure all of you that we will continue to monitor closely the ongoing negotiations in the OECD on the MLC on Pillar 1. We will also submit a report on Pillar 1 to the Council by June 2023 and reassess the situation accordingly, with a view to submitting a proposal if applicable. Our determination is certainly to have both Pillar 1 and Pillar 2 implemented as soon as*

> *possible. If the Pillar 1 initiative does not come to fruition we still have to ensure a swift solution to the tax challenges arising from the digitalization of the economy. I believe the latest compromise of the council and the commission statements do address all of the concerns from our last discussion. Therefore, all conditions are met today to reach unanimity.*"

This statement was apparently sufficient to allay the concerns of the Polish government, and allowed Polish Finance Minister Magdalena Rzeczkowska to support the proposal earlier today.

Hungarian position

The withdrawal of support by Hungary for the minimum taxation proposal at today's meeting was widely expected, following statements from the government and a recommendation by the Economic Committee to the full Hungarian Parliament of a resolution against the measure earlier in the week.

Hungarian Finance Minister Mihaly Varga, who represented the Hungarian position today, acknowledged this vote and referred to '*critical voices*' in the Hungarian Parliament. The main factors underpinning the Hungarian position, according to Minister Varga, relate to the economic impact of the Ukrainian war on businesses and the uncertain economic consequences that would flow from the introduction of the minimum tax at such an early stage. Minister Varga noted the slippage of deadlines to implement both Pillars One and Two and commented that delays had caused harm to the overall package of measures.

He said that there were no other first movers across the world who are yet transposing Pillar Two and that it was too early to do so in Europe, given the ongoing work underway with regards to the rules. Although Hungary noted that the latest modifications represent a positive step, they do not address their concerns. Accordingly, he surmised that Hungary is unable to support the adoption of the present text.

Bruno le Maire responded by stating that Hungary had previously supported the Directive even when there was a war.

A call for a move to Qualified Majority Voting (QMV)

Importantly, Le Maire and Gentiloni stressed that the current negotiations and recent vicissitudes on minimum taxation are a prime example of why the EU should move from unanimity to QMV for tax matters (they also reiterated this during the subsequent press conference). "*If this was QMV...years ago we would already have a new tax regime,*" Le Maire said.

Next steps

During the press conference that followed the ECOFIN meeting, it was noted that further work will be done over the coming days under the French Presidency to reach political agreement to the proposal. However, given that part of the rationale for the Hungarian position is that Hungary does not support the EU moving first on this global deal, it seems as though that will be a substantial hurdle to overcome.

If a resolution is not found before the French Presidency of the EU Council ends on 30 June 2022, the measure will progress under the Czech Presidency beginning on 1 July 2022.

The takeaway

It is unclear how this delay will impact the overall implementation of the pillars within the EU. Undoubtedly the French Presidency will do their best to reach a political agreement before the end of June. This might lead to an additional ECOFIN in June. If no agreement can be reached, the Czech Presidency will have to start the discussion with Hungary under which conditions the proposal could obtain Hungarian support, which would make it difficult to reach agreement by the first ECOFIN of the Czech presidency on 12 July.

The factors preventing the Hungarians from supporting the proposal will present a tricky obstacle for the EU Council to overcome. None of the reasons given (the war in Ukraine, difficult economic environment with rising interest rates, fears of being a first mover on the Pillar Two rules) are likely to be easily resolved with any measure of speed, if indeed the EU has any control over these pressure points at all. And it is possible that Hungary also has other issues – as Poland was rumoured to have – which may also prove hard to resolve quickly.

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

Tax policy contributors

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

Lili Kazemi, *United States*
+1 202-664-9165
golaleh.kazemi@pwc.com

Tax policy editors

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

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

Keetie van der Torren-Jakma, *Netherlands*
+31 6 1856 5973
keetie.van.der.torren-jakma@pwc.com