Briefing

International review for January

Speed read

Following his inauguration, President Biden has the potential to implement some of the more significant tax policy proposals, such as increase in the top statutory corporate income tax rate from 21% to 28% and the creation of a new 15% corporate minimum tax on global book income of $100m and above. The OECD's work on pillar one and pillar two has not slowed with public consultations taking place in January following a period of consultation last year. In Europe, an eleventh-hour UK/EU Free Trade Agreement provides that UK and EU goods are not subject to tariffs or quotas as long as they meet specific 'rules of origin'; however, importers and exporters will already have noticed a fundamentally changed process at the border as the red-tape curtain has descended across the channel.

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It's not quite the start to 2021 that most of us had hoped for with covid-19 continuing to spread at speed, resulting in the return of wide-ranging restrictions on our lives and economies. Nevertheless, with vaccine rollouts gathering pace, we are hopefully starting to see the light at the end of the tunnel. It feels as if a lot has already happened in 2021 and we've barely reached the end of January.

US election

At the time of writing my last article, a Republican controlled Senate and Democrat controlled House of Representatives seemed likely. However, fast forward to 2021, and the Senate will soon be narrowly controlled by the Democrats following the Georgia state runoffs.

But what does this mean for the direction of US tax policy? Well, the door has been opened for Biden to potentially implement some of the more significant tax policy changes raised as part of his presidential campaign. Nonetheless, with small margins of control (with Democratic control in the Senate turning on the role of the vice president), putting together tax legislation that achieves intra-party consensus still could be challenging.

From a business tax perspective, although Biden's campaign tax proposals were not set out in detail, major proposals included an increase in the top statutory corporate income tax rate from 21% to 28% and the creation of a new 15% corporate minimum tax on global book income of $100m or more. Biden's tax proposals also included changes to the global intangible low-taxed income (GILTI) regime, including an increase in the tax rate on certain foreign income from 10.5% to 21%. It remains to be seen how Biden will proceed with these tax policy proposals and if and when he will seek to implement them following his inauguration. Against the backdrop of the ongoing covid-19 pandemic and the outgoing president's impeachment trial in the Senate, we may see tax rises being postponed.

In addition, the White House and the Congress might be expected to make providing additional covid-19 response legislation a front-burner priority and President Biden can be expected to try to garner some bipartisan support, to the extent possible, for such legislation which could include such measures as extended federal unemployment benefits, funding for vaccine distribution, and relief to certain sectors and industries.

Brexit

The UK/EU free trade agreement (FTA) came as an early Christmas present for many, agreed on 24 December 2020, just days before the end of the transition period.

Under this 'skinny' FTA, UK and EU goods are not subject to tariffs or quotas, provided they meet specific 'rules of origin'. However, businesses that import or export from and to the EU are already experiencing significant changes. Customs declarations are required on either side of the border, and businesses are having to put in place further preparations, including holding registrations and having the data to support these declarations. Duty is due on products that do not meet relevant 'rules of origin' therefore various supply chains may be impacted by 'double duty'.

From a corporate tax perspective, there were no surprises in the FTA. As mentioned in my November article (*Tax Journal,* 27 November 2020), the notable changes are that the UK has now lost access to EU directives, leading to additional taxation on certain transactions, and to the arbitration convention governing tax disputes. The fact that a trade deal is now in place should allow negotiations to begin between the UK and EU counterparts, like Germany and Italy, to reduce the rates of withholding tax that apply under those treaties. It should be noted, though, that the domestic provisions which implemented the EU Interest and Royalties Directive remain in effect for payments from the UK companies to EU resident associated companies.

Following the FTA negotiations, a significant reduction in the scope of DAC 6 reporting in the UK has also been announced by the UK government. As a result, only arrangements meeting hallmarks D (arrangements undermining automatic exchange of information (AEOI) and disguising beneficial ownership) will need to be reported in the UK. Although the volume of reporting under hallmark D is expected to be low compared to under the other hallmarks, before businesses breathe a sigh of relief, an important point to remember is that if there is no longer a UK reporting requirement, yet there is a reporting obligation in another EU member state, the UK company itself will need to make the report if there is no other EU intermediary involved in the transaction. As things stand, businesses will also no longer be able to rely on a report in the UK to discharge a reporting obligation in another EU country.

The UK does, however, intend to consult on draft legislation and implement the OECD's mandatory disclosure rules under OECD BEPS Action 12. It will be interesting to see how wide the scope of the UK's new rules will be and whether they will go beyond the OECD proposals.

BEPS 2.0 and the OECD's revenue statistics

The OECD has been busy moving forward the shaping of the OECD's pillar one and pillar two proposals, with two days of public consultation meetings taking place in mid-January.

Pillar one was the focus of day one, with topics up for discussion including key themes from the consultation responses received and reducing the complexity in design.

The complexity of pillar one in its current form presents significant challenges for businesses, risking increasing compliance costs and reducing engagement. Tax certainty is of course key; however, businesses face challenges in practice as they lack the data to readily identify which activities are within the scope of the main new taxing attribution. There is also concern that the current proposals to relieve double taxation are unlikely to be effective without a mandatory binding dispute resolution process to eliminate double taxation. A significant re-think of current pillar one proposals may be required to address these concerns.

Day two turned to pillar two with panels held on tax base, simplification options, and key issues arising from consultation feedback, including the mechanics of the income inclusion rule, subject to tax rule and the undertaxed payments rule. The complexity of the proposals was once again addressed, although this time was seen to be more manageable. Discussions on the starting point for the identification of the tax base revealed widespread consensus on the use of consolidated financial statements and arguments were made for reconsidering the use of deferred tax accounting. The proposals for integration of the US GILTI rules and the substance-based carve-out to pillar two were, on the whole, welcomed.

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It will certainly be interesting to see how these discussions influence future developments to the pillar one and pillar two blueprints released in October 2020. Despite the challenges addressed, it is certainly encouraging to see the progress made to date towards a more modernised and fit for purpose international tax system.

The OECD also published its annual revenue statistics report in December 2020, which showed a decrease in the average tax to GDP in 2019 by 0.1% from the prior year to 33.8%. Despite there being increases in 20 OECD countries for which 2019 data was available, this was outweighed by larger on average decreases in the remaining 15 OECD countries. The report also focused on consumption tax revenues under covid-19 and the lessons to be learned from the 2008 global financial crisis. One prediction made in the report is that covid-19 will have a greater impact on consumption tax revenues than the financial crisis. Perhaps unsurprising when the impact of widespread lockdowns is taken into consideration.

Covid-19

Speaking of lockdowns, despite the vaccine roll out gathering pace across the world, an acceleration of cases and deaths has led to the reintroduction of lockdowns and curfews across Europe. In response to the worsening situation, many countries have decided against the expected phasing out of temporary measures introduced near the start of the covid-19 pandemic.

In the Netherlands, the government elected to extend several tax measures until 1 April 2021, including the temporary emergency bridging measure to retain jobs and the option for businesses to apply for a deferral (or extension of an existing deferral) of payment of taxes. In Poland, additional covid-19 support measures introduced under 'shield 6.0' allow employers in certain sectors which have been particularly impacted by covid-19 to apply for aid to subsidise employees' salaries by up to PLN two thousand per employee, subject to certain conditions.

Further measures have also been introduced and other measures extended across the pond. In Canada, regulations in respect of the Canada emergency wage subsidy and Canada emergency rent subsidy have been extended to the 13 March 2021, with the Government saying it will propose to extend these subsidies further still. Following a brief period of uncertainty, the Consolidated Appropriations Act 2021 was signed into law in the US at the end of December, enacting a number of tax provisions related to covid-19 and also other items including the extension for five years of the controlled foreign company look-though rule for controlled foreign corporations.

Meanwhile in Asia-Pacific, Australia has widened the eligibility criteria for certain temporary tax incentives, allowing more entities that have a track record of making substantial investments in Australia to qualify for immediate expensing of depreciating assets. In Japan, tax reform proposals for 2021 include measures for promoting investment in digital transformation and carbon neutrality as well as special measures for tax losses brought forward in light of covid-19, increasing the amount of tax losses brought forward that can be relieved against current year taxable profits in certain circumstances. There are also provisions regarding tax credits for research and development expenses.

The economic conditions fostered by the covid-19 pandemic have also given rise to significant practical challenges for multinationals' transfer pricing arrangements. The OECD's release of supplementary guidance regarding the application of the arm's length principle and the OECD transfer pricing guidelines to four key areas impacted by covid-19 (see bit.ly/3946JUv) has therefore been welcomed. The guidance does not contain new rules, but it gives useful practical guidance for affected multinationals. The four key areas in question are: comparability analysis; losses and the allocation of covid-19 specific costs; government assistance schemes; and the impact on advance pricing agreements, which the OECD recognises as presenting the most significant additional practical challenges.

The OECD guidance recognises that historical comparable data may be less reliable, meaning that other practical approaches may need to be considered. Government support programmes have been made available across the globe; however, the OECD guidance notes that the take up of these schemes could have transfer pricing implications potentially impacting arm's length pricing. The guidance confirms that existing APAs should continue to be respected unless there has been a breach of critical assumptions.

For groups affected by covid-19, there is no better time than the present to start thinking about some of these issues prior to the finalisation of company level accounts. ■

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