

## Briefing

## International review for May

## Speed read

After a busy start to the year, the pace of developments in the international tax world slowed down in May. There is, however, no respite for BEPS 2.0: the OECD held a public consultation meeting to present the key themes arising from responses to its implementation framework consultation, and it opened, and closed, two pillar one consultations. New Zealand has launched its own consultation on the domestic implementation of pillar two. The OECD has also published a report on tax transparency in Latin America, indicating that while progress has been made, work is still required to combat tax evasion in the region. Finally, Poland and Kenya are the latest jurisdictions to propose changes to their transfer pricing regimes.

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**OECD BEPS 2.0 developments**

On 25 April 2022, the OECD held a public meeting to discuss the feedback it received in response to its recent pillar two implementation framework (IF) consultation.

Following the release of the global anti-base erosion (GloBE) model rules and commentary, the IF is the next step in the work to implement a global minimum tax, facilitating the coordinated implementation and administration of the model rules. The IF will provide agreed administrative procedures, such as filing obligations and multilateral review processes as well as considering the development of safe harbours to facilitate both compliance by multinational enterprises (MNEs) and administration by tax authorities.

A public consultation on the IF began on 14 March 2022, focusing on four key areas: further administrative guidance, information collection and reporting, safe harbours, and rule coordination and tax certainty. The consultation closed on 11 April 2022 and the OECD used the public meeting to present the key themes arising from the 500 pages of comments it received, structured around the following four areas set out in the consultation.

**Further administrative guidance**

- Rule status and consistency: respondents requested clarity about the status of commentary examples and other guidance. The need for consistent interpretation of the model rules in all jurisdictions was also emphasised.
- Prioritising guidance: in light of the ambitious implementation timeline for pillar two, stakeholders requested that guidance be released on a rolling basis, prioritising key areas. Immediate guidance is requested on issues related to scope and transitional rules. Specific guidance was also requested on areas such as treatment of US GILTI, deferred tax accounting, tax credits and transfer pricing adjustments.

**Information collection and reporting**

- Standardised return: concerns were raised that differences in the information and format required for reporting across jurisdictions would result in a disproportionate compliance burden for MNEs. Respondents requested a standardised GloBE information return to address this.
- Centralised filing: the need for centralised filing of returns in the ultimate parent entity (UPE) jurisdiction was a common theme in the responses received, as well as the need for an effective exchange of information framework, including appropriate data and confidentiality safeguards.
- Grace period: the novelty and complexity of the GloBE rules has led many stakeholders to request that good faith mistakes should not trigger any penalty in the early years of the application of the rules.

**Safe harbours**

- Country by country reporting: there was strong support for implementation of a country by country reporting (CbCR) safe harbour. For example, jurisdictions with an effective tax rate (ETR) over a certain percentage (such as 15%, plus an extra margin) based on CbCR data.
- Qualified domestic minimum top-up tax (QDMTT): many responses supported a safe harbour based on the principle there would be no need to compute GloBE ETR for countries that have introduced a QDMTT.
- Jurisdictional approaches: jurisdictional approaches to safe harbours were proposed, for example identifying those circumstances where jurisdictions are unlikely to produce low tax for GloBE purposes. This would reduce the compliance burden for MNEs who would only have to perform ETR calculations for jurisdictions outside this safe harbour.

**Dispute resolution was a key concern, with stakeholders requesting a timely and binding resolution process, either under a new multilateral convention or via existing dispute mechanisms**

**Rule coordination and tax certainty**

There were calls for a central and transparent process, conducted at the OECD level, to determine whether a rule is 'qualified' for pillar two purposes. Dispute resolution was also a key concern, with stakeholders requesting a timely and binding resolution process, either under a new multilateral convention or via existing dispute mechanisms.

The OECD will now work through the detail of all the submission received to help it further develop the IF in the coming months. Throughout the meeting the OECD reiterated that in designing the IF, it will seek wherever possible to adopt a framework that reduces compliance, cost and complexity, provided desired tax policy outcomes can still be met. This sentiment will be welcomed by MNEs and tax authorities alike, but it remains to be seen if it can be delivered in practice.

**New Zealand: pillar two consultation**

Following in the footsteps of Switzerland and the UK, New Zealand is the latest country in the OECD's Inclusive Framework to launch a public consultation on domestic

implementation of the pillar two rules. The consultation document released by the Inland Revenue on 5 May requests feedback on whether and how New Zealand might implement the pillar two rules, with comments due 1 July 2022. It requests feedback on the following issues:

- whether New Zealand needs to adopt the global anti-base erosion (GloBE) rules, assuming that a critical mass of other countries also does so;
- whether New Zealand needs to apply the income inclusion rule (IIR) to New Zealand source income of in-scope multinationals, by way of a domestic minimum top-up tax;
- when any adoption should be effective, particularly in relation to the IIR;
- how best to translate the rules into New Zealand law;
- what areas of uncertainty there may be in applying the rules to New Zealand tax law, and how to resolve these;
- whether tax paid to the New Zealand government under the rules should give rise to imputation credits; and
- administrative aspects (for instance, return filing and timing of payments).

It will be interesting to see if other jurisdictions release similar consultations in the coming months and how these will be framed. For example, the New Zealand consultation question of 'whether' it should adopt the GloBE rules strikes a very different tone to the UK consultation, which was specifically limited to implementation issues.

### OECD: pillar one public consultations

Continuing its rapid programme of rolling consultations, on 14 April 2022 the OECD sought public comments on the exclusion for extractive activities under Amount A of pillar one. The exclusion applies where a group derives revenue from the exploitation of extractive products and the group has carried out the relevant exploration, development or extraction. This approach reflects the policy goal of excluding the economic rents generated from location-specific extractive resources that should only be taxed in the source jurisdiction, while not undermining the comprehensive scope by limiting the exclusion in respect of profits generated from activities taking place beyond the source jurisdiction, or later in the production and manufacturing chain.

On 6 May 2022 the OECD issued a further public consultation on the regulated financial services exclusion under Amount A of pillar one. This provision will exclude from the scope of Amount A the revenues and profits from regulated financial institutions. The defining character of this sector is that it is subject to a unique form of regulation, in the form of capital adequacy requirements, that reflect the risks taken on and borne by the entity. The scope of the exclusion is derived from that requirement, meaning that entities that are subject to specific capital measures (and only those entities) are excluded from Amount A.

As with the previous pillar one rolling consultations, the proposed rules do not reflect consensus by the inclusive framework members on substance, rather they are a working draft of the rules released for comment given the tight implementation timetable for pillar one. Both of these consultations have now closed. In line with previous OECD public consultations on BEPS 2.0, the comments received will be made public and it is also expected that the OECD will summarise the key themes in the responses received, although it is currently unclear how and when this will be done.

### OECD: tax transparency in Latin America

On 3 May 2022, the OECD published a report entitled *Tax Transparency in Latin America 2022*, which considered the region's recent progress in tackling tax evasion and other financial crimes through transparency and exchange of information (EOI) for tax purposes.

Previous studies have identified high rates of personal and corporate income tax evasion in the region (44% and 48% on average respectively), and a significant share of Latin America's wealth is estimated to be held offshore – depriving the government of billions of tax revenue. The average tax-to-GDP ratio for the 16 countries covered in the report remains low by international comparison at 19.8% compared to the OECD average of 33.5% for 2020.

The OECD's report notes some major achievements in recent years, including the fact that fourteen Latin American countries are now parties to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Ten Latin American countries already participate in the automatic exchange of financial account information, and six out of eight Latin American countries assessed in the second round of peer reviews of the EOI request until 2021 were largely compliant.

However, the report found that Latin American countries are not yet making full use of EOI and there is scope for improvement. In addition, beneficial ownership frameworks in the region are in the early stages of implementation, and wider use of treaty-exchanged information to address other financial crimes remains generally challenging.

To address these issues, the report proposes a series of strategies and recommendations focused on keeping the region's political commitment to EOI and tax transparency and strengthening and building sustainable capacity in local tax authorities to successfully implement the relevant standards.

### Transfer pricing update

Finally, following the news in my last update ('International review for April', *Tax Journal*, 22 April 2022) that Brazil will reform its transfer pricing system to bring it in line with international standards, this month has seen further developments in the international transfer pricing landscape.

In Poland, on 25 April 2022, the minister of finance published draft decrees changing the scope of data and information required to be disclosed via transfer pricing reports. The changes include limiting the scope of transfer pricing information provided by entities exempt from the obligation to prepare the local file, yet required to prepare transfer pricing reports. The draft decrees also clarify the content of the entity's declaration that the Local File has been prepared in accordance with the facts, and that the transfer prices are set on an arm's length basis.

Kenya introduced Finance Bill 2022 on 12 April 2022, which proposes widening the scope of transactions falling within the scope of its transfer pricing regime by including non-resident persons operating within the preferential tax regime. The Bill also proposes the introduction of CbCR in line with OECD BEPS Action 13. From 1 July 2022, a notification requirement will be introduced aimed at assisting the commissioner in identifying the party responsible for submitting the CbC report within an MNE group. ■

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- ▶ The two-pillar framework: what does the October statement tell us? (P Greenfield, C O'Hara & G Maffini, 14.10.22)
- ▶ International review for April (T Sarson, 21.4.22)