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# Conclusions of December 6 ECOFIN meeting

### BEPS 2.0 – Pillar Two – Minimum Tax – Unanimity – New own resources – Unshell – DEBRA – DAC7 – Code of Conduct Group (Business Taxation)

On December 6, 2022, the final scheduled meeting of the Economic and Financial Affairs Council of the EU (ECOFIN Council) under the Czech Presidency of the Council took place. Prior to the meeting, the adoption of the EU Minimum Tax Directive proposal was removed from the initial agenda. EU Member States therefore did not discuss this file formally.

During the meeting, 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 tax measures, including on the new own resources package proposed by the European Commission, the Unshell and DEBRA proposals and the implementation of DAC7.

The ECOFIN Council also approved a report by the Code of Conduct Group on its work performed during the term of the Czech Presidency (second half of 2022).

## Background

In preparation for the December 6 ECOFIN meeting, the General Secretariat of the Council of the EU released the provisional agenda on December 5, 2022. In relation to direct tax matters, the draft agenda included the vote on the EU Minimum Tax Directive, a Czech Presidency's report on the state of play regarding new own resources for the EU budget and information from the Czech Presidency in relation to current legislative proposals.

In advance of the meeting, the Czech Presidency of the Council also released a new compromise version of the draft Directive (November 25, 2022) following checks by linguists and lawyers. Other than linguistic and structural amendments, the new compromise text does not provide for any material changes compared to the previous version that was published on June 17, 2022 (for more information, please refer to KPMG's Tax News Flash).

## Pending approval of the EU Minimum Tax Directive

Although approval of the Minimum Tax Directive was initially included on the agenda of the December 6 ECOFIN meeting, the file was removed just prior to the meeting and its approval was therefore not discussed in the public session.

The ECOFIN report notes that bilateral negotiations continued during the Czech Presidency with a view to secure the necessary support for the proposed Directive by all delegations. The removal of this item from the agenda indicates that such support has not yet been secured. Approval of the Directive is therefore still pending.

## Update on other ongoing files related to direct tax

While reaching agreement on the Minimum Tax Directive has been the priority of the Czech Presidency in the area of direct taxation, there are also a number of other pending initiatives on which work progressed in the second half of 2022 and which are expected to be taken forward in 2023.

### New own resources

During the ECOFIN meeting, Member States took note of the Czech Presidency's report on new own resources for the EU budget that was initially proposed by the Commission on December 22, 2021 (for more details, please refer to Euro Tax Flash Issue 463). While the introduction of the new own resource instruments was initially scheduled for January 1, 2023, the Presidency report notes that discussions were put on hold until the underlying legislative measures (the EU emissions trading system (ETS), a carbon border adjustment mechanism (CBAM) and EU implementation of Pillar One) are adopted (for more details on the EU Pillar One perspective, please refer to KPMG's Tax News Flash).

In addition, the Presidency's report makes reference to the Commission's work program, which includes the proposal for a second basket of new own resources that is supposed to build on the initiative for a new corporate tax system referred to as "Business in Europe: Framework for Income Taxation (BEFIT)" (for more details, please refer to E-News Issue 164).

### Rules to prevent the misuse of shell entities (Unshell)

After the legislative proposal was issued on December 22, 2021 (please refer to Euro Tax Flash Issue 464), the text has been subject to discussions in the Council working groups. The ECOFIN report notes that compromise texts have been submitted on parts of the proposal. However, it is understood that while most Member State delegations expressed general support, there are still several issues of a technical, practical and legal nature, which require further discussion in the Council before an agreement can be reached. In particular, the Council working group discussions appear to focus on what tax consequences should be applied on companies that lack substance (for more details, please refer to E-News Issue 165).

### Debt-Equity Bias Reduction Allowance (DEBRA)

After the draft Directive was published on May 11, 2022 (please refer to Euro Tax Flash Issue 475), the proposal has been subject to discussions in the Council working groups since June 2022. The ECOFIN report notes that during the Czech Presidency an article-by-article examination was carried out at three Council working group meetings, giving delegations the opportunity to ask the Commission questions on the functioning of the proposed rules. Following these discussions, it was agreed that examination of the DEBRA proposal should be suspended until other proposals in the area of corporate income taxation announced by the Commission have been put forward. It is understood that this relates to the BEFIT initiative where a legislative proposal is currently expected to be released in the third quarter of 2023.

### DAC7

The ECOFIN report notes that the new reporting rules for digital platforms will start to apply from January 1, 2023. Platform operators will have to report the required information for the calendar year 2023 by January 31, 2024. To eliminate double reporting, DAC7 contains rules that provide relief of the reporting obligations for non-EU platform operators where the Commission has determined that Member States receive equivalent information from non-EU countries that apply similar reporting regimes. The ECOFIN report notes that the Commission's work on such implementing act has continued during the term of the Czech Presidency.

## Work performed by the Code of Conduct Group during the Czech Presidency

The report by the Code of Conduct Group (Group's report), as approved by the ECOFIN Council on December 6, 2022, details the work performed during the Czech Presidency as follows:

### Revision of the mandate of the Code of Conduct Group

The Group's report notes that political agreement on a revision of the Code of Conduct for Business Taxation was reached at the ECOFIN Council meeting on November 8, 2022. The revised Code of Conduct expands the definition of harmful tax regimes to cover features of tax systems that have general application and that may have harmful effects (such as those that lead to double non-taxation), provides for additional options to rollback harmful tax regimes, and strengthens the information exchange between Member States in respect of potentially harmful tax measures. The revised Code of Conduct also clarifies the decision-making process in the Code of Conduct Group (CoCG), which is responsible for the review of potentially harmful tax practices, the collaboration with the European Commission and the interplay with ongoing State aid proceedings.

In general, the revised Code replaces the 1997 version as from January 1, 2023. However, an exception is provided for assessments of tax measures of general application, which will start from January 1, 2024 and only focus on measures enacted or modified on or after January 1, 2023. For more information, please refer to Euro Tax Flash Issue 491.

### Current state of the standstill and rollback review process

The Group's report notes that Poland's holding tax regime and the Greek IP regime were found to be not harmful. In relation to Croatia's tax incentive for investment projects in the manufacturing industry, the Group agreed to keep the assessment on hold since Croatia has committed to amend its legislative framework within 18 months. As regards Ireland's digital games relief, the Group's report notes that the Commission and Ireland are working jointly on an agreed description of the measure following its approval under State aid rules.

In relation to measures that were subject to scrutiny and put under annual monitoring in order to assess their impact on business location decisions, the Group's report notes that the monitoring of certain measures can be terminated (including Greece's patent tax incentive) while the monitoring of other measures should continue (including Poland's and Portugal's notional interest deduction regime).

### Assessment of special economic zone regimes

The Group's report makes reference to the assessment of Member States' compliance with the Group's guidelines on tax privileges related to special economic zones (SEZ). According to the report, the

Commission services tabled a draft assessment of EU Member States' compliance with this guidance and the Group concluded that all Member States are compliant. Nevertheless, the measures in Hungary, Italy, Lithuania, Poland and Spain shall be "under particular scrutiny" with regard to highly mobile activities carried out in the SEZ. The CoCG also agreed on a second review phase in respect of SEZ regimes with a suggested starting date in 2027.

### Update of the EU list of non-cooperative jurisdictions

The Group's report also details the work performed with regards to the revised EU list of non-cooperative jurisdictions ("Annex 1") and commitments taken by cooperative jurisdictions to implement tax good governance principles ("Annex 2" or "grey list"), which were approved by the ECOFIN Council on October 4, 2022 and published in the Official Journal on October 12, 2022 (for more details, please refer to Euro Tax Flash Issue 487).

In relation to **criterion 1.1** (automatic exchange of financial account information (AEOI)), the Group's report notes that the CoCG agreed on the way forward regarding the jurisdictions that the Global Forum found to be non-compliant based on the 2022 peer review report, which was published on November 9, 2022. Based on the peer review report, the CoCG sent letters to 33 jurisdictions asking for commitments to address the deficiencies and to ensure a sufficient level of AEOI compliance in view of the update of the EU list in early 2023.

In relation to **criterion 2.1** (preferential tax regimes), the Group's report notes that the CoCG continued its work on the assessment of the ongoing foreign source income exemption (FSIE) reforms by the concerned jurisdictions. The CoCG asked jurisdictions with ongoing FSIE reforms to complete their reforms by the end of 2022, with the effect on January 1, 2023 and their reforms on the treatment of capital gains by the end of 2023, with effect from January 1, 2024. During the technical examinations of FSIE reforms, the CoCG identified a need for further clarifications in the guidance on FSIE regimes, which was amended accordingly and published in the Annex of the Group's report. Where the additional screening of FSIE regimes results in non-compliance with the revised FSIE guidance, the CoCG agreed to ask for commitments to amend such regimes by June 30, 2024, with effect from July 1, 2024.

In relation to **criterion 2.2** (tax regimes that facilitate offshore structures which attract profits without real economic activity), the report notes that the Group discussed the main findings of the monitoring exercise in respect of the implementation of substance requirements for Collective Investment Funds (CIVs) and agreed to send recommendations to the jurisdictions with regard to the identified deficiencies.

In relation to **criterion 3.2** (implementation of Country-by-Country Reporting (CbCR)), the Group's report notes that it was agreed to remove Barbados and the British Virgin Islands from Annex II for criterion 3.2 and to remove the reference to criterion 3.2 in the entry of the Bahamas in Annex I, following the release of the latest Inclusive Framework peer review report on CbCR (October 4, 2022). The Group also agreed to extend the scope of criterion 3.2 to those jurisdictions, which joined the Inclusive Framework on BEPS after January 1, 2018 and are developed countries or developing countries without a financial centre. The jurisdictions concerned will be informed about the application of criterion 3.2 in a timely fashion.

### Defensive measures against non-cooperative jurisdictions

At the meeting on September 20, 2022, the Code of Conduct Group agreed the draft questionnaire on the application by Member States of defensive measures. Member States were invited to reply by November 30, 2022.

For more details on defensive measures adopted by EU Member States against non-cooperative jurisdictions, please refer to KPMG's Summary of proposed or enacted measures.

## ETC Comment

A harmonized EU-wide implementation of Pillar Two in the EU remains the preference of most Member States. During the press conference following the ECOFIN meeting, the Czech Minister of Finance confirmed that also the Czech Presidency remains fully committed to securing unanimous agreement on the proposed Directive and finding a compromise with Hungary on the various pending files in the next few days. The Minister advised that once a compromise solution is found, it would just be a technical matter of approving the package, which could be done in any Council configuration (possibly through a video conference meeting of the ECOFIN scheduled for end of December).

Should unanimity not be reached in a timely manner, individual Member States may proceed with the implementation of the Pillar Two GloBE rules unilaterally and apply the Income Inclusion Rule from December 31, 2023. In this context, the French Minister of Finance announced in early November France's intention to unilaterally implement Pillar Two by early 2023. France had previously issued a joint statement together with the governments of Germany, Italy, Spain and the Netherlands to express their full commitment to introducing rules on global minimum effective taxation in 2023, by any possible legal means (for more details, please refer to KPMG's Tax News Flash). Based on statements made by Belgian tax officials, it is understood that Belgium has also joined this commitment.

The alternative is for a groups of at least nine Member States to request the European Commission to put forward a proposal for adoption of the rules under enhanced cooperation. According to Benjamin Angel (Director of the Commission's DG TAXUD division), this would be the Commission's preferred if no unanimous agreement is reached (please refer to E-News Issue 165).

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.


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