Navigating BEPS 2.0

Key considerations for General Counsels

What is the OECD's Base Erosion and Profit Shifting (BEPS) program?

Approximately 140 member jurisdictions of the OECD/G20 Inclusive Framework (IF) on base erosion and profit shifting (BEPS) — representing more than 90 percent of global GDP — have signed up to the BEPS 2.0 initiative.

On 8 October 2021, the IF approved an eight-page statement finalizing key aspects of a framework for reforming the international tax system, and several updated releases have been issued since that time.

The BEPS 2.0 initiative is comprised of two pillars — Pillar One and Pillar Two. Together, the two pillars reflect one of the most significant reforms to the international tax system in over 100 years. With an expected start date of 2024, for some jurisdictions, there is a limited period of time to prepare for the changes. Known colloquially as BEPS 2.0, this package deals with profit shifting, cross border tax arbitrage and tax transparency, with the purpose of moving towards a consensus position to help avoid misaligned unilateral efforts and double taxation. In addition, through the global minimum tax rules, it also seeks to address some of the perceived gaps in the way BEPS 1.0 deals with base erosion and stop the "race to the bottom" on company tax rate competition globally.

What should you know as a General Counsel?

While currently affecting Heads of Tax, the OECD's BEPS 2.0 developments, will likely have significant impacts on your legal department. Even if there is no global consensus for BEPS 2.0, much of its substance is likely to live-on through unilateral measures.

01 Corporate and business structures may need to be revised to continue qualifying for tax benefits in various jurisdictions. While certain jurisdictions may have a headline corporate tax rate exceeding 15 percent, various incentives, exclusions, or exemptions may create an effective tax rate below 15 percent, requiring "top-up tax" to be paid and negating the tax benefit.

02 The OECD released the implementation framework for Pillar Two in December 2022, which includes a host of additional reporting requirements for multinational groups. Collapsing complex structures may simplify reporting, helping to provide cost savings and reduce the tax risk for the group. In some cases, the upfront cost of unwinding or modifying a group structure will be less than the tax at risk under these proposals.

03 Timing for the introduction of Pillar One is unknown and depends on its acceptance by a critical mass of countries. Many countries are likely to persist with or introduce digital services taxes (DSTs) should the negotiations on Pillar One fail. The Office of the United States Trade Representative's response to previous DSTs has been to recommend the imposition of tariffs on these jurisdictions. The tariffs were suspended as Pillar One negotiations continued, however the US may look to reintroduce the tariffs should negotiations on Pillar One fail and countries instead impose unilateral DSTs.

Legal considerations in relation to Pillar Two:

- Current corporate/group structures are likely to be suboptimal in a Pillar Two world — the time is now to undertake a structure review
- Co-investment impacts under Pillar Two could be significant
- Where will GloBE tax sit in the MNE group? Will it be reallocated to another entity?
- Contractual agreements for sale, including revised tax indemnity agreements and change in law clauses
- Disposal readiness and long-term preparation (eg. where to sell or buy in a chain of companies and how to reorganize effectively)
- Timing of disclosure to markets, including the role of substantive enactment for accounting purposes and the need for both group and country analyses

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Pillar Two — Global Minimum Tax

The below table provides a further overview of the Pillar Two initiatives, including its scope, potential impact for legal teams, and the expected date of implementation.

What is it?	Pillar Two rules subject thousands of multinational groups around the world to a global minimum tax of 15 percent (groups with global revenue of EUR 750M or more are in scope).
Why does it matter?	Large multinational groups will now be subject to a minimum effective tax rate of 15 percent in the jurisdictions in which they operate. This means tax incentives claimed/low tax income in offshore locations and certain exempt income may no longer be of benefit to the group from 2024. These changes may make current business models and structures obsolete and organizations have to be ready to respond if the group structure and value chain are no longer appropriate.
Who does if effect?	Multinational groups with revenue of EUR 750M or more in two of the last four years, but jurisdictions may choose to apply a lower threshold.
When does it take effect?	The EU and a number of other jurisdictions intend to introduce Pillar Two from 2024, while other countries and jurisdictions (i.e., Singapore, Hong Kong (SAR), China, Malaysia, and Thailand) have indicated they will introduce Pillar Two from 2025. Certain jurisdictions have now released draft domestic legislation based on the Global Anti-Base Erosion (GloBE) Model Rules and Commentary to implement Pillar Two.

How KPMG professionals can help

Legal entity simplification
KPMG firm tax and legal professionals can help organizations with restructuring to potentially simplify reporting, provide cost savings and help reduce tax risk for the corporate group, if the group structure and value chain are no longer appropriate.

Communication with stakeholders
KPMG firms can support organizations in establishing expected BEPS 2.0 impacts and assist with engaging C-suite/audit committees. Other tax and legal support including international and transfer pricing issues, DST taxes as well as IP and R&D considerations can all be provided.

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