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NOTE

From:	Permanent Representatives Committee (Part 2)
To:	Council
Subject:	Directive on ensuring a global minimum level of taxation for multinational groups in the Union *General approach*

I. INTRODUCTION

1. On 8 October 2021, the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting ('the Inclusive Framework') reached agreement on a reform of the international rules on the taxation of the profits of multinational enterprises. All EU Member States expressed their support for the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy. In its conclusions of 27 November 2020, the Council expressed its continued support for the work of the Inclusive Framework[1].

[1] ST 13350/20.

2. Minimum effective taxation ('Pillar Two' of the reform) is mainly based on two rules to be applied in domestic law ('GloBE rules') – an income inclusion rule (IIR) and an undertaxed payment rule (UTPR) – which are intended to ensure that the profits made by multinational groups with a turnover of EUR 750 million or more are taxed at an effective rate of at least 15 %. According to the October Statement of the Inclusive Framework, Pillar Two should be brought into law in 2022, to be effective in 2023, with the UTPR coming into effect in 2024.

3. In order to ensure that the implementation of the GloBE rules is consistent and compatible with EU law, and based on the model rules adopted by the Inclusive Framework on 14 December, on 22 December 2021 the European Commission presented a proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union[2]. This proposal for a Directive, which is intended to transpose Pillar Two into EU law, sets out the rules on the basis of which Member States will apply an additional tax in respect of the low-taxed income of a constituent entity of any national or multinational group that falls within the scope of the reform.

4. In parallel, work is continuing on the implementation of the rules on the allocation of taxing rights between jurisdictions ('Pillar One'), in accordance with the detailed implementation plan approved by the Inclusive Framework, in order to develop a multilateral convention ('MLC') which will be open for signature from mid-2022, with a view to its implementation as of 2023. At their meeting on 17 and 18 February 2022, the G20 finance ministers reiterated their commitment to this timetable.

[2] ST 15294/21.

II. STATE OF PLAY

5. On 18 January 2022, the Ecofin Council held a policy debate on the proposal for a Directive[3] in order to provide political guidance for the technical examination of the text. The debate showed that all Member States agree that this tax issue is a priority, and that the rules agreed by the OECD Inclusive Framework need to be transposed into EU law as faithfully as possible and without delay.

6. Since the beginning of January 2022, and taking into account the guidance from ministers, the French Presidency has held eight meetings of the Working Party on Tax Questions (Direct Taxation, including two high-level meetings) dedicated to the technical examination of the proposal for a Directive. These meetings have made it possible to:

   (i) clarify the rules set out in the Directive, in particular those necessary to ensure compliance with EU law in Pillar Two;

   (ii) significantly align the wording of the text with that of the OECD model rules and, where appropriate, retain some of the flexibility;

   (iii) make adjustments or additions to certain articles in response to converging requests from Member States, for example as regards domestic top-up tax;

   (iv) identify the key issues still to be settled at political level in order to reach agreement on the whole text.

7. At the meeting of the Permanent Representatives Committee on 9 March, most Member States were already able to support the French Presidency's compromise text. Taking account of the comments made, the Presidency circulated a new compromise text on 12 March (ST 6975/22).

[3] ST 5015/22.

8. The Presidency is of the opinion that the changes strike an overall balance acceptable to the delegations, subject to reaching a compromise on the political issues set out in part III below.

III. KEY ISSUES

9. Discussions at the meetings of the Working Party on Tax Questions and the meeting of the Permanent Representatives Committee highlighted three important issues of a more political nature which require discussion at that level.

(a) Link between Pillar Two and Pillar One

10. The OECD/G20 Statement of 8 October 2021 is based on two separate pillars, with different arrangements for implementation in accordance with the detailed implementation plan also approved by the Inclusive Framework. The request from three Member States to link the entry into force of the two pillars, by making the entry into force of Pillar Two contingent on the entry into force of the multilateral convention implementing Pillar One, raises legal difficulties confirmed by the Commission and the Council Legal Service. Moreover, this request is not acceptable to the majority of the Member States. However, as the G20 has recently done, the EU must continue to affirm its political determination to conclude the work on both pillars according to the timetable set out in the agreement of 8 October 2021.

11. In order to resolve this issue, the Presidency proposes that the agreement on the proposal for a Directive be accompanied by a Council statement confirming the commitment of all Member States to the ongoing process within the Inclusive Framework as regards Pillar One, in line with the timetable for implementation approved in October 2021, and calling for the other States Parties to respect that commitment. The proposed text of that statement is set out in the annex to this note.

(b) Deadline for transposition of the Directive and entry into force of national rules (Article 55)

12. Member States agree on the need to respect the political commitment they entered into by joining the Statement of the Inclusive Framework, which provides for transposition into law in 2022 and effective implementation by the end of 2023. However, a number of Member States consider that implementation as of 1 January 2023 would cause them significant practical or institutional difficulties.

13. The Presidency would point out that the Member States have undertaken to transpose the Pillar Two rules into law in 2022, with a view to their entry into force in 2023. While the first commitment would be fulfilled by the adoption of the Directive, the Presidency calls for agreement on entry into force of national legislation transposing the Directive by 31 December 2023 at the latest, in line with the OECD agreement.

(c) Mandatory application of the income inclusion rule (Articles 5 to 7)

14. Unlike the political statement of 8 October 2021, the proposal for a Directive provides for the mandatory application of the income inclusion rule by the Member States. However, some Member States would like the application of this rule to be optional.

15. The vast majority of Member States consider that implementing such a derogation on a permanent basis would undermine the coordinated application of Pillar Two in the internal market and be a source of complexity for enterprises.

16. The Presidency proposes that a transitional derogation, as included in the most recent compromise text (Article 47a), be available on an optional basis to Member States in which no more than 10 ultimate parent entities are located, and that such a derogation should only apply for a limited period to be discussed, from three to five years.

IV. NEXT STEPS

17. In this context, the Presidency proposes the compromise text set out in ST 6975/22 as a basis for discussions on this matter, and calls for the issues described in part III of this note to be resolved in a spirit of compromise.

18. The Council is therefore invited to:

- discuss the key issues set out in part III of this note;

- reach a general approach on this legislative proposal, on the basis of the compromise text set out in ST 6975/22, with a view to the adoption of the Directive, subject to receiving the opinion of the European Parliament and legal-linguistic revision;

- approve the statement to be entered in the minutes, as set out in the annex to this note.

Annex: draft Council statement

The Council:

REAFFIRMS the EU's commitment to the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy and its implementation plan, approved in October 2021, and INVITES all members of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) to uphold their commitment to the two pillars;

NOTES that, since 2017, the EU has risen to the tax challenges arising from the digitalisation of the economy, and that its continuous efforts have contributed to the global agreement on the two-pillar solution;

CONFIRMS its continued support for the work being carried out in the OECD/G20 Inclusive Framework on BEPS and is fully committed to successfully completing, within the agreed time frame, the ongoing work on Pillar One, including the multilateral convention, which should be open for signature in mid-2022 and enter into force in the course of 2023;

STRESSES that the Council will, where necessary, reassess the situation regarding Pillar One, in the context of the ongoing work in the OECD Inclusive Framework on BEPS, with a view to swiftly finding a solution to the tax challenges arising from the digitalisation of the economy.