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130 Countries Sign Historic Agreement on International Tax Reform

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In July, 130 countries signed the global agreement on international tax reform, based on a two-pillar solution which allows multinational companies to pay more tax in the countries where they operate as well as a global minimum tax rate.

As estimated by the OECD, a total amount of USD 100 billion of profits per year will be reallocated to the market jurisdictions, under the rules agreed in Pillar One. Companies within scope include the largest MNEs with global turnover above 20 billion euros and profitability above 10% (profit before tax/revenue) with the turnover threshold to be reduced to 10 billion euros over time, subject to conditions. Financial services and extractive industries will be excluded from the agreement. The agreement creates new nexus rules, for a market jurisdiction where the MNE derives minimum 1 million euros in revenue from that jurisdiction. For smaller jurisdictions with GDP lower than 40 billion euros, a minimum of 250 000 euros is required to trigger the new nexus and bring the MNE within scope. In terms of revenue allocation, according to the agreement 20-30% of the residual profit (profit in excess of 10%) will be allocated to market jurisdictions using a revenue-based allocation key. Profitability of the in-scope companies will be determined with reference to financial accounting income, and loss carry-forward will be allowed.

The global minimum corporate income tax under Pillar Two set at 15% will generate USD 150 billion in additional global tax revenues annually. OECD also estimates additional revenue due to the stabilisation of the international tax system after years of uncertainty and patchwork of newly introduced rules concerning the digitalising economy. The global minimum tax is intended to be applied via specific sets of rules:

- Income Inclusion Rule, top-up tax on a parent company concerning the low-taxed income of the subsidiary/ constituent entity;
- Undertaxed Payment Rule, which allows adjustments or denies deduction if the low-tax income of the subsidiary/ constituent entity is not subject to tax under an income-inclusion rule;
- Subject to Tax Clause, a double tax treaty-based rule that allows source jurisdictions to impose source taxation on associated party payments below the minimum rate. These amounts will be creditable as a covered tax for tax treaty purposes.

The effective tax rate will be calculated on a jurisdictional basis using a common definition of covered taxes and a tax base determined by reference to financial accounting income. The rules provide for *de minimis* exemptions and substance carve-out that will exclude income of 5 - 7,5% of the carrying value of tangible assets and payroll. Further technical detail is yet to be discussed, with further updates expected in October 2021.

Commenting the new OECD Secretary-General Mathias Cormann said: "*After years of intense work and negotiations, this historic package will ensure that large multinational companies pay their fair share of tax everywhere. This package does not eliminate tax competition, as it should not, but it does set multilaterally agreed limitations on it. It also accommodates the various interests across the negotiating table, including those of small economies and developing jurisdictions. It is in everyone's interest that we reach a final agreement among all Inclusive Framework Members as scheduled later this year,"* Mr Cormann said.

The international community welcomed the agreement, facilitated by the recent proposals from US President Biden. Countries that refused to sign the agreement include Estonia, Hungary, Ireland, Kenya, Nigeria, Sri Lanka, Barbados, St Vincent & the Grenadines. Peru abstained due to absence of government. Cyprus announced that it will veto the adoption via EU directive. Harmonised EU implementation could be hampered due to the unanimity requirement for tax-related directives at EU level.

EU: Landmark Climate Policy Package

On 14 July, the European Commission proposed an ambitious climate policy package, encompassing multiple policy instruments to deliver on the European Green Deal Commitment to make Europe a carbon neutral continent by 2050, and to cut carbon emissions 55% by 2030. The package includes a number of instruments, which will require consent of Member states to achieve full implementation across the continent. Proposed instruments include: extension and reenforcement of the ETS to new sectors; increased use of renewables and energy efficiency; a faster roll-out of low emission transport modes and the infrastructure and fuels to support them; an alignment of taxation policies with the European Green Deal objectives, and measures to prevent carbon leakage.

Tax-related policy instruments include revisions of the Energy Taxation Directive, with a key policy goal to help Member States transition to green taxes, as less detrimental to growth and more sustainable compared to the present over-reliance on taxes on work/ labour. The Carbon Adjustment Mechanism aims to level the playing field with imported goods from countries which do not apply the same standards as Europe, thus preventing carbon leakage. To do so, the Directive aims to put a price on carbon-intensive imports, thus encouraging trade partners to implement similar green policies at home. As a result, global reduction of carbon emissions could be achieved simultaneously. A Social Climate Fund is

planned to help Member states facilitate the green transition and avoid situations where certain Member states or regions are left behind.

Commenting, Commissioner Paolo Gentiloni said this is the 'now or never' moment for the world: *"Our efforts to tackle climate change need to be politically ambitious, globally coordinated and socially fair. We are updating our two-decades old energy taxation rules to encourage the use of greener fuels and reduce harmful energy tax competition. And we are proposing a carbon border adjustment mechanism that will align the carbon price on imports with that applicable within the EU. In full respect of our WTO commitments, this will ensure that our climate ambition is not undermined by foreign firms subject to more lax environmental requirements. It will also encourage greener standards outside our borders. With every passing year the terrible reality of climate change becomes more apparent: today we confirm our determination to act before it is really too late."* Similarly, Commission President Ursula von der Leyen said: *"The fossil fuel economy has reached its limits. We want to leave the next generation a healthy planet as well as good jobs and growth that does not hurt our nature."*

OECD: Global Forum Publishes Peer-Review Reports on EOIR

The OECD's Global Forum on Tax Transparency in July published a new set of peer review reports assessing the legal and regulatory framework against the international standard on transparency and exchange of information on request (EOIR) for Antigua and Barbuda, Argentina, the Russian Federation, South Africa and Ukraine. Key findings and recommendations are available on OECD's dedicated website.

EU Commission Publishes Anti-Money Laundering Legislative Package

The European Commission has published its Anti-Money Laundering legislative package, which will upgrade the existing EU anti-money laundering legislative (AML) framework.

The package consists of four proposals, namely:

- A Regulation establishing a new EU AML/CFT Authority;
- A Regulation on AML/CFT, containing directly-applicable rules, including in the areas of Customer Due Diligence and Beneficial Ownership;
- A sixth Directive on AML/CFT ("AMLD6"), replacing the existing Directive 2015/849/EU (the fourth AML directive as amended by the fifth AML directive), containing provisions that will be transposed into national law, such as rules on national supervisors and Financial Intelligence Units in Member States;
- A revision of the 2015 Regulation on Transfers of Funds to trace transfers of crypto-assets (Regulation 2015/847/EU).

Significantly, the package will establish an EU Anti-Money Laundering supervisory body, the Anti-Money Laundering Authority, or AMLA, which would commence operating in 2024 and is envisaged to employ around 350 people. The AMLA will establish a single integrated system of supervision across the EU, be given direct supervisory powers at EU level to monitor and coordinate national supervisory bodies, as well as be given the ability to give fines and directly supervise cross-border financial companies. The AMLA will also coordinate with national Financial Intelligence Units (FIUs) and facilitate joint analyses to detect illicit financial flows.

The package will also create a single EU Rulebook for AML across the EU, including rules on Customer Due Diligence, Beneficial Ownership and the powers and task of supervisors and Financial Intelligence Units (FIUs). Existing national registers of bank accounts will be linked to the system, providing access to FIUs on bank accounts and deposit boxes. It is also proposed that law enforcement will be provided access to the system.

Other notable elements of the package include plans to extend the full application of the AML framework to to the crypto sector, impose an EU-wide cash payment limit of EUR 10,000 and create a "black-list" and "grey-list" based on the recommendations made by the global money laundering and terrorist financing watchdog, Financial Action Task Force (FATF). Any country listed in recommendations by FATF will be listed by the EU in either the “black-list” and a “grey-list", and measures will be applied by the EU on the basis of the risk level. The EU will also be able to list additional countries not subject to a FATF recommendation, based on its own assessment of risk level to the EU.

Executive Vice-President Valdis Dombrovskis said of the package: *“Every fresh money laundering scandal is one scandal too many – and a wake-up call that our work to close the gaps in our financial system is not yet done. We have made huge strides in recent years and our EU AML rules are now among the toughest in the world. But they now need to be applied consistently and closely supervised to make sure they really bite. This is why we are today taking these bold steps to close the door on money laundering and stop criminals from lining their pockets with ill-gotten gains.”*

The package will now be considered by Parliament and Council. The proposals set out that the EU AML Authority would commence its duties from 2024 onwards, with the direct supervision role to commence later, after the Directive is transposed and the regulatory framework starts to apply.

OECD Tax Report on Sustainable Home Working

With the shift to remote working induced by the Covid-pandemic, the OECD has published a note facilitating the design of remote working policies, and sustainable, location-independent organisational culture. The paper in particular highlights policies that tax administrations may wish to consider in designing processes and guidance to help ensure that longer-term remote working is sustainable for all parties, including individual employees.

State Aid: Nike Loses Procedural Challenge to Commission & Commission Appeals General Court Ruling in Amazon Case

Nike has lost a challenge to Commission's State aid case on formal grounds, the General Court of the EU ruled on 14 July in Case C-648/19 (*Nike European Operations Netherlands BV & Converse Netherlands BV v European Commission*). Nike alleged incorrect assessment of the character of the State aid; incorrect assessment of the nature of an APA in Netherlands law; and, breach of the principles of good administration and equal treatment. The second plea alleged breach of the obligation to state reasons and incorrect assessment of selectivity. The third plea alleged breach of the applicants' procedural rights; and, premature initiation of the formal investigation procedure.

The Court dismissed Nike's arguments on incorrect assessment of selectivity, citing established case-law, such as *Commission v MOL:* in the case of individual aid, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective. The presumption of selectivity operates independently of the question whether there are operators on the relevant market in a comparable factual and legal situation. Only when examining an aid scheme it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or sectors (Judgment of 4 June 2015, *Commission* v *MOL*, C-15/14 P, paragraph 60).

On the procedural arguments, the Court established that the Commission was entitled to initiate the formal examination procedure and did not breach the principles of equal treatment and good administration. As a result of this judgment the Commission will continue its investigation into the APAs issues by the Dutch tax administration from 2006 to 2015, establishing levels of royalty paid by the Nike/ Converse subsidiaries for use of the IP belonging to the group company for products sold in the EMEA regions.

Also this month, the European Commission lodged an appeal against the EU General Court's ruling in its dispute with Amazon concerning profit allocation and application of TNMM as transfer-pricing method, in Case T-816/17 *Luxembourg and Amazon v Commission.*

The General Court in its ruling found that the Commission did not prove the existence of State aid to the requisite legal standard and annulled the Commission decision. From a transfer-pricing perspective, the Court found that even if the 'arm's length' royalty should have been calculated using the Commission's designated group company as the 'tested party' in the application of the TNMM, the Commission still did not establish the existence of an advantage since the Commission did not take into account the evolution of the intangible assets and the cost sharing agreement, ie. the subsequent increase in value of said intangible assets.

The Commission will argue before the European Court of Justice that the General Court made a number of errors of law in its judgment, notably that the Court should have based its ruling on the profits recorded in Luxembourg by Amazon rather than looking at the US where it holds its intellectual property.

CFE EU Tax Policy Report: Semester 1 2021

CFE Tax Advisers Europe has now published its EU Tax Policy Report covering the first semester of 2021. The EU Tax Policy Report is a bi-annual publication which provides a detailed analysis of significant primary law and tax policy developments at both EU and international level that have occurred in the previous six months which would be of interest to European tax advisers. It also includes an overview of selected CJEU case-law and relevant European Commission decisions.

We invite you to read the EU Tax Policy Report, and remain available for any questions or comments that you may have.

New EU VAT Rules Enter Into Force

The new rules concerning the EU VAT regime entered into force on 1 July, creating a simplified VAT regime for cross-border supplies of goods (B2C) and distance sales. The new rules provide for a system to declare and pay VAT in the EU using the Import One-Stop Shop and also level the playing field between EU businesses and non-EU sellers.

Online sellers, including online marketplaces and platforms can now register in one EU Member State and this will be valid for the declaration and payment of VAT on all distance sales of goods and cross-border supplies of services to customers within the EU. According to the European Commission, online marketplaces will now benefit from a reduction in red tape of up to 95% by registering with the new One Stop Shop (OSS).

EU Delays Digital Levy Plans

The EU decided in July to delay the release of its digital levy proposal until at least autumn, pending further discussion with the US. It was anticipated that the draft proposal for the EU digital levy would be published in the coming week.

In January, the EU Commission's DG TAXUD published an inception impact assessment roadmap revealing that a proposal for a digital levy would be introduced later in 2021, intended to sit alongside any multilateral digital tax measures agreed at OECD level, in order to introduce an EU-own revenue source to aid in the recovery from the economic impact of the COVID-19 virus. Speaking after the March ECOFIN meeting on behalf of the Commission, Executive Vice-President Dombrovskis stated *"…as mandated by the European Council, we are continuing preparations for proposing an EU digital levy, to serve as an EU own resource by 2023. We will ensure that this will complement the OECD process and be WTO-compatible. The crisis makes it even more important to agree on the taxation of digital businesses and other issues such a*

minimum tax rate. This is both in order to secure much-needed tax revenues and to make sure that everyone pays their fair share of tax."

However, as negotiations on the OECD's two-pillar plan progress closer to final agreement, the EU has come under increasing pressure from the US to abandon its digital levy plans in order for a multilateral solution to be agreed at a global level. Pascal Saint-Amans commented on the delay in the plan, saying: *"The postponing of the EU digital levy is good news. It is wiser indeed to wait for the deal to be finalised and not risk any disruption with ongoing complicated legislative processes."* U.S. Treasury Secretary Janet Yellen travelled to Europe in early July, in order to attend the G20 meeting in Venice on 9 July, and held a series of bilateral meetings with European Commission officials.

CFE Opinion Statement on Issues With the Supply of Goods with Transport Under e-Commerce Rules

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CFE Tax Advisers Europe has published an Opinion Statement on issues with supply of goods with transport under e-commerce rules. Determining the nature of a transaction is one of the most important steps when determining the VAT treatment of supplies, including how the place of supply rules operate. It is only after the nature of a supply has been determined, including determining whether a supply should be considered a supply of goods or services, that the different rules regarding determination of the place of taxation can be applied. The situation becomes particularly complicated in cases where the supplier provides to its buyer both supplies of goods and services at the same time. In such cases it must be established whether, for the purposes of VAT, the supply should be treated as two distinct taxable transactions or as a single composite supply for VAT purposes. This question often arises when the supplier supplies goods and provides transport of the goods at the same time. Such a situation is even more common with e-commerce activities, when businesses are selling goods online to final consumers located in other Member States (distance sales of goods).

In the statement, CFE identifies that different rules apply when determining the place of supply of goods and the transport of goods, which often cause administrative problems in practice. Since there are different rules regarding determination of place of taxation for transportation services and supply of goods, CFE identifies through highlighting these issues in practice that it would be helpful if there could be some Commission guidance issued clarifying what the position is or, alternatively, if consideration could be given to making changes to the VAT Directive so that transport services are dealt with more consistently with the underlying supply.

We invite you to read the statement, and remain available for any queries.

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