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UN Approves Africa Initiative for United Nations Tax Leadership

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The Second Committee of the UN General Assembly voted in favour of bringing international tax cooperation at the United Nations, directly challenging the G20-mandated OECD leadership in international tax matters. Last week's vote on a resolution filed by Nigeria saw a clear divide between developed countries, such as the EU, US, UK and Japan, and the rest of the world.

The resolution was carried by 125 countries in favour to 48 against, with 9 abstentions. Votes in favour or abstentions included Columbia, Chile, Iceland, Mexico and Norway, who are OECD members. Nigeria's diplomats at the United Nations, who introduced the draft resolution on behalf of Africa, said it represents "a beacon of hope for developing nations." “The decades-long fight of Global South countries to establish a fully inclusive process at the United Nations to participate in agenda setting and norm setting on international tax is now a reality. The African Union looks forward to agreeing an effective UN Framework Convention on International Tax Cooperation to urgently mobilise resources for our development”, the African Union stated.

Norway's Foreign Minister Espen Barth Eide told the Financial Times that Norway did not vote against the UN resolution on order to “send a signal” about building bridges with the Global South: “The world is unfortunately becoming more polarised and we are seeing an unhelpful division forming between the west and the rest. We want to connect through a more global agenda. We don’t want to contribute to the divide, and we salute the Africa Group for raising the issue as a global issue", Norway's FM stated. The EU and UK have been criticised for attempting to block progress on the proposed UN-led tax cooperation.

Following last week's meeting at the United Nations in New York to discuss the Africa Group's call for a UN Tax Convention, the matter was discussed under the UN General Assembly Second Committee Draft Resolution on Promotion of Inclusive and Effective International Tax Cooperation at the United Nations. The UN General Assembly is aiming for the "establishment of a Member State-led, open-ended ad hoc intergovernmental committee to elaborate a comprehensive UN Tax Convention". The matter is being approached as one of high priority, with a tentative deadline to finish the UN Tax Convention by June 2025. The proposed international cooperation is to have a "comprehensive UN Tax Convention with a holistic scope and sufficient flexibility and resilience to continuously ensure equitable results as the international tax cooperation landscape evolves, establishing clear links between international taxation and other key UN agendas and ensuring the full and effective participation of civil society in the intergovernmental UN tax process to develop a new UN Tax Convention". A concept note setting out international support for the UN Tax Convention can be found here.

It is anticipated that the new ad hoc intergovernmental body would be open to participation to all UN member states, supported by a bureau. The options offered are based on a compulsory and voluntary model, including the drafting of a framework convention.

OECD Statement on International Tax Reform Developments

The OECD has issued a statement related to the UN developments in which the Secretary General said they are proud of OECD's record on addressing tax evasion and tax avoidance and supporting developing countries. The statement reads:

"The OECD is proud of its record of achieving consensus-based solutions to address tax evasion and avoidance, stabilise the international tax system and support developing countries. The BEPS Inclusive Framework, now consisting of 145 countries and jurisdictions, has agreed a consensus-based groundbreaking international tax agreement – to make international tax arrangements fairer and work better in a digitalised and globalised world economy. The Two-Pillar solution is designed to help prevent tax avoidance, protect against the erosion of domestic tax bases and tackle illicit financial flows. The OECD remains committed to completing this critically important work and to ensuring the broad and effective implementation of this agreement. The OECD was born from a spirit of cooperation among nations. Building on the widely shared benefits achieved in ending bank secrecy, reducing tax evasion and avoidance and tackling illicit financial flows, we are committed to continue to collaborate with global partners – including at the UN – to strengthen inclusivity and continue to deliver a better and fairer international tax system."

EU Reaffirms Commitment to Pillar 2

The ECOFIN Council meeting of EU's finance ministers held on 9 November saw the adoption of two statements (by the Council and by the Commission) concerning their commitment to Pillar 2.

On Pillar Two, the European Commission called on all EU Member States to *"proceed swiftly with the transposition of the Pillar Two Directive and will continue to support the efforts of Member States in this regard."* The Commission also expressed the view that the OECD administrative guidance of December 2022, February 2023 and July 2023 is compatible with the EU Directive on Minimum Tax (Council Directive (EU) 2022/2523 of 14 December 2022).

On Pillar One, the Commission welcomed the release of the text of the

Multilateral Convention and the technical agreement reached on key points of Amount A, which paves the way for implementing a partial reallocation of taxing rights. The Commission also underlined the importance of Amount B as a key component of the ongoing reform of international taxation, simplifying transfer pricing and enhancing legal certainty. The Commission called on Member States to swiftly sign and ratify the Multilateral Convention.

European Commission's Assessment in Apple Case Upheld in Opinion of ECJ's Advocate General

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Advocate General (AG) Giovanni Pitruzzella in the Opinion delivered on 9 November 2023 in Case *C-465/20 P European Commission v Ireland, Apple Sales International and Apple Operations International*, found that the General Court in its first instance judgment erred in law by overruling the Commission's assessment in the Apple case. The AG opinion, relevant for the EU law assessment of "tax rulings" cases, serves to advise the Court of Justice in its deliberations.

The AG found that the judgment of the General Court puts an "unjustifiably excessive burden of proof on the Commission" and that the General Court erred in the definition of the standard of proof incumbent on the Commission. The AG considers the threshold set for the Commission "impossible" given the requirement to *"prove the existence of negative facts which, by their nature, cannot be demonstrated, but only deduced from presumptions based on established positive facts or by evidence of a positive fact to the contrary, paragraph 304 of the judgment under appeal imposes an unjustifiably excessive burden of proof on the Commission"*, the AG argues.

The AG considers that the General Court erred in law when it concluded that the Commission had adopted an ‘exclusion’ approach in its primary line of reasoning, an error which vitiates the conclusions reached by the General Court with regard to application of Irish law (Section 25 of the TCA 97), the findings in relation to the taxation of profits under Irish tax law, the findings concerning the Arm's Length Principle (ALP) and the authorised OECD approach. On the basis of the same error of interpretation, the AG believes the General Court wrongly dismissed the methodology applied by the Commission. Given the relevance of the functions performed by Apple Inc. in the context of the Commission's primary line of reasoning which led the General Court to uphold the actions brought by ASI and AOE and Ireland, the AG considers that the General Court failed to state reasons which in effect prevents the ECJ from knowing the basis for rejecting the Commission's analysis.

As the AG contends, fundamental errors in the determination of the methodology applicable to the profit allocation for the purposes of calculating the tax base of a non-resident company operating through a branch may necessarily lead to an undervaluation of those profits compared to an arm's length result, and are therefore inherently or manifestly capable of reducing the tax burden of that company compared with normal taxation. In such cases, the Commission, in order to prove the existence of a selective advantage within the meaning of Article 107(1) TFEU, may rely on proof of the existence of such an error and on the fact that the Member State concerned has failed to demonstrate that it has no effect on whether the level of profits thus calculated corresponds to an arm's length value. The General Court therefore incorrectly assessed where the standard of proof lies, in the case of decisions such as that at issue, the AG contends.

The AG also accepts Commission's submission that the General Court's conclusions are based on an incorrect classification of ASI's Irish branch as a routine logistical risk-free service provider. In so far as that classification depends on the correct application of the principles laid down in the OECD Transfer Pricing Guidelines on which Apple and Ireland relied to justify *ex post* the advance decisions as well as the appropriateness of the operating costs as the profit level indicator of the ASI branch, the arguments raised by the Commission do not fall outside the limits of the Court's review of the facts at the appeal stage, the AG argues. With relation to the applicability of the recent *Fiat* case, where the Court stated that without harmonisation the methods and criteria for determining an arm's length outcome rest with Member states, the AG stressed that the *Apple* case differs from *Fiat Chrysler*, therefore rejecting that paragraph 95 of the *Fiat* judgment applies to the *Apple* case. On the basis of the above analysis, the AG's opinion contends the Commission's appeal is well founded thus advising the ECJ to set aside the General Court judgment.

OECD: MNEs Continue Reporting Low-Taxed Profits Even in High-Tax Jurisdictions

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The OECD Report on corporate tax rates indicates that tax incentives and other concessions in jurisdictions with high statutory and average tax rates enable some MNEs to continue paying low effective tax rates (ETRs). The OECD’s latest *Corporate Tax Statistics* report and accompanying working paper, *Effective Tax Rates of MNEs: New evidence on global low-taxed profit*, provide new data on global low-taxed profit, a key issue for determining the impact of the global minimum tax. According to the OECD, "the findings highlight how the introduction of a global minimum tax rate would create new opportunities for domestic resource mobilisation for high-tax and low-jurisdictions alike." The Corporate Tax Statistics Report, however, estimates that high-tax jurisdictions – jurisdictions with statutory and average tax rates above 15% – account for more than half (56.8%) of all global profits currently taxed below 15%. High-tax jurisdictions even account for more than 20% of very low-taxed profits – those with an ETR below 5%. These low-taxed profits in jurisdictions with high tax rates, are likely the result of tax incentives and other targeted advantages, the OECD report finds, highlighting the need for further measures like global minimum tax.

European Parliament ECON Report on BEFIT

The European Parliament Economic and Monetary Affairs Committee (ECON) adopted a draft report on the European Commission proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT), submitted by Evelyn Regner MEP. The report includes a number of key amendments to the Commission text regarding the threshold of application of the rules, notably by suggesting a lower threshold after the transition period has lapsed: "*The Committee proposes that the common framework of rules should be mandatory for groups with a taxable presence in the Union provided that they have annual combined revenues of EUR 750 000 000 or more based on their consolidated financial statements. Once the transition period lapses, such threshold should be set at EUR 40 000 000 or more, in line with the definition of large groups within the meaning of Directive 2013/34/EU of the European Parliament and of the Council1a . In this way, the scope would thus be targeted at businesses that are most likely to have cross-border activities and, thereby, can benefit from the simplification which a common legal framework would offer. The threshold would also provide alignment with Directive (EU) 2022/2523 for a consistent approach in the Union.*"

The amendments also propose introduction of interest limitation rules applicable to the BEFIT group members in an attempt "to reduce the debt-equity bias that can occur via an over-reliance to intra-group debt financing and to reduce the scope for base erosion and profit shifting through excessive interest payments." To guarantee a minimal level of taxation of royalties, a royalties limitation rule for BEFIT group members should be introduced in accordance with the Subject to Tax Rule, as proposed by the OECD/G20 Inclusive Framework in Pillar II, the draft observes. The Commission proposal allows Member States to adjust their allocated share without a ceiling to ensure national policy choices (post-allocation adjustment). The European Parliament, on the other hand, wishes to see introduction of measures that would require Member states to refrain from offering output-based tax incentives such as patent boxes and other IP regimes.

It is expected that the BEFIT proposal, as well as the Transfer-Pricing Directive, would be tabled for discussion under the Belgian presidency of the EU which starts on 1 January 2024.

48 Countries to Implement OECD Tax Transparency Standards for Crypto-Assets by 2027

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48 countries and jurisdictions have committed to implementing the OECD's global tax transparency framework for the reporting and exchange of information with respect to crypto-assets by 2027. The Crypto-Asset Reporting Framework (CARF) is a key component of the International Standards for Automatic Exchange of Information in Tax Matters developed by the OECD under a G20 mandate. It provides for the automatic exchange of tax-relevant information on crypto-assets and comes against the backdrop of a rapid adoption of the use of crypto-assets for a wide range of investment and financial uses.

Speaking concerning the commitments made by the jurisdictions, OECD Secretary-General Mathias Cormann said, *"Today's announcement of co-ordinated international action on crypto-assets is a major step forward, marking another important milestone towards the widespread and co-ordinated approach to combat tax evasion through greater transparency and exchange of information. We strongly welcome the extensive support being shown for quick action to make the international exchange of information collected under the OECD standard on crypto-asset reporting a reality. The international community can count on the OECD and the Global Forum on Transparency and Exchange of Information for Tax Purposes to ensure that the tax transparency architecture remains both up-to-date and effective going forward."*

Crypto-asset reporting will be further discussed at the Global Forum's 16th Plenary Meeting taking place in Lisbon, Portugal from 29 November to 1 December 2023.

European Commission Adopts 2024 Work Programme

The European Commission has adopted its Commission Work Programme 2024, setting out priorities and legislative proposals that will form the focus of the upcoming year. The Programme has a focus on simplification and competitiveness for EU business, with emphasis being placed on measures to be introduced for SMEs.

In terms of taxation, the Programme emphasises that progressing currently tabled legislative proposals will be the central focus, stating that the EU *"need to agree on the new rules on withholding tax procedures, the proposal to prevent the misuse of shell entities for tax purposes and a series of measures to modernise the EU's ValueAdded Tax (VAT) system and make it more resilient to fraud by embracing digitalisation. Furthermore, we need to advance on the proposal to improve business taxation (BEFIT and transfer pricing) and the comprehensive reform of the EU Customs Union."* The Programme document claims that the BEFIT proposal on business in Europe: framework for income taxation could reduce tax compliance costs for businesses operating in the EU by up to 65%.

It also emphasises as priority progressing the Commission's regulatory fitness and performance programme (REFIT), establishing a Head Office Taxation system to simplify rules and cut tax compliance costs for SMEs expanding their operations across borders as a key priority for 2024.

EU Tax Observatory Calls for Global Minimum Wealth Tax

The EU Tax Observatory has called for a global minimum tax of wealthy individuals in its Global Tax Evasion Report 2024 published this month, citing statistics that the effective tax rates of billionaires is equivalent to 0% to 0.5% of their wealth, far less than ordinary citizens.

The report also takes aim at the effectiveness of the OECD BEPS measures in fighting international tax evasion and harmful tax competition, stating that the proposed 15% minimum corporate tax rate for multinational companies is not only "far too low" but "has been made largely toothless by a series of loopholes and “carveouts”.

The report examines trends in global offshore tax evasion, global corporate profit shifting, new forms of international tax competition, tax deficits in high net worth individuals and sets out proposed policies to collect the tax deficit of multinationals and wealthy individuals.

Meeting of the EU Parliament Permanent Taxation Subcommittee

The European Parliament's Permanent Taxation Subcommittee, FISC, this month held a meeting which took place on 30 November 2023 from 09:00 to 10:00 CET. The Subcommittee held an exchange of views with Ms María José Garde, Chair of the Code of Conduct Group on Business Taxation. The exchange of views addressed the revision of the Code of Conduct of 8 November 2022, which broadened its scope to include not only preferential tax measures but also 'tax features of general application' and the effectiveness of the Code of Conduct for the EU's work to fight tax evasion and avoidance. Furthermore, it aims to deepen the institutional cooperation between the Code of Conduct Group for Business Taxation and the FISC Subcommittee. The meeting is available to be streamed here.

The Subcommittee also recently published a calendar of meetings for 2024, currently containing dates for Q1 meetings in 2024. Further information on the topics will be made available in due course.

The selection of the remitted material has been prepared by: Aleksandar Ivanovski & Brodie McIntosh