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US Letter Threatens to Upend OECD Digital Tax Discussions

In a letter to the OECD dated 3 December US Treasury Secretary, Steven Mnuchin stated that the US has *“serious concerns regarding potential mandatory departures from arm’s-length transfer pricing and taxable nexus standards—longstanding pillars of the international tax system upon which U.S. taxpayers rely, Nevertheless, we believe that taxpayer concerns could be addressed and the goals of Pillar 1 could be substantially achieved by making Pillar 1 a safe-harbour regime”*.

Were the Pillar 1 proposals to take the form of a safe harbour, this would allow governments to choose to adopt the regime, as opposed to it being mandatory to adopt it. If the approach were to be mandatory for the countries signing up, as was planned up until the US letter being sent, this would become mandatory for example by way of signing a new MLI. It would appear that the US is now proposing the measure be designed as a "safe harbour", meaning that companies could choose to apply or ignore Pillar 1.

In the [response](#) to the US letter, Angel Gurría, Secretary-General of the OECD, stated that *“throughout the extensive consultation process, however, we had so far not come across the notion that Pillar 1 could be a safe-harbour regime”*, emphasising that the public consultations held to date *“clearly identified the need for greater tax certainty and administrability”*, noting that this *“is why the OECD proposal on a “Unified Approach” contains a very strong tax certainty dimension”*. The letter notes that the US raising this issue may impact on the ability of the OECD to adhere to the deadlines agreed by the Inclusive Forum.

The US has been invited to meeting with the OECD prior to Christmas to discuss the issue further.



OECD Meeting on Pillar Two: Stakeholders’ Input on the OECD Secretariat Proposals

A public consultation took place at the OECD in Paris on 9 December concerning the OECD Global Anti-Base Erosion Pillar 2 Proposal. Representatives from the OECD, the BEPS Inclusive Framework, academics, tax practitioners and advisers and representatives of

business were in attendance. Ahead of the consultation, the OECD [published the comments](#) submitted by stakeholders to the Secretariat proposals.

CFE issued an [Opinion Statement](#) responding to the consultation setting out its view that there are too many variables in the GloBE proposal, with ramifications that could arise from the open policy and key design questions, calling for more certainty, simplicity and absence of double or multiple taxation. CFE's statement highlights a number of key elements that should be embedded as part of this process, namely that:

- The process needs to address the interaction of the four elements of Pillar Two, as it transpires that these are not intended to apply simultaneously, but no decision has been made as to which rule will take priority.
- The complexity of this proposal under Pillar Two confirms the need for a streamlined multilateral cooperation process; otherwise the system will become unworkable.
- The introduction of CFC rules are designed to achieve the same objective as the income inclusion rule. From CFE's perspective a simpler alternative to the income inclusion rule might be world-wide introduction of effective CFC rules.
- There are potentially a number of EU law points raised with the income inclusion rule which must be considered and resolved.
- The achievement of the policy aim to establish global minimum tax will depend significantly on the chosen model: jurisdiction-by-jurisdiction approach or an average global rate approach.
- Clarity would be welcome on the interaction between Pillar One and Pillar Two – CFE welcomes introduction of multilateral instruments where treaty benefits/ payments are being denied based on effective rate under Pillar Two, if the effective tax rate is based on a payment that is subsequently spread across multiple jurisdictions under Pillar One.
- As with Pillar One enhanced dispute prevention and resolution mechanisms will be essential, including multilateral mandatory binding arbitration.
- CFE is concerned that the use of financial accounts as a starting point for determining the tax base for the GloBE proposal would amount to more complexity.

Additionally, to evaluate the full effect of the existing BEPS standards, some of which are still under implementation in most countries of the Inclusive Framework, CFE in its Opinion Statement set out that a longer-term perspective seems more appropriate to appreciate the entirety of the remaining BEPS issues. 11

Those who were unable to attend can watch the consultation on [OECD WebTV](#), via the OnDemand tab of the OECD platform.

Work at government representative level is ongoing, with the Secretariat proposal serving as a blueprint for further negotiations. The next Inclusive Framework meeting is scheduled for January 2020. However, the anticipated timeline for progress concerning the OECD proposals may be compromised by the recent position adopted by the US in its letter to the OECD on 3 December, suggesting the Pillar 1 proposals could apply as a safe-harbour.

Council of the EU Adopts Conclusions on Anti-Money Laundering Priorities



The Council of the EU on 5 December [adopted conclusions](#) setting out priorities for the EU's new anti-money laundering framework, seeking to guide the EU Commission in introducing harmonised EU anti-money laundering rules as well as enhanced anti-money laundering supervision across the EU, primarily addressed to the financial sector.

The Council in its recommendations urges Member States to transpose the AML legislation as soon as possible into national law. The conclusions also invite the Commission to explore further possible means of improving AML rules, such as further enhanced cooperation between authorities involved in anti-money laundering.

The conclusions can be viewed [here](#).



VAT Committee Meeting Documents Published

The [agenda](#) and [supporting documents](#) concerning the most recent VAT Committee meeting have now been made available online.

At its 114th meeting, the VAT Committee reviewed recently adopted VAT provisions, questions concerning the application of EU VAT provisions, options exercised by Member States such as the temporary reverse charge mechanism, the centralised clearances for customs importation and recent judgments of the ECJ.



Council of EU Adopts Report on Defensive Administrative Measures for List of Non-Cooperative Tax Jurisdictions

The Council of the EU have adopted a [report](#) of the EU's Code of Conduct Group (Business Taxation), which sets out a detailed 6-monthly progress report on achievements of the Code of Conduct Group, and the status of jurisdictions that have been examined under the list.

Notably, the report details that the Code of Conduct Group reached agreement at its meeting on 14 November concerning guidance for Member States on defensive measures that can be taken in the tax field concerning non-cooperative jurisdictions.

The guidance sets out co-ordinated actions for Member States to take of a legislative nature, to encourage compliance with the Code of Conduct screening criteria as well as other international standards. Member States are recommended to apply at least one of the measures, which include non-deductibility of costs, CFC rules, withholding tax measures and denial of participation exemption on profit distribution.