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The two pillars of the OECD: an introduction

As part of Action 1 of the BEPS Plan, the OECD and the European Union have undertaken various efforts to tax digital economy products in the countries where they are marketed. Some countries have already introduced national taxes, generally in the form of indirect taxes. In an effort to systematise the issue, the OECD presented two reports in 2020 .[1]

The Pillar 1 report[2] , after presenting the three possible methods of taxing the digital economy, based on user participation, intangible marketing assets or significant economic presence, proposes a new connecting factor applicable to activities aimed at consumers and using digital technology. This factor would replace the permanent establishment factor and would be broken down into three phases. An amount A would be the portion of the presumed residual profit remaining after attribution of a presumed routine profit to activities

[1] Statement on a Two-Pillar solution to Address the Tax Challenges arising from the Digitalization of the Economy, 1 July 2021, OECD, Paris, 2021; Déclaration sur une solution reposant sur deux piliers pour résoudre les défis fiscaux soulevés par la numérisation de l'économie, 8 octobre 2021, OCDE, Paris, 2021.

[2] OECD-G20, Base Erosion and Profit Shifting Project-Tax Challenges Arising from Digitalization-Report on the Pillar one, Blueprint, Inclusive Framework on BEPS, OECD Publishing, Paris, 2020.

located in a country. This profit would be divided between the market jurisdictions on the basis of a formula taking sales into account.

An amount B would be allocated to activities developed in the market jurisdiction in accordance with existing rules (permanent establishments, transfer pricing) with the possible use of a fixed remuneration.

A C amount would recognise specific activities in market jurisdictions beyond those qualifying for a B amount.

A draft multilateral convention has been prepared to allow participating States to tax a portion of the residual profits of multinational enterprises (Pillar I amount A).

Pillar II[3] or the GloBe proposal ("Global anti-base Erosion Proposal") generally targets the transfer by multinational companies of their profits to low-tax jurisdictions by adopting four rules:

- an income inclusion rule requires taxation of a foreign establishment or controlled foreign company in the country of the

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[3] OECD-G20, Base Erosion and Profit Shifting Project-Tax Challenges Arising from Digitalization-Report on the Pillar two, Blueprint, Inclusive Framework on BEPS, OECD Publishing, Paris, 2020.

controlling company if the income is subject to tax at less than a minimum rate;

- a rule relating to under-taxed payments disallows their deduction or imposes taxation at source where the payment to a related party is subject to tax that is again below a minimum rate ;

- a "switch-over" rule would be introduced into the treaties, providing for the substitution of the credit method for the exemption method if the profits of a permanent establishment or real estate are subject to tax at a rate lower than a minimum rate;

- finally, a tax liability rule would subject a payment to taxation at source or deny the applicability of the benefits of a treaty where the payment is not subject to a minimum rate.

There have been discussions about setting this rate. The OECD has agreed on a rate of 15% and has published various documents .[4]

[4] Cfr. also Tax Challenges Arising from Digitalization, Global Anti-Base Erosion Model Rules (Pillar Two). Inclusive Framework on BEPS, OECD, Paris, 2021; Tax Challenges Arising from Digitalization, Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two). Inclusive Framework on BEPS, OECD, Paris, 2022 ; Manual for the Implementation of the Minimum Tax (Pillar Two), Inclusive Framework on BEPS, OECD, 2023 ; Tax Challenges Arising from the Digitalization of the Economy, Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), OECD/G20 Inclusive Framework on BEPS, OECD, Paris, 2023 ; Global Anti-Base Erosion Model Rules (Pillar Two), Frequently Asked Questions, OECD, Paris, July 2023; Tax Challenges Arising from Digitalization, Global Anti-Base Erosion Model Rules (Pillar Two). Examples. Inclusive Framework on BEPS, OECD, Paris, 2024 Outcome Statement on the Two-Pillar Solutions to Address the Tax Challenges Arising from the Digitalization of the Economy, 11 July 2023, OECD, Paris, 2023.

The inclusive OECD/G20 BEPS framework prepared in September 2023 a multilateral instrument facilitating the implementation of the Pillar Two tax liability rule (TLR), which would allow developing countries to tax certain intra-group payments subject to a tax rate below 9%.

The implementation of Pillar II requires coordination with the rules applicable to Controlled Foreign Corporations (CFCs), which originated in the 1962 US Revenue Act, the brainchild of Professor Stanley S. Surrey, then President Kennedy's Under Secretary of the Treasury. Surrey, then President Kennedy's Under-Secretary of the

Treasury, and has since been widely adopted throughout the world[5] , with Belgium coming on board after a long period of abstention .[6]

Below is a study by Ricardo A. Galendí Jr. on this issue.

Jacques Malherbe

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[5] B.J. Arnold, The Taxation of Controlled Foreign Corporations: An International Comparison, Toronto, The Canadian Tax Foundation, 1986; Int'l Fiscal Assn, 2001 San Francisco Congress, Cah. dr. fisc. internat, vol. 86 b, Limits on the use of low-tax regimes by multinational businesses: current measures and emerging trends: General Report by B.J. Arnold and P. Dibout; National Reports; M. Lang, H.-S; Aigner, V. Scheuerle and M. Stefiner, CFC Legislation, Domestic Provisions, Tax Treaties and EC Law, Vienna, Linde Verlag, 2004; General Report and National Reports; J.M. Almudi Cid, El regimen jurídico de transparencia fiscal internacional, Madrid, Instituto de Estudios Fiscales, 2005; R. Fontana, The Uncertain Future of CFC Regimes in the Member States of the European Union, European Taxation, 2006, pp. 259 to 317; International Fiscal Association, 2007 Kyoto Congress, Cah. dr. fisc. internat, vol. 92 b, Conflicts in the attribution of income to a person: General Report by Joanna C. Wheeler, National Reports; J. Malherbe, S. de Monès, P.H. Durand et al, Controlled Foreign Corporations in the EU after *Cadbury-Schweppes*, 36 Tax Management International Journal 12, 2007, 607.

[6] Law of 25 December 20174 reforming corporation tax, art. 20, replaced by art. 24 of the Law of 30 July 2018.