Kluwer International Tax Blog

The Contents of Intertax, Volume 50, Issue 12, 2022

Ana Paula Dourado (General Editor of Intertax) · Thursday, December 8th, 2022

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

Joachim Englisch, GloBE Rules and Tax Competition

This article studies foreseeable effects that a relatively comprehensive implementation of the Pillar 2 GloBE international effective minimum tax would have on international tax competition for investment. The discussion focuses on the perspective of countries that seek to attract foreign direct investment through their tax system. The article shows that there was disagreement within the G20/OECD Inclusive Framework (IF) about the objective to curb international tax competition through a minimum tax. The reservations of some member countries have manifested themselves in the compromise design of the internationally agreed GloBE regime: With the carve-out for substance-based routine profits (the so-called SBIE), the IF abandoned the idea of setting a general floor for business tax competition at the agreed minimum rate. Instead, the SBIE establishes an effective 15 % floor only for the taxation of excess profits. Due to the additional possibility for source countries to collect any eventual minimum tax themselves through a qualified domestic minimum top-up tax (QDMTT), tax competition could theoretically continue unabated above this floor, implying the successive substitution of traditional business taxation with a domestic minimum tax mimicking the international GloBE top-up tax. Taking into account fiscal, legal, and political constraints, however, such an extreme scenario is unlikely to materialize. A broad GloBE implementation should therefore reduce incentives to use effective tax rate below 15 % (on overall profit) in order to attract high-margin investment. This notwithstanding, certain features of the GloBE Model Rules imply that some forms of business tax competition will continue as before or even gain in relative attractiveness. Due to its – albeit moderate – mitigating effects on business tax competition, GloBE might moreover lead to intensified competition for investment through other channels.

Mindy Herzfeld, Do GILTI + BEAT + BMT = GloBE?

The enactment by the United States in August 2022 of a minimum tax on the global book earnings of large corporations (the book minimum tax, or BMT) raises the question of how the US minimum taxes – including the global intangible low-taxed income (GILTI), the base erosion and anti-abuse tax (the BEAT) and the BMT – interact with the global minimum tax, or GloBE, agreed to by over 135 countries under an OECD framework. Particularly important are questions regarding the hierarchy in application of different regimes. In the context of multiple agreements

for global minimum taxes, how to determine who gets priority of taxing rights? To answer these types of questions it's helpful to parse the technical differences between the different minimum taxes outlined in the GloBE model rules and the US GILTI, BEAT, and BMT. The GloBE model rules fail to provide clear guidance as to whether or not either GILTI or the BMT will provide the United States with the first right to tax the earnings of US companies' foreign subsidiaries and whether enactment of the BMT will shield US companies from having other countries impose additional taxes on their domestic earnings. But there are good reasons to conclude that taken as a whole, the panoply of minimum taxes enacted by the United States are at least equivalent to the regime for taxing multinationals' global earnings proposed by the OECD.

Suranjali Tandon, Assessing the Impact of Pillar Two on Developing Countries

The PillarTwo reform is designed to end the four decade long race to the bottomthat persisted despite theminimumstandards and best practices promoted by the Base Erosion and Profit Shifting (BEPS) Program. However, in the process of mending the inadequate international tax system, the Organisation for Economic Co-operation and Development (OECD) changed its agenda to addressing tax competition. With a wide objective of increasing the effective tax rates (ETRs) across jurisdictions to 15%, it disregards the constraints that it imposes on developing countries. This article demonstrates that the immediate revenue gains of developing countries remain limited, and the tax will restrict the ability to offer tax incentives and will undermine the sovereignty of states in its application to some extent.

Luc De Broe, Some EU and Tax Treaty Law Considerations on the Draft EU Directive on Global Minimum Taxation for Multinationals in the Union

In this article the author examines whether the draft EU Directive on Global Minimum Taxation for Multinationals complies with primary Union and whether the GloBE Model rules comply with the commitments undertaken by jurisdictions under their bilateral tax treaties that follow the OECD Model. Suggestions are also made on how the prevention and resolution of disputes under the GloBE Model rules can be improved.

Dieter Bettens, The DEBRA Directive and Its Interplay with Pillar 2

The Debt-Equity Bias Reduction Allowance (DEBRA) directive seeks to reduce the distortionary bias towards debt on the part of companies seeking investment. Two measures are introduced to achieve this, i.e., the deduction of a deemed interest expense on capital (DEBRA) and the further restriction of the deductibility of actual interest expense. The former seeks to promote the attractiveness of equity investments while the latter endeavours to reduce the attractiveness of debt investments. While these measures initially appear to be appropriate, another legislative initiative known as the Pillar 2 directive might undermine its effectiveness. Indeed, this directive attempts to impose a minimum tax rate of 15% on large entities' profits wherever they operate. While uncommon, the DEBRA might reduce the effective tax rate (ETR) below 15% thereby effectuating the minimum tax. The limited deductibility of interest expense might do the opposite and increase the ETR above 15% thereby preventing such minimum tax. Thus, where the DEBRA directive provides a benefit, the Pillar 2 directive might eliminate it and, where the DEBRA directive introduces a disadvantage, the Pillar 2 directive may neutralize it.

Filip Debelva & Luc De Broe, Pillar 2: An Analysis of the IIR and UTPR from an International Customary Law, Tax Treaty Law and European Union Law Perspective

This article discusses potential jurisdictional conflicts between the Pillar 2 rules and international customary law, taking into account potential frictions with tax treaty law and European Union law. In addition, the authors assess whether the Pillar 2 rules can be justified in the same way as controlled foreign company (CFC) rules, thereby referring to the principle of personality. Part three of the article evaluates how conflicts between the Pillar 2 rules and international law are to be resolved. The authors conclude by providing potential solutions to resolve jurisdictional conflicts.

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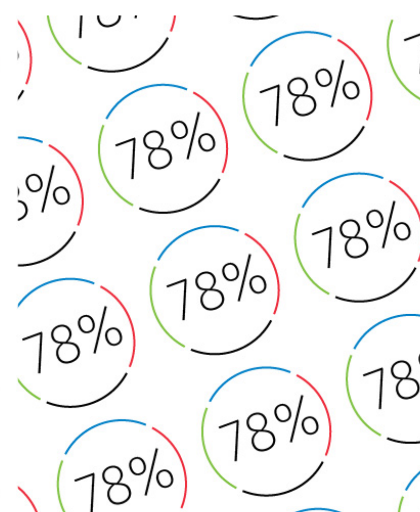

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