AmCham EU

SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Gerassimos Thomas
Director-General
Directorate-General for Taxation and Customs Union
Rue Joseph II 79, 1000 Bruxelles
Belgium

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Dear Mr Thomas,

The American Chamber of Commerce to the European Union (AmCham EU) commends the EU's commitment in finding an international agreement with over 130 countries to reform the global corporate tax framework and address countries' concerns regarding broad tax challenges arising from the digitalisation of the global economy.

We very much welcome the opportunity to provide feedback to the European Commission on its minimum tax proposal. AmCham EU believes the Pillar II implementing directive should be fully aligned with the international agreement and consistently applied across the EU. Moreover, we believe it is very important for business to be involved in designing the implementing structure of these rules in order to ensure that complexity in the rules is reduced wherever possible to help both administration by tax authorities and compliance by taxpayers. In addition, we believe sufficient time should be allowed to ensure a globally consistent implementation to avoid any discrepancies between the OECD operating rules and the directive, especially considering that the OECD Commentary and implementation framework were originally set for publication in February and public consultation on the latter is expected in March.

Specifically, we would like to raise to your attention the following considerations relating to the timing of both adoption and implementation of the directive:

- The successful implementation of both Pillars requires all members of the OECD Inclusive Framework to implement the rules and to do so at the same time in a consistent manner under a common approach. A "fast-tracked" adoption of Pillar II in the EU, without regard to the progress made towards implementation by its major trading partners, risks undermining the competitiveness of EU Member States and businesses operating in the EU, as trading partners could adopt a different interpretation of the rules. This is particularly true at a time when its crucial for the EU to attract business and investment to drive the recovery from the COVID19 pandemic.
- A unilateral or early adoption of these rules in the EU, would result in businesses being subject to tax in different jurisdictions on the same income (i.e giving rise to double or multiple taxation) and result in significant legal uncertainty as to how to treat such situations. In addition, it is unclear whether transitional measures will apply if the EU implements the Pillar II model rules earlier than countries who have committed to implement them but at a later date.
- The OECD Inclusive Framework reached political agreement on Pillars 1 & 2 as a package. It is unclear how interdependencies with Pillar 1 will be managed if the EU proceeds with the implementation of Pillar 2 first.
- Since the publication by the OECD of the model rules in December, a number of policy and technical matters have been highlighted in which further clarity or amendment is necessary. One such example is that top-up tax could arise even for a loss-making entity. As the model rules and associated commentary agreed at the OECD level evolve over the coming months, early adoption of the EU directive will lead to a divergence from the global framework, increasing double taxation risks and compliance costs. It is anticipated there will be a 'legal mechanism' at EU level, ensuring additional clarifications and commentary released by the OECD will 'automatically' be considered in the Draft EU Pillar II Implementing directive. It is however unclear how this mechanism will work in practice and we would welcome further clarification on this point.
- The Pillar II rules represent a significant change in the tax and financial reporting IT systems of companies. Tax authorities and businesses will need to design and implement new systems and processes to comply.

These changes will need to be in place shortly after the commencement date as businesses will need to reflect the impact of the new rules in their quarterly financial reports. Such system changes are costly to implement and take significant time to put in place. With a proposed effective date of January 2023, before which the directive must be finalised and transposed into national legislation, we are concerned that many tax authorities and businesses will not be sufficiently prepared, risking a successful implementation. This is especially so as there are many uncertainties yet to be clarified in the rules, and without those clarifications, it is not possible to commence work on designing the necessary modifications to business IT systems.

In addition, we have the following comments relating to additional aspects of the draft directive, its application to third countries and the administrative burden it will impose:

- US companies are already subject to a global minimum tax (the Global Intangible low taxed income tax ("GILTI")). The GILTI provisions are onerous and ensure US companies pay a minimum level of tax on their foreign earnings. Whilst noting Article 51 of the draft directive, which includes provisions to assess whether a regime is an equivalent Income Inclusion Rule, we would urge that GILTI is deemed equivalent. If the current GILTI regime is not deemed an equivalent IIR, then not only will US businesses be subject to double tax, so will many EU based businesses that hold their investments through US holding companies. In any event, the Qualified Minimum Domestic Top-up Tax and the undertaxed payment rule should not be applied to companies subject to GILTI as a minimum level of tax will have already been applied.
- The original purpose of the Undertaxed Payment Rule was to act as a backstop to the IIR. We are concerned that the scope of this rule has been expanded in the EU minimum tax proposal to apply to domestic income arising in other jurisdictions which may have an ETR below 15% simply as a result of domestic incentive regimes.
- Further detailed consideration is needed of how the qualified domestic top-up tax that Member States are allowed to implement under the draft EU Pillar 2 implementing Directive would work in practice and how this is recognized by parent jurisdictions. It is also unclear how the qualified domestic top-up tax applied in a Member State will interact with a 'qualified refundable tax credit' granted by the parent jurisdiction (e.g. tax credits for R&D investments), and whether such credits will lead to an increase of the qualified domestic top-up tax applied by that Member State.
- Member States sovereignty should be respected so that they remain free to adopt fiscal and other incentives as they deem appropriate given their economic circumstances (e.g., incentives to support the EU's green agenda, R&D and job creation).
- The draft directive and model rules are extremely complex. It will be time-consuming and expensive for tax authorities to administer and businesses to comply. Administrative simplifications for example safe-harbors should be considered and where possible adopted to reduce the compliance burden.
- As a result of implementing the directive, all companies within scope will pay a minimum level of tax in each jurisdiction. As such, it appears that a number of existing anti-avoidance measures will no longer be necessary to protect the tax base. To reduce the administrative burden for tax authorities and business, a review should be undertaken and superfluous legislation removed or disapplied for those companies within the scope of the directive.

We remain at your disposal to discuss this further in the context of the feedback process and beyond.

Yours sincerely,

Will Morris

Will Morris
Chair
Tax Committee