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# Washington Dispatch

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## Treaty news

### United States, Croatia sign income tax treaty

The US and Croatia on 7 December 2022 signed the first-ever income tax treaty and protocol between the two countries. The treaty is the first treaty based on the revised US Model Treaty released in 2016 ([2016 Model](#)). The 2016 Model updated the 2006 US Model Treaty and introduces several new provisions, including a number of anti-abuse rules.

The most significant provisions of the proposed treaty include:

- ▶ Lower withholding taxes on cross-border payments of dividends (0% withholding on dividends paid to certain pension funds), interest and royalties
- ▶ Denial of treaty benefits for:
  - Certain income of a beneficial owner that is a connected person and benefits from a special tax regime (STR)
  - Interest beneficially owned by a connected person that benefits from a notional interest deduction on amounts that are treated as equity in the person's residence state
  - Certain dividends and deductible payments made by a US corporation treated as an expatriated entity during the 10 years following the completion of an inversion transaction
- ▶ A comprehensive limitation on benefits (LOB) article, which includes a "derivative benefits" test, "headquarter company" test, a base erosion prong to the "subsidiary of a publicly traded company" test, and a revised "active trade or business test"
- ▶ Termination of certain treaty benefits if subsequent changes in domestic laws affect applicable tax rates
- ▶ Mandatory binding arbitration for the resolution of certain treaty disputes
- ▶ Coordination of the treaty with the US base erosion and anti-abuse tax (BEAT) under Section 59A

### Congressional Republicans voice concerns over BEPS 2.0 Pillar Two undertaxed profits rule

In a 14 December 2022 [letter](#) to Treasury Secretary Janet Yellen, all Republican members of the Senate Finance Committee and House Ways and Means Committee as well as the ranking member of the Senate Foreign Relations Committee addressed the BEPS 2.0 Pillar Two undertaxed profits rule (UTPR): "Despite the United States being the only country to implement a global minimum tax, this Administration has agreed to allow foreign countries to impose additional tax on U.S. companies' U.S. profits under the UTPR."

The letter goes on to say that the Biden Administration "has routinely made commitments in the OECD negotiations it has no authority to fulfill. ... The Administration cannot continue to ignore the fundamental problems with the [BEPS] Pillar Two Agreement. ... While the Administration may treat these Rules as final, we do not."

The accompanying protocol defines the term "pension funds" for United States and Croatia. In addition, it considers a specified voluntary pension insurance scheme in Croatia to be a resident for purposes of Article 4. The Protocol also describes how to determine the rate of taxation for STRs.

Finally, the protocol enables Croatia to request a consultation on possible amendments to the treaty if it enacts regimes similar to BEAT (Section 59A) or those for expatriated entities (Section 7874), US RICs or US REITs.

Once ratified, the treaty's withholding provisions will take effect for amounts paid or credited on or after the first day of the second month following the date on which the treaty enters into force. For all other taxes, the provisions will take effect for tax periods beginning on or after the first day of January following the date on which the treaty enters into force.

### Congress passes omnibus spending bill; tax measures (other than the SECURE 2.0 retirement changes) left out

The US Congress passed a \$1.7 trillion omnibus spending bill right before the holidays; President Biden signed the 4,155 page bill into law on 29 December 2022. After a protracted negotiation, the final bill did not include business tax provisions such as modifications to Section 163(j) or relief from the Section 174 R&D amortization requirement - both of the *Tax Cuts and Jobs Act* cliffs that took hold this year - nor tax extenders or an expanded Child Tax Credit.

The exchange of information under Article 26 will take effect on the date on which the treaty enters into force, irrespective of the tax year to which the matter relates.

It is unclear how long the hearing and ratification process will take; other outstanding US tax treaties with Chile and Poland are pending ratification in the Senate.

It remains to be seen whether the US Treasury Department will take a similar approach, and follow the 2016 Model, in ongoing treaty-modernization negotiations with Switzerland and Israel or other US tax treaties currently in force.

## Treasury and IRS news

### IRS issues interim guidance on application of new corporate alternative minimum tax

The IRS in late December 2022 issued eagerly anticipated interim guidance ([Notice 2023-7](#)) addressing the application of the corporate alternative minimum tax (CAMT), enacted under the *Inflation Reduction Act of 2022*.

Notice 2023-7 describes rules that the IRS intends to include in proposed regulations pertaining to: certain issues regarding IRC subchapters C and K; “troubled corporations”; groups of corporations that file consolidated returns; depreciation of Section 168 property; and the treatment of certain federal income tax credits under the CAMT. Taxpayers may rely on the interim guidance pending the release of proposed regulations.

Additionally, Notice 2023-7 provides a simplified method for determining whether an entity constitutes an “applicable corporation” and notes that further interim guidance may be forthcoming and may be oriented toward particular industries encountering unintended adverse consequences under the CAMT.

The IRS invites written comments on any (i) questions arising from Notice 2023-7; and (ii) issues that should be addressed in future guidance, including which guidance “is needed most quickly.” Interested parties should submit written comments to the IRS electronically within 60 days from the date Notice 2023-7 is published in the Federal Register.

### IRS releases guidance on new stock buyback excise tax

The IRS issued interim guidance ([Notice 2023-2](#)) in late December 2022 that addresses the 1% excise tax on certain corporate stock repurchases under new Section 4501. While the excise tax under the statute applies primarily to repurchases by publicly-traded domestic corporations and foreign corporations that inverted on or after 20 September 2021, the Notice includes a broad (and unexpected) anti-abuse rule that could subject certain repurchases made by any publicly-traded foreign corporation to the excise tax if the repurchase was “funded” by a domestic affiliate. Affected foreign corporations should consider the application of this rule to their cash pooling and other intercompany funding arrangements.

The excise tax applies to repurchases after 31 December 2022. Notice 2023-2 provides interim guidance until proposed regulations are issued. On 28 December, the IRS published [Draft Form 7208, Excise Tax on Repurchase of Corporate Stock](#), which when finalized will be used to report stock repurchases for calculating the 1% stock buyback excise tax.

Taken together, Notice 2023-2 and draft Form 7208 will affect many, if not most, covered corporations, including those that do not have ongoing stock repurchase programs.

### IRS issues final revised qualified intermediary agreements effective beginning in 2023

The IRS released [Revenue Procedure 2022-43](#) on 13 December 2022, setting forth a final, revised qualified intermediary (QI) agreement that will apply for QI agreements entering into effect on or after 1 January 2023. The QI agreement established under Revenue Procedure 2017-15 (2017 QI agreement) expired on 31 December 2022. The 2023 QI Agreement adopts many of the proposed changes in Notice 2022-23.

The new qualified intermediary agreement expands the scope of a QI agreement to allow QIs to assume withholding and reporting responsibilities for purposes of Section 1446(a) and (f).

The new QI agreement updates requirements for qualified derivatives dealers and qualified securities lenders for payments of dividend equivalents under Section 871(m). It also incorporates prior guidance from IRS FAQS, compliance and certification changes, stakeholder input and changes to the 2017 QI agreement.

## IRS releases additional guidance for brokers on transfers of interests in publicly traded partnerships

The IRS in December 2022 issued [Notice 2023-8](#) providing additional guidance on the final regulations under Section 1446(f) for withholding on dispositions of interests in publicly traded partnerships (PTPs). The Notice addresses (i) withholding requirements for non-US PTPs; (ii) reliance on late documentation; and (iii) when the short-sale exception applies. The Notice does not delay the effective date of withholding, which remains 1 January 2023.

The Notice allows a broker to presume that a foreign-traded entity is not a PTP unless the broker has actual knowledge otherwise. If the broker knows a foreign-traded entity is a PTP, however, the broker must withhold under Section 1446(f) on the disposition of a PTP interest unless the PTP issues a qualified notice that a withholding exception applies.

The IRS indicated that it intends to issue proposed regulations that would amend the final regulations to implement the guidance in the Notice.

The notice applies to PTP sales and distributions made on or after 1 January 2023. Brokers (including qualified intermediaries) may rely on the Notice until the proposed regulations are issued.

## IRS issues proposed rules on single-entity treatment of consolidated groups

The IRS on 9 December 2022 issued proposed regulations on the single-entity treatment of consolidated groups for specific purposes. The proposed regulations ([REG-113839-22](#)) would treat members of a consolidated group as a single US shareholder in certain situations for purposes of Section 951(a)(2)(B).

The proposed rules would affect consolidated groups that own stock in foreign corporations. A Treasury official was quoted as saying the goal is to finalize the proposed regulations before 15 April 2023.

## FinCEN continues to extend certain signature authority reporting (FBAR, Form 114)

The Finance Crimes Enforcement Network (FinCEN) on 9 December released [Notice 2022-1](#), further extending the filing deadline for certain individuals who previously qualified for an extension of time to file the Report of Foreign Bank and Financial Accounts (FBAR) regarding signature authority under Notice 2021-1 and previous guidance.

## FinCEN releases proposed rules on beneficial ownership

FinCEN on 15 December 2022 released [proposed regulations](#) on beneficial ownership. The proposed rules would "implement the strict protocols on security and confidentiality required by the CTA [Corporate Transparency Act] to protect sensitive personally identifiable information reported to FinCEN."

The Notice pertains only to individuals who were initially granted extensions of time to report signature authority under FinCEN Notices 2011-1 and 2011-2 (most recently extended by FinCEN Notice 2021-1). Under the Notice, individuals have until 15 April 2024, to file deferred FBARs, subject to any potential further extension. Any persons not covered by the Notice for 2022 will have until 17 April 2023 – automatically extended six months to 16 October 2023 – to file their FBARs for the 2022 calendar year.

In no case is an extension (beyond the automatic six-month extension) available for financial interest filing obligations.

Organizations that assist their officers, employees and agents with their personal FBAR responsibilities as related to the entities' accounts may consider whether to defer the 2022 filing in hopes that FinCEN issues new regulations containing the signature authority exemption. If the regulations, however, are finalized before the 2023 deadline, it is possible they could only apply to 2023 reports due in 2024.

## OECD developments

### OECD releases public consultation document on Pillar One Amount A and Digital Services Taxes

The OECD Secretariat on 20 December 2022 released a [consultation document](#) on the Multilateral Convention (MLC) provisions on Digital Services Taxes (DSTs) and other relevant similar measures in connection with Amount A of Pillar One of the ongoing OECD/G20 BEPS 2.0 project.

The consultation document contains draft MLC provisions implementing the commitments with respect to DSTs and other relevant similar measures, including: (i) an obligation to withdraw the measures listed in an Annex to the MLC and stop applying them to any company; (ii) a definition of the measures that the parties to the MLC will commit not to enact in the future; and (iii) a mechanism that will eliminate Amount A allocations if this commitment is breached.

The consultation document is intended to illustrate the structure and operation of the provisions on the standstill and withdrawal commitment for DSTs and other relevant similar measures. It does not reflect the final views of the Inclusive Framework regarding the substance of the document.

The consultation document has been released by the OECD Secretariat to obtain input from stakeholders to assist the Inclusive Framework in further refining and finalizing the relevant provisions. Written comments are requested by 20 January 2023.

### **OECD releases consultation document on tax certainty for the Pillar Two GloBE rules**

The OECD on 20 December 2022 released a consultation document on [Tax Certainty for the GloBE Rules](#), in connection with the ongoing OECD/G20 BEPS 2.0 project. The document seeks input from stakeholders to inform the OECD/G20 Inclusive Framework's ongoing work on tax certainty for the Global Anti-base Erosion (GloBE) Rules.

As the GloBE rules are to be introduced by jurisdictions through domestic law, scenarios may arise where there are differences in interpretation or application of the GloBE Rules between two or more jurisdictions. The Inclusive Framework has begun work on possible mechanisms to ensure tax certainty under the GloBE Rules, which can be divided into two groups: (i) dispute prevention mechanisms and (ii) dispute resolution mechanisms.

With respect to dispute prevention mechanisms, the options discussed are:

- ▶ Relying on the Model Rules, Commentary and Administrative Guidance to be agreed by the Inclusive Framework and released in the future, such as a multilateral review process with respect to the qualified status of the rules implemented by jurisdictions and the possibility of referring issues to the Inclusive Framework for clarification
- ▶ Use of common risk assessment and coordinated compliance processes
- ▶ Use of binding certainty mechanisms such as Advance Pricing Arrangements (APAs)

With respect to dispute resolution mechanisms, the options discussed are:

- ▶ Developing a multilateral convention
- ▶ Relying on competent authority agreements under the Convention on Mutual Administrative Assistance in Tax Matters
- ▶ Relying on existing tax treaties
- ▶ Creating a dispute resolution provision in domestic law

The Consultation Document includes specific questions seeking further input from stakeholders, including input on other options that could be explored to achieve tax certainty for the GloBE Rules. Written comments should be submitted by 3 February 2023.

### **OECD releases consultation document on Pillar Two GloBE Information Return**

The OECD Secretariat on 20 December 2022 released a [consultation document](#) on the Pillar Two GloBE Information Return as part of the ongoing work of the OECD/G20 Inclusive Framework on addressing the tax challenges arising from the BEPS 2.0 project. The development of a standardized *GloBE information return* is aimed at facilitating compliance with and administration of the GloBE rules.

The consultation document provides information on the development of a standardized *GloBE information return* and includes Annexes setting out identified data points that multinational enterprises are expected to need for Pillar Two compliance (including the calculation of their GloBE tax liability) as well as accompanying explanatory guidance.

### **OECD/G20 Inclusive Framework releases document on safe harbors and penalty relief under Pillar Two GloBE rules**

The OECD on 20 December 2022 released guidance on safe harbors and penalty relief under the BEPS 2.0 Pillar Two Global Anti-Base Erosion (GloBE) rules (the [document](#)), as approved by the OECD /G20 Inclusive Framework. This guidance follows an earlier public consultation on the GloBE Implementation Framework where stakeholders raised concerns about the complexity of the GloBE rules and called for safe harbors and simplifications.

The document includes the agreed terms of a transitional country-by-country reporting (CbCR) safe harbor that effectively removes the need to calculate the GloBE effective tax rate based on the GloBE rules for a multinational enterprise's (MNE) operations in certain lower-risk jurisdictions in the initial years. It also includes the framework for the development of permanent safe harbors based on simplified income and tax calculations.

Finally, it includes a common understanding among the Inclusive Framework member jurisdictions as to a transitional penalty relief regime for the initial years of application of the GloBE rules, which requires that jurisdictions give careful consideration as to the appropriateness of applying penalties or sanctions where an MNE has taken reasonable measures to ensure the correct application of the GloBE rules.

The document notes that the Inclusive Framework will continue to explore whether other safe harbors and simplifications can be developed at a future time, highlighting in particular the ongoing work on a qualified domestic minimum top-up tax (QDMTT) safe harbor that would provide compliance simplifications for MNEs operating in jurisdictions that have adopted a QDMTT.

### **OECD releases public consultation document on Amount B of Pillar One on baseline marketing and distribution functions**

The OECD Secretariat on 8 December 2022 released a [consultation document](#) on Amount B of Pillar One in connection with the ongoing OECD/G20 BEPS 2.0 project. Amount B is aimed at simplifying and streamlining the transfer pricing of in-country baseline marketing and distribution activities, while ensuring outputs consistent with the arm's-length principle.

It is important to note that there is no threshold proposed for multinational enterprises (MNEs) to be within scope of Amount B; this is in contrast to both Amount A of Pillar One and the global minimum tax rules under Pillar Two, where specified thresholds would apply for determining whether an MNE is within scope.

This consultation document outlines the main design elements of Amount B, addressing the following topics:

- ▶ Amount B mandate and goals
- ▶ Scope of Amount B
- ▶ Amount B pricing methodology
- ▶ Amount B documentation requirements including transitional issues
- ▶ Tax certainty with respect to Amount B

The consultation document is described as presenting work undertaken to date, which is viewed as having reached sufficient level of detail and stability that public comments would be appropriate and helpful, but it does not reflect the final views of the Inclusive Framework member jurisdictions.

The OECD Secretariat hosted a webinar on 8 December 2022, summarizing key points of the consultation document, topics still under discussion in the Inclusive Framework and specific areas for which comments are sought. During the webinar, the Secretariat indicated that the intention is for Amount B to be implemented effective in 2024.

### **EU Member States unanimously adopt Directive implementing Pillar Two Global Minimum Tax rules**

On 15 December 2022, the Council of the EU (i.e., the EU Member States) unanimously [adopted](#) the Directive ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.

The text in the adopted Directive is the [version](#) that was published by the Czech EU Presidency on 25 November 2022. The adopted version includes only editorial changes following a legal-linguistic review by EU institutions, as compared to the previous compromise text of 21 June 2022.

EU Member States have until 31 December 2023 to transpose the Directive into national legislation with the rules to be applicable for fiscal years starting on or after 31 December 2023, with the exception of the undertaxed profits rule which is to be applicable for fiscal years starting on or after 31 December 2024.

## OECD's 2021 MAP statistics show US continues to decrease case inventory

Newly-released [statistics](#) from the OECD on MAP show that the US mutual agreement procedure (MAP) program's inventory decreased in 2021. In addition, the US MAP program closed more cases (that were started on or after 1 January 2016) than it opened in 2021.

The 2021 statistics were released on 22 November 2022, at the OECD's fourth Tax Certainty Day. During the event, the OECD also released the [2021 MAP awards](#).

Along with the US statistics, the 2021 statistics include information from other members of the OECD/G20 Inclusive Framework on BEPS that joined the Inclusive Framework before 2022 and submitted their MAP statistics. The 2021 data covers almost all MAP cases worldwide. Separate statistics are provided for transfer pricing cases and "other" cases (i.e., non-transfer pricing cases) for 2021.

The 2021 MAP statistics also include the number of MAP cases that each jurisdiction has with each of its treaty partners. Moreover, each reporting jurisdiction's performance against key indicators for each type of case can be compared through an [interactive tool](#). The MAP statistics demonstrate that the MAP found in most double tax treaties remains an effective way to eliminate double taxation and taxation not in accordance with a treaty.

## OECD releases corporate tax statistics and the 2022 revenue statistics and consumption tax trends

The OECD on 17 November 2022 released the fourth edition of its annual Corporate Tax Statistics publication (the [Corporate Tax report](#)) together with an updated [database](#). The OECD describes the database as intended to assist in the study of corporate tax policy and expand the quality and range of data available for the analysis of base erosion and profit shifting activity.

The database includes anonymized and aggregated country-by-country (CbC) reporting statistics, reflecting information for the year 2018 and including information from CbC reports filed in 47 jurisdictions, together with a list of [Frequently Asked Questions](#) on the anonymized and aggregated CbC reporting data. The database also includes information on 60 intellectual property regimes in 45 jurisdictions and withholding tax rate statistics for 112 jurisdictions, including withholding tax rates on dividends, interest and royalty payments that are applicable as of the 2022 fiscal year.

On 30 November 2022, the OECD released its [2022 Revenue Statistics](#) report, showing that tax-to-GDP ratios increased in 24 of the 36 OECD countries for which 2021 data on tax revenues was available, declined in 11 and remained unchanged in one country. On the same date, the OECD also released its [2022 Consumption Tax Trends report](#), showing that consumption tax revenues have slightly decreased overall in 2020 to 9.9% of GDP in OECD countries on average, although consumption tax-to-GDP ratios increased in nine countries and one country saw no change in this ratio.

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