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Client Alert

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International: The arrival of Pillar Two moves ever closer with latest OECD publications

In brief

On 17 July 2023, the OECD/G20 Inclusive Framework on BEPS released a package of documents as part of its continuing effort to implement the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy. On Pillar Two, this included further Administrative Guidance (including two new safe harbours) and the GLoBE Information Return, together with a report on the Subject to Tax Rule including a model treaty provision and accompanying commentary. We set out below our experts' insights on the publications.

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Key takeaways

In more detail

Key takeaways

a. Following the publication of the first set of Administrative Guidance on 2 February 2023 ("**February Guidance**"), the OECD/G20 Inclusive Framework on BEPS ("**IF**") has published a second set of Administrative Guidance on 17 July 2023 ("**Admin Guidance**"). The Admin Guidance provides guidance on: currency conversion rules when performing the GloBE calculation; tax credits; the application of the Substance-Based Income Exclusion ("**SBIE**"); and the Qualified Domestic Minimum Top-Up Tax ("**QDMTT**"). In addition, the Admin Guidance introduces two new safe harbours: (i) a permanent safe harbour for jurisdictions that introduce a QDMTT ("**QDMTT Safe Harbour**"); and (ii) a transitional safe harbour, which provides the ultimate parent entity ("**UPE**") jurisdiction with a statutory tax rate of at least 20% with relief from the application of the undertaxed profits rule ("**UTPR**") for fiscal years which run no longer than 12 months that begin on or before 31 December 2025 and end before 31 December 2026 ("**Transitional Safe Harbour"**). The Transitional Safe Harbour seems to be aimed at US Multinational Groups. The new safe harbours are a welcome addition as MNE groups continue to navigate the implications of Pillar Two as the rules are implemented worldwide.

b. The IF has also published a standardized GloBE Information Return ("**GIR**"). The GIR adds flesh to the bones of the GIR outlined in Article 8 of the Pillar Two GloBE Model Rules ("**GloBE Rules**") and is intended to provide a standard template for MNE groups to file information on their GloBE tax liability calculations with tax authorities.

c. Finally, the IF released a package containing the Subject to Tax Rule ("**STTR**") model treaty provision with an accompanying commentary. IF members can choose whether to implement the STTR either by signing a multilateral convention (which is due to be opened for signature on 2 October 2023) or by bilaterally amending their treaties and including the STTR when requested by developing IF members.

In more detail

Administrative Guidance

- Following the publication of the February Guidance (see our previous client alert here), the IF published the Admin Guidance on 17 July 2023. The Admin Guidance provides guidance on: currency conversion rules when performing the GloBE calculation; tax credits; the application of the SBIE; and the QDMTT. In addition, the Admin Guidance introduces two new safe harbours: (i) the QDMTT Safe Harbour; and (ii) the Transitional Safe Harbour. We set out further details on each aspect of the guidance below.

Transitional UTPR Safe Harbour

- Although the Admin Guidance provides further clarifications on the GloBE Rules, the biggest news in the Admin Guidance is the introduction of the Transitional UTPR Safe Harbour.
- The UTPR functions as a backstop to the IIR. Applying the UTPR to the UPE Jurisdiction before it is able to implement the QDMTT is undesirable. The Admin Guidance therefore introduces a Transitional UTPR Safe Harbour for UPE jurisdictions. Under the Transitional UTPR Safe Harbour, the Top-Up Tax of a UPE is deemed to be zero provided that the UPE Jurisdiction has a corporate income tax rate of at least 20% (nominal rate).
- The Transitional Period applies to fiscal years which run no longer than 12 months that begin on or before 31 December 2025 and end before 31 December 2026. Hence, the Transitional UTPR Safe Harbour intends to grant a transitional relief in the UPE Jurisdiction during the first year in which the GloBE Rules come into effect. For Constituent Entities with a calendar year, the Transitional Period will in principle be one year between 1 January 2024 and 31 December 2025.

  If an MNE group qualifies for the Transitional UTPR Safe Harbour and the Transitional CbCR Safe Harbour with respect to the UPE Jurisdiction, the MNE group can decide which safe harbour to apply. In order to avoid losing the benefit of the Transitional CbCR Safe Harbour (under the "once out always out" approach), the MNE group may choose to elect to apply the Transitional CbCR Safe Harbour instead of the Transitional UTPR Safe Harbour. This is an important consideration for an MNE Group since the CbCR Safe Harbour may, in contrary to the UTPR Safe Harbour, be applied in 2026 (for a fiscal year that is a calendar year).

QDMTT Safe Harbour

- MNE groups are required to prepare two separate Top-Up Tax calculations with respect to the same jurisdiction in case of an application of the GloBE Rules (e.g. in the UPE jurisdiction under the IIR) and the QDMTT (i.e. in the QDMTT jurisdictions). The Admin Guidance introduces a QDMTT Safe Harbour which should enable an MNE group to undertake only one Top-Up Tax computation under the QDMTT. An automatic reduction of the Top-Up Tax to zero will be granted in the jurisdiction that applies the GloBE Rules (e.g. the IIR jurisdiction). Having a QDMTT in itself does not safeguard a jurisdiction to apply the QDMTT Safe Harbour. The QDMTT Safe Harbour is only applicable if the following conditions to be met:
  - QDMTT Accounting Standard: The QDMTT computation is either based on the accounts used for preparing the Consolidated Financial Statements of the UPE or is based on the Local Financial Accounting Standard of the QDMTT jurisdiction.
  - Consistency Standard: The computations under the QDMTT should be similar as the computations under the GloBE Rules, except where the OECD IF explicitly requires the QDMTT to depart from the GloBE Rules.
  - Administration Standard: The QDMTT is administrated under the ongoing monitoring process applicable to the GloBE Rules.
- The additional conditions seem to have been introduced by the OECD IF to grant sufficient comfort to the OECD IF that QDMTTs are functionally equivalent to the GloBE Rules.

General Currency Conversion Rules for the GloBE Rules

- The Admin Guidance clarifies that the GloBE calculations should be undertaken in the presentation currency of the MNE group's consolidated financial statements. This should provide a consistent and reliable basis for the application of the GloBE calculation and ensure that the compliance burden is not increased unnecessarily for MNE groups. For consistency, the GIR should also be presented in the presentation currency of the MNE Group.
- Not all of the amounts required for GloBE purposes will be readily available in the presentation currency of the MNE group. Where amounts have not been translated to the MNE group's presentation currency, the MNE group will be required to translate these amounts in accordance with the foreign currency translation rules of the Authorised Financial Accounting Standard used to calculate the Financial Accounting Net Income or Loss.
- The GloBE calculations, including the Top-Up Tax, will first need to be performed in the MNE group's presentation currency. Local foreign currency translation rules may then be applied to translate the Top-Up Tax from the presentation currency into the local currency provided that the exchange rate is considered reasonable.
- To determine whether the GloBE thresholds have been met, the MNE group will be required to translate amounts from the MNE group's presentation currency to the currency in which the threshold is expressed locally based on the average foreign exchange

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rate of December from the previous fiscal year. This specific guidance is limited to determining whether the GloBE thresholds have been exceeded.

Tax Credits

- Where GloBE Rules do not provide for specific provisions, the starting point for applying the GloBE Rules should be the relevant accounting standard that has been used to determine the Financial Accounting Net Income or Loss for GloBE purposes. The IF concluded that neither the IFRS nor the US GAAP provide comprehensive and authoritative guidance on the accounting treatment of tax credits. Hence, the IF found it necessary to determine a uniform and mandatory treatment of tax credits under GloBE Rules.
- Thus far, under the GloBE Rules, tax credits could either be classified as Qualified Refundable Tax Credits ("**QRTC(s)**") or Non-Qualified Refundable Tax Credits ("**Non-QRTC(s)**"). A QRTC increases the GloBE income, whereas a Non-QRTC decreases the Covered Taxes in the Pillar Two Effective Tax Rate ("**ETR**") calculation. In addition to these categories of tax credits, the IF has now introduced additional categories of tax credits under the GloBE Rules, being the Marketable Transferable Tax Credits ("**MTTC(s)**"), Non-Marketable Transferable Tax Credits ("**Non-MTTC(s)**") and Other Tax Credits ("**OTC(s)**"). Essentially, QRTCs and MTTCs will be taken into account in the GloBE income or loss computation, whereas Non-QRTCs, Non-MTTCs and all OTCs will be taken into account as a reduction to the Covered Taxes.
- The qualification of the tax credit depends primarily on the refundability criteria and secondarily on the transferability criteria. Thus, if the tax credit meets the refundability test, it should qualify as a QRTC irrespective of whether it meets the transferability test. In such a case, the tax credit will be taken into account in the GloBE income or loss computation. If the tax credit does not meet the refundability test (because it is either non-refundable or a Non-QRTC), the tax credit should still be taken into account in the GloBE income or loss computation if it meets the transferability test, in which case it will qualify as an MTTC. Otherwise, the tax credit should qualify as a Non-MTTC and should accordingly be treated as a reduction to the Covered Taxes.
- This can be summarized in the table below:

Tax Credit	Description	Pillar Two Treatment
Qualified Refundable Tax Credits (QRTCs)	A tax credit is refundable within four years (regardless of whether it could be transferable at a marketable price).	Inclusion of the tax credit in the computation of the GloBE Income
Non-Qualified Refundable Tax Credits (Non-QRTCs)	A tax credit either not refundable at all or is refundable but after four years and is not transferable at a market price.	Reduction to Covered Taxes
Marketable Transferable Tax Credits (MTTCs)	A tax credit is transferable at a market price.	Inclusion of the tax credit in the computation of the GloBE Income
Non-Marketable Transferable Tax Credits (Non-MTTCs)	A tax credit is refundable after four years but s not transferable at a market price.	Reduction to Covered Taxes
Other Tax Credits (OTC)	All other tax credits.	Reduction to Covered Taxes

Substance-Based Income Exclusion

- The SBIE grants a relief from the GloBE income (after calculating the Pillar Two ETR) based on a formula that takes into account "eligible employees" and "eligible tangible assets". The purpose of the SBIE is to capture the substantive activities occurring in a jurisdiction. However, this purpose would be undermined if any presence within the entity that employs the employee or owns the asset was sufficient to allow a full allocation of the payroll carve-out (with respect to eligible employees) and the tangible asset carve-out (with respect to eligible tangible assets).
- The Admin Guidance now provides guidance to determine the SBIE with respect to eligible employees and eligible tangible assets that are outside of the jurisdiction of the entity that employs the employee or owns the asset.

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- According to the Admin Guidance, the full amounts of the payroll carve-out and the tangible asset carve-out are allocated to a Constituent Entity, provided that the following thresholds are met:
  - the eligible employee spends more than 50% of the working time in the jurisdiction of the Constituent Entity; and
  - the eligible tangible asset is located within the jurisdiction of the Constituent Entity more than 50% of the time.
- Otherwise, the payroll carve-out and the tangible asset carve-out are proportionally allocated to a Constituent Entity. Further consideration will be given by the IF to a simplified allocation mechanism for industries where a substantial portion of the employees and assets are located outside the jurisdiction of the Constituent Entity.

Qualified Domestic Minimum Top-Up Tax

- In line with the February Guidance, the Admin Guidance emphasizes that a QDMTT may result in a greater tax charge than the tax charge that would arise under the Income Inclusion Rule ("**IIR**"). This is because the QDMTT is based on the whole amount of the Jurisdictional Top-Up Tax, irrespective of the ownership interest held in the Constituent Entities located in the QDMTT jurisdiction (as opposed to the IIR, which does take into account the ownership interest). The Admin Guidance confirms that this also applies to Top-Up Tax under a QDMTT in respect of joint ventures, joint venture subsidiaries and minority-owned entities. Jurisdictions may choose to design their QDMTT such that it only applies to MNE groups where all the Constituent Entities are wholly owned by the UPE, in which case the QDMTT would not apply to joint ventures, joint venture subsidiaries and minority-owned entities in that jurisdiction.
- The GloBE Rules compute the Pillar Two ETR by blending the income and taxes of Constituent Entities of an MNE group located in the same jurisdiction. Under certain circumstances, domestic rules of QDMTT jurisdictions do not allow jurisdictional blending. The Admin Guidance provides guidance that would allow jurisdictions to blend income and taxes at a sub-national level (which means that the QDMTT liability will be determined based on a sub-national jurisdictional blending) or on a Constituent Entity-by-Constituent Entity basis (which means that the QDMTT liability will be based on a taxable unit blending).
- The Admin Guidance provides possible design options that QDMTT jurisdictions could consider to allocate the QDMTT liability among Constituent Entities. The design options are purely for illustrative purposes to support QDMTT jurisdictions in the design of the QDMTT legislation.
- The Admin Guidance permits QDMTT jurisdictions to freely choose whether they would like to impose QDMTT directly from a Flow-Through UPE or to introduce a similar mechanism to ensure that the Top-Up Tax is collected for example from the owners. The Admin Guidance also permits the application of the QDMTT to Flow-Through Entities that are Stateless Constituent Entities provided that they are created under the domestic law of the QDMTT. QDMTT jurisdictions may even choose to not apply the QDMTT to the Flow-Through UPE or its owners, in which case the Top-Up Tax will be collected under the UTPR by another jurisdiction. Lastly, the Admin Guidance clarifies that a Flow-Through Entity that is required to apply the IIR is considered to be located in the QDMTT jurisdiction if the Flow-Through Entity is created in the QDMTT jurisdiction. Though, a QDMTT jurisdiction is permitted to decide whether or not to impose a QDMTT charge on the Flow-Through Entity located in the QDMTT jurisdiction (e.g. if the Flow-Through Entity is not a tax resident of the QDMTT jurisdiction, the QDMTT jurisdiction may decide to impose the QDMTT charge to another Constituent Entity tax resident in the QDMTT jurisdiction). This point will be particilary relevant for Multinational Groups with partnerships in their holding structure.
- The February Guidance clarified that QDMTT would exclude CFC-taxes paid by a Constituent Entity-owner and Permanent Establishment taxes paid by a Main Entity with respect to the CFC and Permanent Establishment located in the QDMTT jurisdiction. In line with the February Guidance, the Admin Guidance now clarifies taxes paid by Constituent Entity-owners on the income of hybrid entities shall be excluded in the QDMTT jurisdiction. The Admin Guidance also clarifies that withholding taxes imposed by the QDMTT jurisdictions on distributions from a Constituent Entity located in the QDMTT jurisdictions are allocated to the distributing Constituent Entity under the QDMTT.
- The "transition year" under the GloBE Rules has been defined as the first fiscal year that the MNE group comes within the scope of the GloBE Rules (i.e. the IIR and/or the UTPR) in respect of the relevant jurisdiction. The fiscal year for which the MNE group becomes first subject to the GloBE Rules in respect of a jurisdiction can be different (e.g. because of the Transitional CbCR Safe Harbour, or because of the fiscal year in which the IIR or the QDMTT comes into effect). If the GloBE Rules come into effect after the QDMTT, the QDMTT must have a supplemental rule which treats the fiscal year that the GloBE Rules come into effect as a new transition year resulting in a re-set of attributes, such as deferred taxes.

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- If the consolidated financial statements of an MNE group are prepared in another currency than the currency under the QDMTT, the consolidated financial statements will need to be translated into local currency in order to determine the QDMTT consequences. The Admin Guidance clarifies the translation rules to be taken into account for QDMTT purposes.
    - If the QDMTT is based on the consolidated financial statements, the QDMTT computations should be undertaken in the MNE group's presentation currency.
    - If the QDMTT is based on the local accounting standard and all Constituent Entities of the QDMTT jurisdiction use this local currency as their functional currency, the QDMTT should require the relevant computations in the local currency. If not all Constituent Entities of the QDMTT jurisdiction use the local currency as their functional currency, the QDMTT computation should be made in a single currency.
- The GIR does not require QDMTT jurisdictions to use the GIR for purposes of the QDMTT information collection. The QDMTT jurisdiction is permitted to follow another format than the GIR for the collection of information for purposes of the QDMTT.

GLoBE Information Return

- The IF has also published a standardized GIR. The GIR adds flesh to the bones of the GIR outlined in Article 8 of the GloBE Rules and is intended to provide a standard template for MNE groups to file information on their GloBE tax liability calculations with tax authorities. Similar to Country-by-Country Reporting, the GIR's stated purpose is to ensure transparency and ease administration; in particular, by facilitating exchange of information between authorities while providing the information necessary for administrations to perform risk assessments and evaluate the accuracy of Top-up Tax liabilities in their jurisdiction. As such, the GIR is not a tax return – tax return filing and payment obligations are expected to be left to implementing jurisdictions.
- The GIR consists of a general section, that applies to the MNE group as a whole, and multiple jurisdictional sections based on a single template that needs to be filled in for every jurisdiction where the MNE group is operating. The jurisdictional sections provide a template that shall apply for every jurisdiction where the MNE group is operating. For groups with jurisdictions where relevant safe harbours and exclusions apply, there is a short section requiring only limited information disclosures. Where safe harbours and exclusions do not apply, more detailed ETR and (if relevant) Top-up Tax computations and allocations are necessary. These jurisdictional sections would also be used for the purposes of reporting the calculations undertaken under a QDMTT.
- The publication of the GIR follows a public consultation that closed in February 2023. There are several features that are included in this publication that were not in the version set out in the consultation. The latest GIR includes a framework for simplified jurisdictional reporting during a transitional period (for fiscal years ending before 30 June 2030). The transitional period will come as welcome relief to many MNE groups and is explicitly designed to buy time for the commercial development of GloBE-appropriate accounting systems and processes. At the same time, the transitional simplified reporting does not preclude tax authorities requesting further information in this period, so MNE groups may be faced with a period where the level of information provided varies greatly from jurisdiction to jurisdiction.
- There is also some guidance on dissemination, and how the information is submitted and shared between tax authorities, although the document acknowledges the exact mechanics for the dissemination are still to be ironed out. The IF puts jurisdictions needing to receive information into three categories:
    - UPE jurisdictions will need all the data to assess the application of the rules across the MNE group.
    - Jurisdictions with taxing rights under the GloBE Rules (including jurisdictions that have introduced a QDMTT) will need those parts of the GIR that relate to the Top-up Tax calculation in their jurisdiction.
    - All implementing jurisdictions where Constituent Entities of the MNE group are located should receive some general information and the corporate structure.
- It is intended that each MNE group will prepare a GIR on an annual basis that will generally be submitted centrally to the tax authority of the UPE jurisdiction, which will then exchange that with the other relevant jurisdictions. The IF intends to further develop appropriate mechanisms to allow tax administrations to automatically exchange GloBE information, including a framework or "Qualifying Competent Authority Agreements" (which might be bilateral or multilateral), as well as the IT-solutions to support this exchange. However, where the UPE jurisdiction does not have the necessary exchange of information agreements in place, MNE groups may also need to submit the GIR locally.

- The GIR highlights the breadth of the information required and the burdens of implementing Pillar Two, both for taxpayers and for tax authorities. The ease with which it is adopted seems to hinge in part on IT and accounting systems (for the collection of information by MNE groups as well as the dissemination of this information among tax authorities) which it is hoped will be developed in the coming years.

Subject to Tax Rule

- Finally, the IF also released a package containing the STTR model treaty provision with an accompanying commentary. One of the main differences to the GloBE Rules is that the STTR does not only apply to MNE groups with a consolidated turnover exceeding the EUR 750 million threshold.
- The STTR is defined as a treaty-based rule that applies to certain intra-group payments made from source States to the State of the payee, provided that this payment is subject to low nominal tax rates (i.e. below 9%) in the latter State. The OECD has presented it in the form of a model provision to be included in a double tax treaty since it implies a reclaim of taxing rights which initially, according to the tax treaty, have been ceded to the State of the payee. The main aim of this treaty-based rule is not to revisit the current allocation of taxing rights between source and residence States.
- In this sense, IF members that apply nominal corporate income tax rates below the STTR minimum rate to interest, royalties and a defined set of other payments have committed to implement the STTR into their bilateral treaties with other IF members that are developing countries.
- A multilateral convention could prove useful to facilitate the implementation of the STTR into bilateral treaties. That is why, in order to facilitate the swift implementation of the STTR, the OECD has committed to open for signature a multilateral convention from 2 October 2023. However, IF members can choose to implement the STTR either by signing the multilateral convention or by bilaterally amending their treaties and including the STTR when requested by developing IF members.
- The specific tax charged as a consequence of the STTR (which will be calculated as the difference between 9% and the tax rate applicable in the contracting state receiving the income) will be charged on the gross amount of covered income. The tax chargeable in respect of an item of Covered Income shall be determined following the end of the fiscal year in which the income has arisen. For these purposes, "Covered Income "means interest (as defined in article 11.3 OECD Model Tax Convention), royalties (as defined in article 12.2 OECD Model Tax Convention) and a defined set of other intra-group payments.

  By way of example, the OECD illustrates the application of the STTR as follows: The agreed minimum rate is 9%. Assume the tax rate is 5%, and the gross amount of the item of Covered Income is 100. The specified rate is therefore 9% - 5 % = 4%. The source State's taxing right is limited to 4% of 100, producing a tax of 4. However, this does not mean that the source State needs to tax in full the 4, but this will depend on the domestic taxation laws (i.e. the 4% acts as a ceiling).
- In the same vein, if under the application of other tax treaty provisions, the source State could tax the income at a greater rate, the STTR would not be applicable provided that the source State has already taxed this payment at this percentage under the normal tax treaty rules.
- However, there are certain exclusions. These provisions will not apply to an item of Covered Income paid by an individual or derived by a resident that is: (i) an individual; (ii) not connected to the payer; (iii) a recognised pension fund; or (iv) a non-profit organisation (among others). Nevertheless, anti-abuse rules have been also considered to avoid artificial structures.
- On top of that, a mark-up threshold has also been foreseen where a more limited BEPS risk is deemed to exist. In this regard, the above provisions would not apply provided that the gross amount of income (excluding interest and/or royalties) does not exceed the costs incurred plus an 8.5% mark-up. Furthermore, a materiality threshold has also been included. If this materiality threshold is not exceeded, the STTR would not apply.
- Finally, regarding the compliance obligations derived from the STTR, the IF leaves the field to the competent authorities of the contracting states, that will need to publish a STTR tax return for paying the STTR to the local tax authorities. The tax paid because of the operation of STTR will be considered as a Covered Tax for the purposes of the IIR and UTPR, and therefore, added to the ETR computation.

Next Steps

The Admin Guidance will be incorporated into a revised version of the Commentary to the GLoBE Rules that will be released later this year and the IF has said that it will continue to consider Administrative Guidance priorities on an ongoing basis with the aim of releasing guidance throughout the year, so that IF members can meet their implementation schedule.

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As the content of the GIR and the dissemination approach are now outlined, the IF can turn to finalizing the mechanics and it has also said that it will explore the possibility of developing other administrative mechanisms to facilitate further co-ordination and consistent application of the GloBE Rules.

Members of the IF that apply nominal corporate income tax rates below the STTR minimum rate to interest, royalties and a defined set of other payments have committed to implement the STTR into their bilateral treaties with other IF members that are developing countries. The multilateral convention which is being opened for signature on 2 October 2023 will facilitate the implementation of this in relevant treaties.

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