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SMU-IFA David R Tillinghast Global Taxation Conference

BEPS 2.0/ESG: Asian Voices at the Cutting Edge



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Multilateralism in Asia: Rolling out BEPS and Level Playing Field Across Asia

The European Union Perspective

With the Participation of



BEPS 1.0 | *EU Implementation*

OECD BEPS	Corresponding EU Measures
Action 1 – Digital Economy	<ul style="list-style-type: none"> Final report of the <u>Commission Expert Group on Taxation of the Digital Economy</u> (28 May 2014) Proposals for a long-term solution (SDP, <u>COM(2018)147</u> and <u>C(2018)1650</u>) and a short-term solution (DST, <u>COM(2018)148</u>) Announcement of potential EU action if no OECD consensus emerges and plans for a "digital levy" (<u>Ares(2021)312667</u>), now focus on <i>implementation of the OECD Pillars</i> (→ Commission work programme 2022, <u>COM(2021) 645</u> and <u>Annexes</u>) and Proposal for a <i>GloBE Directive</i> (<u>COM(2021)823</u>)
Action 2 – Hybrid Mismatches	<ul style="list-style-type: none"> Taxing obligation for hybrid financial instruments in the Parent-Subsidiary-Directive (Directive <u>2014/86/EU</u>) <i>Anti-Hybrid Measures in Art. 9, 9a and 9b ATAD</i> (Directive <u>(EU) 2016/1164</u>, amended – by Directive <u>(EU) 2017/952</u>) Recommendation to introduce a Subject-to-Tax-Clause in tax treaties (<u>C(2012)8806</u>) Proposal to introduce a Subject-to-Tax-Clause in the Interest-Royalties-Directive (<u>COM(2011)714</u>)
Action 3 – CFC Rules	<ul style="list-style-type: none"> <i>CFC Rules in Arts 7 and 8 ATAD</i> (Directive <u>(EU) 2016/1164</u>)

BEPS 1.0 | *EU Implementation*

OECD BEPS	Corresponding EU Measures
Action 4 – Interest Limitation	<ul style="list-style-type: none"> • Interest Limitation Rule in Art. 4 ATAD (Directive <u>(EU) 2016/1164</u>)
Action 5 – Harmful Tax Competition	<ul style="list-style-type: none"> • Automatic exchange of tax rulings (“DAC3”; Directive <u>(EU) 2015/2376</u>) • Agreement on the “nexus approach” for patent/IP boxes (<u>Dok. 9912/16 FISC 97 ECOFIN 558</u>) • State aid aspects of tax measures, including rulings (<u>Notice [2016] OJ C 262/1</u>) • External strategy towards third countries (<u>COM(2016)24</u> and <u>COM(2020)313</u>), including work on an EU black-list (initially <u>[2017] OJ C 438/5</u>, with ongoing amendments) • Package on Fair and Simple Taxation, including measures on tax good governance (<u>COM(2020)313</u>)
Action 6 – Treaty Abuse	<ul style="list-style-type: none"> • Recommendation to introduce a GAAR in domestic law (<u>C(2012)8806</u>) • Recommendation to introduce an EU-compliant “Principal Purpose Test” in tax treaties (<u>C(2016)271</u>) • GAAR in Art. 6 of the ATAD (Directive <u>(EU) 2016/1164</u>)

BEPS 1.0 | *EU Implementation*

OECD BEPS	Corresponding EU Measures
Action 7 – Permanent Establishments	<ul style="list-style-type: none"> Recommendation to follow the OECD BEPS-approach with regard to the definition of PEs (Art. 5) (C(2016)271)
Actions 8-10 – Transfer Pricing	<ul style="list-style-type: none"> Ongoing work of the EU Joint Transfer Pricing Forum (JTPF) Commission work on a concrete implementation of the OECD guidelines in the EU (see COM(2015)302) Announced establishment of expert group on transfer pricing (Pt A21 in the EU Commission's Action Plan for Fair and Simple Taxation, COM(2020)312 and Annex)
Action 11 – Data	<ul style="list-style-type: none"> Work on a better quantification of the “tax gap” and set-up of a Fiscalis project group (see COM(2015)136) 2018 Report of the Tax Gap Project Group (TGPG) on Corporate Income Tax
Action 12 – Disclosure	<ul style="list-style-type: none"> Disclosure of of reportable cross-border arrangements (“DAC6”; Directive (EU) 2018/822), based on the Commission's agenda for tax transparency (COM(2016)451) and proposal COM(2017)335

BEPS 1.0 | *EU Implementation*

OECD BEPS	Corresponding EU Measures
Action 13 – Country-by-Country Reporting	<ul style="list-style-type: none"> • Introduction of Country-by-Country-Reporting (“DAC4”; Directive (EU) 2016/881) • Public Country-by-Country-Reporting in the accounting directive Directive (EU) 2021/2101, based on COM(2016)198)
Actions 14 – MAPs and Arbitration	<ul style="list-style-type: none"> • EU Arbitration Convention (90/436/EEC) and Code-of-Conduct ([2009] OJ C 322/1) • Tax Dispute Resolution Directive (Directive (EU) 2017/1852) • Announced implementation of a Standing Committee for dispute resolution (Pt A15 in the EU Commission’s Action Plan for Fair and Simple Taxation, COM(2020)312 and Annex)
Action 15 – Multilateral Instrument	<ul style="list-style-type: none"> • Recommendation on PEs and an EU-compliant “Principal Purpose Test” (C(2016)271)

- EU Implementation of the **OECD's Two Pillar Solution** → Pt 2.2. in the Communication on "Business Taxation for the 21st Century", COM(2021)251 (see also Pt. 2.3 of the Commission work programme 2022: Making Europe stronger together, COM(2021) 645)

Once agreed and translated into a multilateral convention, the application of Pillar 1 will be mandatory for participating countries. **In order to ensure its consistent implementation in all EU Member States**, including those that are not Members of the OECD and do not participate in the Inclusive Framework, the **Commission will propose a Directive for the implementation of Pillar 1 in the EU.**

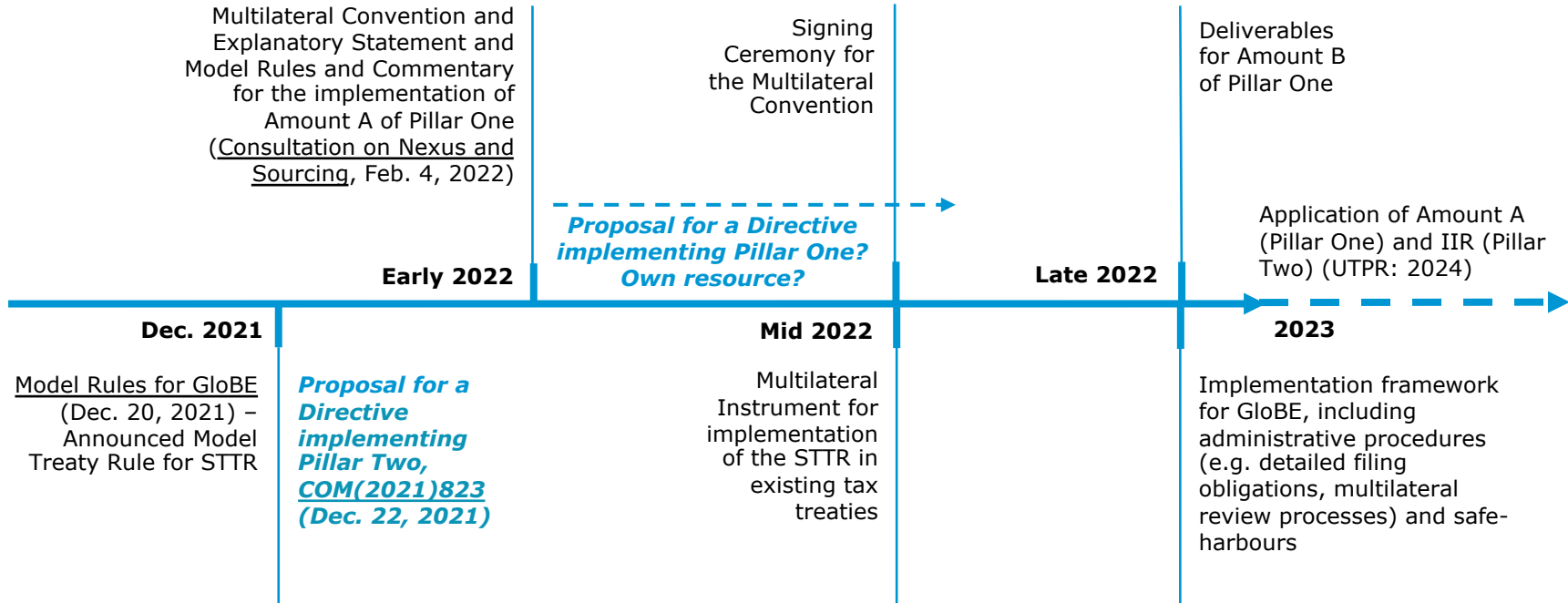
In order to ensure its consistent application within the EU and compatibility with EU law, **the principal method for implementing Pillar 2 will be an EU Directive that will reflect the OECD Model Rules with the necessary adjustments.** The implementation of a global agreement on minimum effective taxation will also have implications for existing and pending EU Directives and initiatives (see box 2 below).

- Pillar 1-based **own resource for the EU budget** (€ 2.5-4 bn./yr)? → Pt 2.1. in the Communication on "The next generation of own resources for the EU Budget", COM(2021)566)

The Commission proposes an own resource equivalent to 15% of the share of the residual profits of the largest and most profitable multinational enterprises that are reallocated to EU Member States under the agreement on a reform of the international tax framework.

BEPS 2.0 | *EU Implementation*

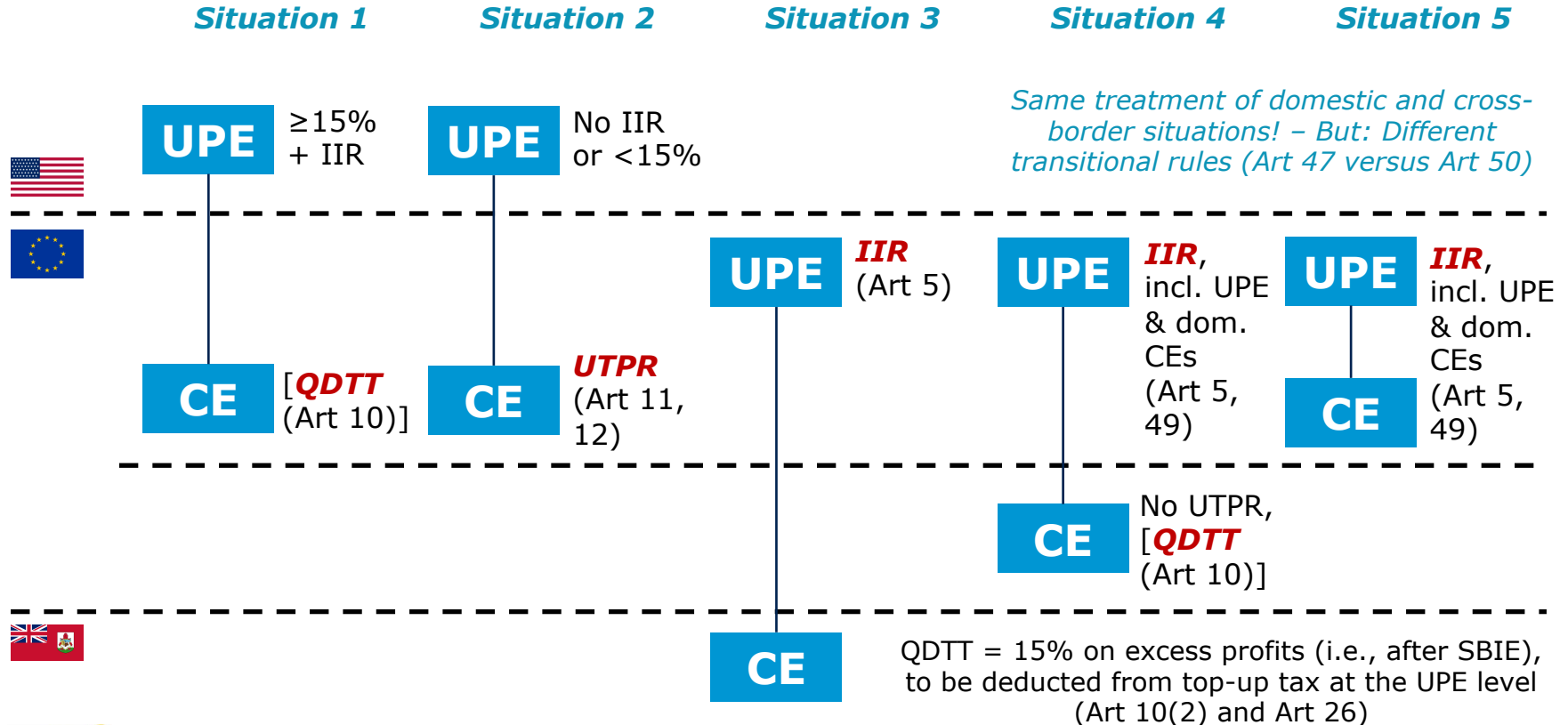
Large, profitable MNEs + BEPS 2.0



- ***Proposal for a GloBE Directive, tabled by the EU Commission on Dec. 22, 2021*** (COM(2021)823)
 - Closely based on the ***OECD Model Rules*** (“common approach”) → Uniform rules and a common minimum level of protection in the ***EU internal market*** and prevention of disparities in cross-border situations
 - Unlike ATAD, the GloBE Proposal creates a ***mandatory new system*** (≠ OECD “common approach”) independent of domestic corporate tax systems, including for domestic situations → So-called ***“exhaustive harmonization”***
 - Criteria for the ***assessment of equivalence of foreign GloBE rules*** (Art. 51) and listing approach

- **Proposal for a GloBE Directive, tabled by the EU Commission on Dec. 22, 2021** (COM(2021)823)
 - **Non-discrimination** → Clear approach to avoid conflicts with the non-discrimination rules of the **fundamental freedoms** by extending the IIR to purely domestic groups (Art 5, 49), i.e., to groups with the UPE and CEs (entities or PEs) in the same MS
 - **State Aid** → Art 107 TFEU only refers to “aid granted by a Member State or through State resources” → No **imputability to the Member States** (e.g., *Deutsche Bahn*, Para. 44 of the 2016 Commission Notice)
 - Two **“collateral issues”**:
 - **Explicit external powers** on simplified reporting obligations (Art. 54) and (much) broader **implied external competence** (Art. 3(2), 216 TFEU)?
 - Possibly “EU mandated” **tax treaty override**, should IIR/UTPR be viewed as violating tax treaty law (Art. 351 TFEU)

BEPS 2.0 | *Proposed GloBE Directive*



- **2021 Statement** → Commitment to **remove DSTs etc** in the Statement of 8 October 2021

The Multilateral Convention (MLC) will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future. No newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC. The modality for the removal of existing Digital Services Taxes and other relevant similar measures will be appropriately coordinated. The IF notes reports from some members that transitional arrangements are being discussed expeditiously.

- **US Trade Investigations** → Joint statement from the United Kingdom, Austria, France, Italy, Spain and the United States regarding a compromise on a transitional approach to existing unilateral measures during the interim period before Pillar 1 is in effect (21 October 2021)
- **EU?** → Proposal for an **EU DST** (COM(2018)148) and subsequently a **"digital levy"** (initially announced for Q2/2021, Inception impact assessment Ares(2021)312667)
- **Generally** → How does that commitment relate to taxes potentially covered by the new **Art. 12B UN MC?**

Thank you!



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