

Implementing Pillar Two and Mandatory Automatic Exchange of Information in the European Union

I INTRODUCTION

One of the major criticisms to the initiative on a global minimum level of taxation for multinational enterprise (MNE) groups (known as Pillar Two) is the complexity of its rules and compliance requirements.¹ The latter also demands reporting to the tax authorities in the jurisdiction in which the MNE operates and automatically exchanging information among the jurisdictions in which the different constituent entities of the group operate.

In that context, the OECD created a standard template – the GloBE information return or GIR.² In late October 2024, the European Commission proposed a directive to adapt the OECD GIR to be used by the large multinational groups in the European Union that are subject submitted to Pillar Two.³ The information return is characterized in the Explanatory Memorandum as a risk-assessment tool that allows the tax administrations to correctly evaluate the entity's tax liability.⁴

The proposal foresees that each constituent entity files its top-up tax information return in the Member State of location, but its purpose is that only one entity of the group files it on behalf of the entire MNE. That entity would be the ultimate parent or a designated filing entity. All that is needed as a condition for the single return is an

arrangement for automatic exchange of information between the involved jurisdictions.

The proposal will most likely be approved without major obstacles as it is a major tool for implementing the EU Directive on Pillar two. Moreover, there is broad awareness that cooperation is a basic requirement for collecting taxes from MNEs, and past experience teaches us that, when there is a tool recommended by the OECD, the EU promptly adopts it. Finally, all other EU directives expanding the scope of mutual assistance between tax authorities have been swiftly approved.

2 MANDATORY AUTOMATIC EXCHANGE OF INFORMATION IN THE EUROPEAN UNION

Directive 77/799/EEC⁵ provided for automatic exchange of information in categories of cases but only after consultation between the competent tax authorities, and bank secrecy was still a limit to any type of information exchange. Under Directive 2011/16/EU,⁶ automatic exchange of information became mandatory and would occur between EU Member States concerning certain categories of income and capital, mainly of a non-financial nature, held by taxpayers in Member States other than their residence state. At the time, automatic exchange of

Notes

¹ Ana Paula Dourado, *The Global Anti-Base Erosion Proposal (GloBE) in Pillar II*, 48(2) Intertax 152–156 (2020), <https://kluwerlawonline.com/journalarticle/Intertax/48.2/TAXI2020014>, doi: 10.54648/TAXI2020014; Ana Paula Dourado, *The EC Proposal of Directive on a Minimum Level of Taxation in Light of Pillar Two: Some Preliminary Comments*, 50(3) Intertax 200–204 (2022), <https://kluwerlawonline.com/journalarticle/Intertax/50.3/TAXI2022029>, doi: 10.54648/TAXI2022029; Yariv Brauner, *Agreement? What Agreement? The 8 Oct. 2021, OECD Statement in Perspective*, 50(1) Intertax 2–6 (2022), <https://kluwerlawonline.com/journalarticle/Intertax/50.1/TAXI2022001>, doi: 10.54648/TAXI2022001; M. de Wilde, *Is There a Leak in the OECD's Global Minimum Tax Proposal (GloBE, Pillar Two)?* (Kluwer International Tax Blog 1 Mar. 2021), <http://kluwertaxblog.com/2021/03/01/is-there-a-leak-in-the-oecd-global-minimum-tax-proposals-globe-pillar-two/> (accessed 6 Jan. 2025).

² *OECD Draft User Guide for the GloBE Information Return XML Schema*, <https://www.oecd.org/en/events/public-consultations/2024/07/draft-user-guide-for-the-globe-information-return-xml-schema.html> (accessed 6 Jan. 2025).

³ *Proposal for a Council Directive Amending Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation* (Brussels 28 Oct. 2024), COM(2024) 497 final 2024/0276 (CNS), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52024PC0497> (accessed 6 Jan. 2025).

⁴ *Proposal for a Council Directive*, *supra* n. 3.

⁵ *Council Directive 77/799/EEC of 19 Dec. 1977 Concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation*, Official Journal L 336, 27 Dec. 1977 at 0015–0020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31977L0799#:~:text=COUNCIL%20DIRECTIVE%20of%2019%20December%201977%20concerning%20mutual,taxation%202877%2F799%2FEEC%29%20THE%20COUNCIL%20OF%20THE%20EUROPEAN%20COMMUNITIES%2C> (accessed 6 Jan. 2025).

⁶ *Council Directive 2011/16/EU of 15 Feb. 2011 on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC*, OJ L 64, 11 Mar. 2011 at 1–12, <https://eur-lex.europa.eu/eli/dir/2011/16/oj/eng> (accessed 6 Jan. 2025).

information would focus on available information of five categories of income according to a step-by-step approach.⁷

Automatic exchange of information was recognized ‘as the most effective means of enhancing the correct assessment of taxes in cross-border situations and of fighting fraud’.⁸ It expanded globally and in the European Union when the G20, the G8, and the OECD began to develop a global standard for automatic exchange of financial account information in tax matters in 2013.

During 2014, the standard package on automatic exchange of financial account information in tax matters was developed, endorsed by the G20 Finance Ministers and Central Bank Governors, and released and ready to be implemented. It included the Model Competent Authority Agreement (CAA) and a Common Reporting Standard (CRS). The EU approved a directive extending its scope to implement reporting and due diligence rules fully consistent with the CAA and the CRS.⁹

Since 2014, automatic exchange of information has been required by each EU cooperation initiative on ensuring minimum taxation or combating tax evasion, tax avoidance, or aggressive tax planning of multinationals. Since the approval of the EU 2011 Directive, there have been several amendments to it expanding the object and scope of automatic exchange of information.¹⁰

3 CONCLUDING REMARKS

The OECD GIR and the European Commission proposal for its adaptation are comparable to the 2013 global standard for automatic exchange of financial account information in tax matters. However, before international tax coordination, automatic exchange of information was mainly a preventive tool against tax evasion. In the context of the base erosion and profit shifting (BEPS) project and Pillar Two, it has become a necessary instrument to check the correct fulfilment of compliance duties in a globalized economy. A final comment is that the proposal delegates implementing acts to the Commission.¹¹ If the Commission enacts strict implementing acts that correspond to the solutions approved and included in the provisions of the directive, there should be no problems of legality. In contrast, those implementing acts can neither change nor add or eliminate any of the policy decisions included in the directive as taken by the Council by unanimity.

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Notes

⁷ *Infra* n. 10 of the Preamble of the Council Directive 2011/16/EU of 15 Feb. 2011, *supra* n. 6.

⁸ *Ibid.*

⁹ Council Directive 2014/107/EU of 9 Dec. 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

¹⁰ For example, Council Directive 2014/107/EU (4) introduced the Common Reporting Standard (CRS) developed by the Organization for Economic Cooperation and Development (OECD) for financial account information within the Union; Council Directive (EU) 2015/2376 (5) provided for the automatic exchange of information on advance cross-border tax rulings; Council Directive (EU) 2016/881 (6), provided for the mandatory automatic exchange of information on country-by-country reporting of multinational enterprises between tax authorities; and anti-money-laundering information was the object of Council Directive (EU) 2016/2258 (7).

¹¹ Article 8 ae, para. 5: To facilitate the exchange of information referred to in para. 2 of this article, the Commission shall adopt, by means of implementing acts, the necessary practical arrangements, as part of the procedure for establishing the standard computerized form provided for in Art. 20(5). Those implementing acts shall be adopted in accordance with the procedure referred to in Art. 26(2).