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## A Whole New Ballgame: The Global Tax Policy Negotiations on Pillars One and Two



BY JEFFERSON VANDERWOLK

The OECD/G20 Inclusive Framework's two-pillar project on the tax challenges of digitalization, sometimes called BEPS 2.0, has been ongoing for more than two years. Originally aimed at updating international tax rules to ensure that taxes could be imposed in market countries on nonresident sellers of digitalized services and products, the project quickly underwent "mission creep" and grew to encompass broader proposals to reallocate to market countries above-normal profits of consumer-facing businesses, clarify the taxation of cross-border marketing and distribution activities, and implement a global minimum tax regime common to all countries.

One of the main purposes of the project is to create a single, globally agreed set of tax rules regarding the subject matter of the discussions. The 139 countries participating in the negotiations have agreed, up front, that if a global agreement is reached, all "relevant unilateral measures"—such as digital services taxes—will be repealed and no new ones will be introduced.

By the end of 2020, the project had become bogged down in a morass of political disagreement (primarily caused by reluctance on the part of the U.S.) and confusion about how the various proposals would work, what they were actually meant to achieve, and what the economic and revenue effects of the proposals would be for the many different participants in the process.

Early in 2021, the new U.S. Secretary of the Treasury, Janet Yellen, breathed life into the process by signaling

that the U.S. would no longer be reluctant to work toward a global tax agreement. It was not until April 8, 2021, however, that the U.S. Treasury delegate to the Steering Group of the Inclusive Framework on BEPS laid out a new vision for fellow delegates to consider.

First, due to concerns about the possibility that multinational corporations might still be able to book profits in low-tax jurisdictions for tax purposes, the Biden administration is proposing to increase the tax rate on GILTI income of U.S. multinationals to 21%, while at the same time proposing to deny tax deductions for payments to offshore affiliates in low-tax locations. Therefore, the U.S. proposed to the Inclusive Framework that the global minimum tax rate to be agreed upon globally should be 21% or something close to that.

Second, the U.S. proposed that the reallocation for tax purposes of above-normal profits of multinational businesses should be simplified and limited to no more than 100 of the world's largest and most profitable companies. No effort should be made to identify consumer-facing businesses or companies providing automated digital services. Rather, a set of numerical thresholds and formulaic computations involving a company's global revenue, its global profit margin, and its sales revenue in particular countries should determine the desired reallocation of profits and which companies would be in scope. None of the proposed numbers or formulae have yet become public knowledge, however.

The new proposals from the U.S. have led to widespread expressions of optimism about the prospect of a global agreement on most or all of the outstanding political issues by early July, when the Inclusive Framework next meets. The OECD's tax policy leader, Pascal Saint-Amans, is predicting that most of the design details of the main parts of the overall deal will be clear and agreed upon by October, when the G20 finance

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ministers meet. What almost no one is talking about, however, is that the project's original purpose—updating international tax rules to deal with digitalization—seems to have been completely abandoned. In this case, “mission creep” appears to have resulted in a whole new ballgame.

Be that as it may, let's assume that the optimists are correct, and that the Inclusive Framework will announce an “agreement in principle” on the U.S. proposals at its early July meeting. As it has done in the past when agreeing to work together on certain proposals, the Inclusive Framework might state expressly that its collective agreement to proceed on the basis of the U.S. proposals is “without prejudice” to each country's sovereign right to adopt, or not adopt, particular tax measures that have not yet been agreed upon.

For example, the exact rate of the global minimum tax would likely be left for further discussion, due to the need for unanimity among EU member states on all of the particulars of the deal. EU members such as Ireland and Hungary have already indicated that they intend to defend their right to maintain their relatively low corporate tax rates without incurring the negative consequences of non-deductibility in other countries of payments to Irish or Hungarian affiliates. If the EU is only able to achieve unanimous agreement on a relatively low minimum tax rate, the U.S. might balk.

The U.S., of course, needs the support of Congress for any deal. Both Democrats and Republicans are

likely to oppose a deal that does not appear to be beneficial to the U.S. economy or the U.S. fisc. Although Congressional taxwriters agree that eliminating “relevant unilateral measures” such as digital service taxes would be a good thing, it is not clear that they will accept a potentially bad Inclusive Framework agreement (bad for the U.S., that is) in exchange.

It seems likely, therefore, that a final, binding agreement on a set of detailed proposals will still be uncertain, and will in any event not occur for many months to come, even if the Inclusive Framework reaches agreement in early July to proceed on the basis of the U.S. proposals of April 8, 2021.

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