The outlook for global tax policy and controversy in 2019

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Building a better working world

The importance of the tax policy field of play for business

Kate Barton

Ever since the OECD unveiled its 2015 BEPS recommendations for international tax changes, we have been living through a period of great legislative flux.

And with policies implemented in response to the BEPS recommendations still fresh, the global tax community is already faced with a new phase of work on even more dramatic changes, with new nexus definitions, revised profit allocation rules, and a global minimum tax all being actively discussed in 2019. Tax administrations, too, continue to make changes that affect global businesses, collaborating together on more multilateral approaches, revitalizing programs such as joint audits, expanding procedures such as the International Compliance Assurance Programme (ICAP), and all the while digitizing their end-to-end compliance processes at record speed.

Worldwide, we see more tax legislative change playing out than ever before. Companies need to be compliant with new tax laws, which means that the more global the company's footprint, the more tax law change the company faces. Most businesses have already felt the impact of US tax reform and the effect of global tariff and trade disputes. And in 2019, companies will be feeling the impact of Brexit discussions and new calls for public transparency and mandatory disclosure.

Where new legislation finds its genesis is changing too, with more than 40 governments having turned over in the past 18 months. Many of these new leaders are focusing on tax law changes immediately to deliver on their campaign promises. Tax law is being used as a tool to encourage or discourage particular behaviors, to raise revenues or to stimulate economies the world over. And of course, every time a country changes its tax laws, companies need to understand the impacts on business. Meeting the evolving demands of tax reform around the world requires deep subject matter expertise and tax technical skills. In addition, it almost inevitably means factoring in new and expanded data requirements and changes to the systems, processes and computations that ultimately feed into a myriad of forms and filings.

I believe that paying more active attention to the tax policy field of play can help you, as a tax professional, do more for your organization. By engaging actively with respect to policy developments you can help better prepare for changes, reducing risk through proactive decision–making and positioning your business for success, with fewer "surprises".

Today, the global tax environment is arguably more dynamic – and challenging – than it has ever been, with change present or promised in most places in the world. With this in mind, I hope that our Outlook for 2019 helps you see the swells on the horizon so you can navigate these stormy waters with more confidence.

Kate Barton
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About the report

The outlook for global tax policy and controversy in 2019 is a survey of EY tax policy and controversy leaders in 48 jurisdictions. It covers known and forecasted tax changes in each jurisdiction, spanning all key tax types and including specific information on enforcement trends and key audit triggers.

Country surveys were collected during December 2018 and January 2019. This is the ninth edition of this publication.

A wave theory of global tax policy

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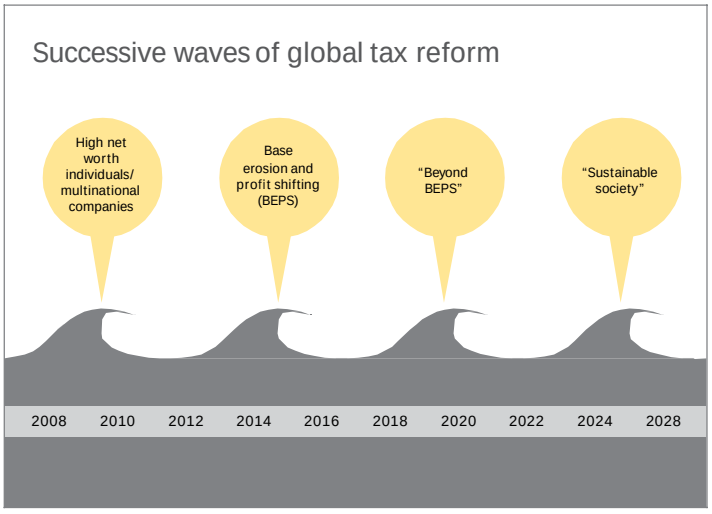
1 March 2019

Whether one looks a decade back or forward, the notion of a busy beach with a sizeable series of incoming waves is an apt metaphor for today's global tax vista.

As with so much of nature, the simplicity of a wave belies complicated mechanics at work beneath the surface. While it may look like each wave is a self-contained object, the dynamics are far more complex; one wave receding feeds energy to the next, and parts of one wave soon find themselves comingled in others. And as they hit the shore, waves unleash energy, foam and noise. Occasionally, the unique shape of the land may cause a riptide to occur, creating hidden danger and menace.



Tax "waves" behave in a similar manner: the last decade of change began with tax and spending stimulus, and a focus on the tax affairs of both High Net Worth Individuals (HNWIs) and multinational companies. That focus on HNWIs is swelling again today, illustrated by calls for wealth taxes.

Five years later, G20 leaders tasked the OECD to issue a far-reaching set of BEPS recommendations, the majority of which continue to be implemented in 2019, our surveys suggest.

In 2019 the next wave is starting to arch higher and will soon release its pent-up energy. What first looked like a relative ripple – taxing the digitalized economy and a new round BEPS work has quickly transformed into the kind of wave that makes parents jump up and pull their children to safety.

Achieving consensus will be time consuming and challenging

Whatever emerges from the 129-member-strong BEPS Inclusive Framework (IF)[1] may not match exactly what is being discussed today – indeed, that discussion is still being held under the Taxation of digitalized business banner, but as my colleague, Marlies de Ruiter argues on page 15, it goes far further. Taxpayers certainly seem to agree with the sentiment that consensus will be difficult; in a February 2019 EY webcast,[2] just one in six of 1,200 online poll respondents felt that there was a "great chance of a comprehensive solution emerging" at OECD level.

Looking for the next big wave

Looking out to sea, a new swell is already starting to form around yet another wave that we think will fuel the next five or even ten years of tax policy direction.

Five of 48 jurisdictions tracked in this publication are already proposing or forecasting higher top marginal rates of PIT in 2019. Countries including the Netherlands are implementing energy taxes, while in the US, talk of a "Green New Deal" is creating headlines. Outside of tax, too, the growing calls for equality can be seen; consider the streets of Paris in early 2019, where the so-called "gilets jaunes" illustrate the depth of public anger about inequality, almost a decade after the birth of "The other 99%" movement.

And around the world, rising tax enforcement completes the wave life cycle, providing energy to the next wave.

[1] The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) brings together over 125 countries and jurisdictions to collaborate on the implementation of the BEPS Package

[2] https://www.ey.com/gl/en/issues/webcast_2019-02-11-1500_global-tax-policy-and-controversy-in-2019

Drivers of change in 2019

Pinpointing the drivers of tax change has always been an interesting business. BEPS and ATAD are obvious contenders in 2019, as is the election "super cycle," which continues to produce unexpected results.

More subtle are other new drivers; information flows to tax administrations is starting to have a broader effect on tax policy formation, and, with greater visibility on exactly where assets reside, countries now have a better opportunity to design new regimes to tax them or for taxpayers to voluntarily disclose them.

Furthermore, US tax reform is having an influence on other countries' tax reforms, with some countries responding already, but others waiting more patiently for more complete data to drive policy decisions.

But these drivers alone do not fuel the "new era" of international tax reform of which the OECD's tax leader talked in December 2018; that will be the product of a far more wide-ranging, long-term and deeply ingrained set of drivers.

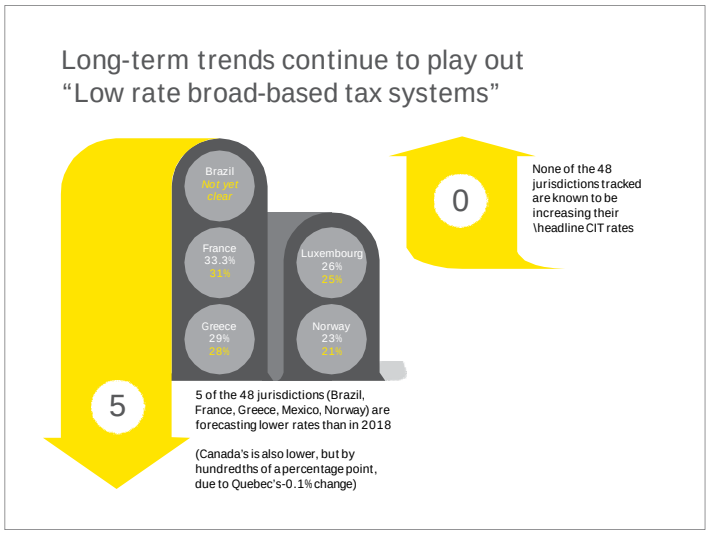
A US Treasury official similarly described his views on the coming shifts (also in a December 2018 speech), saying:

> "I believe that many observers would agree that, over the last five years or so, we have seen an accelerating breakdown of the international consensus as to how taxing jurisdiction should be allocated around countries. If this trend continues, it could lead to a serious breakdown in international standards."

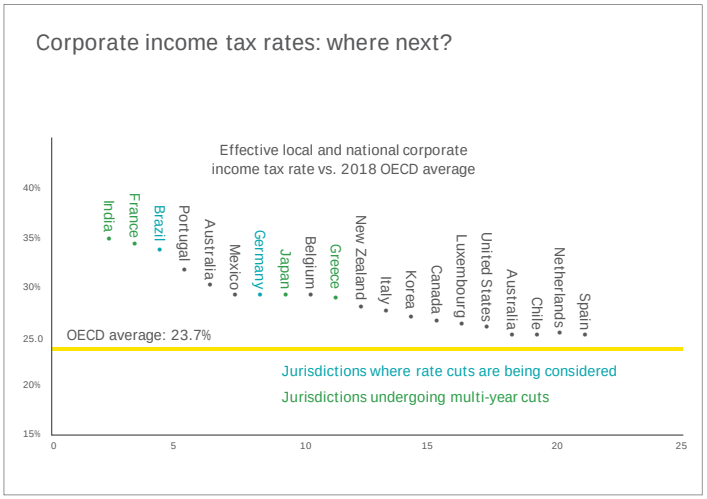
What does that really mean in practical terms? Arguably, a series of recent tax measures in different geographies collectively express the frustration of governments regarding their inability to protect their tax bases. They include diverted profit taxes (DPTs) in a number of jurisdictions; the base erosion and anti abuse tax (BEAT) and Global Intangible Low-Taxed Income (GILTI) measures within the US tax reform package; digital services taxes (DSTs) both multilaterally in the EU and unilaterally in a number of jurisdictions; new digital permanent establishment (PE) concepts; differing interpretations of key transfer pricing concepts; and, of course, differing applications of BEPS recommendations – ironically adding to disparities in international tax systems, being the very problem the BEPS project itself was trying to solve.

Long-term trends are still playing out

Underpinning so much material change, some – but certainly not all – of the trends we had identified in recent editions of this publication remain present. First, and again showing a clear, unarguable direction, are headline corporate income tax rates. In every edition of this annual publication, we have stated in some form that "headline rates are falling and tax bases are broadening." This is no different in 2019, as the infographic below illustrates.

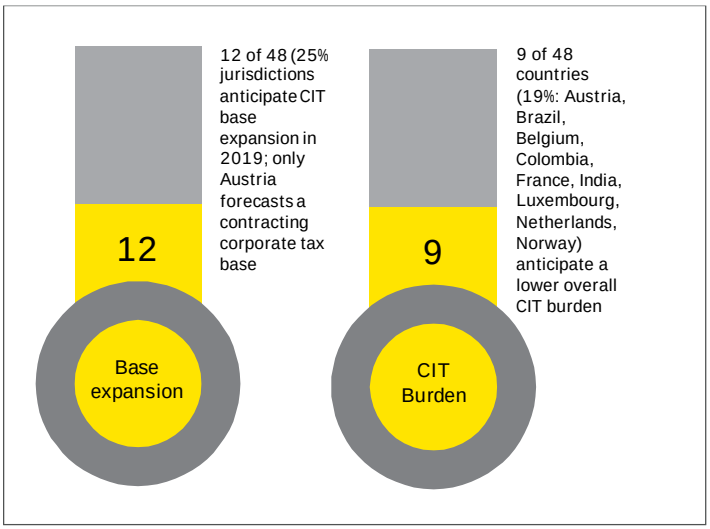


It is interesting to see how the effective CIT rates for each country stack up against the OECD's 2018 average of 23.7% By doing so, one may secure insight into which countries may be the next movers. Interestingly, action is already occurring. France and Greece are already partway through multi-phase rate reductions. Brazil has recently made it known that it plans to reduce its 34% rate – but by how much is not known. My colleagues in India, likewise, report that the government "recognizes the need for lowering the tax burden in line with international trends," and that a phased approach to reduction is expected. On that basis, we advise readers to also watch for other reductions in 2019, especially among those furthest above the OECD average, as illustrated below.



Recent years have seen many countries convene around a rate "corridor" of (roughly) 19% to 25%. It is possible that this corridor may move lower in the future. There will, of course, always be a price to access a market jurisdiction, but on the flipside, the BEPS project has probably (perhaps unsurprisingly,) increased tax competition via headline rates. What effect a possible reallocation of taxing rights and the application of some form of global minimum tax might have on the trajectory of headline CIT rates will be a focus for future editions of this publication.

Headline tax rates are but one element of tax competition, though, and their fall is often accompanied by corresponding tax base expansion. That continues to be the case in 2019, where 12 of the 48 jurisdictions (25%) tracked anticipate overall CIT base expansion in the year ahead, as shownbelow



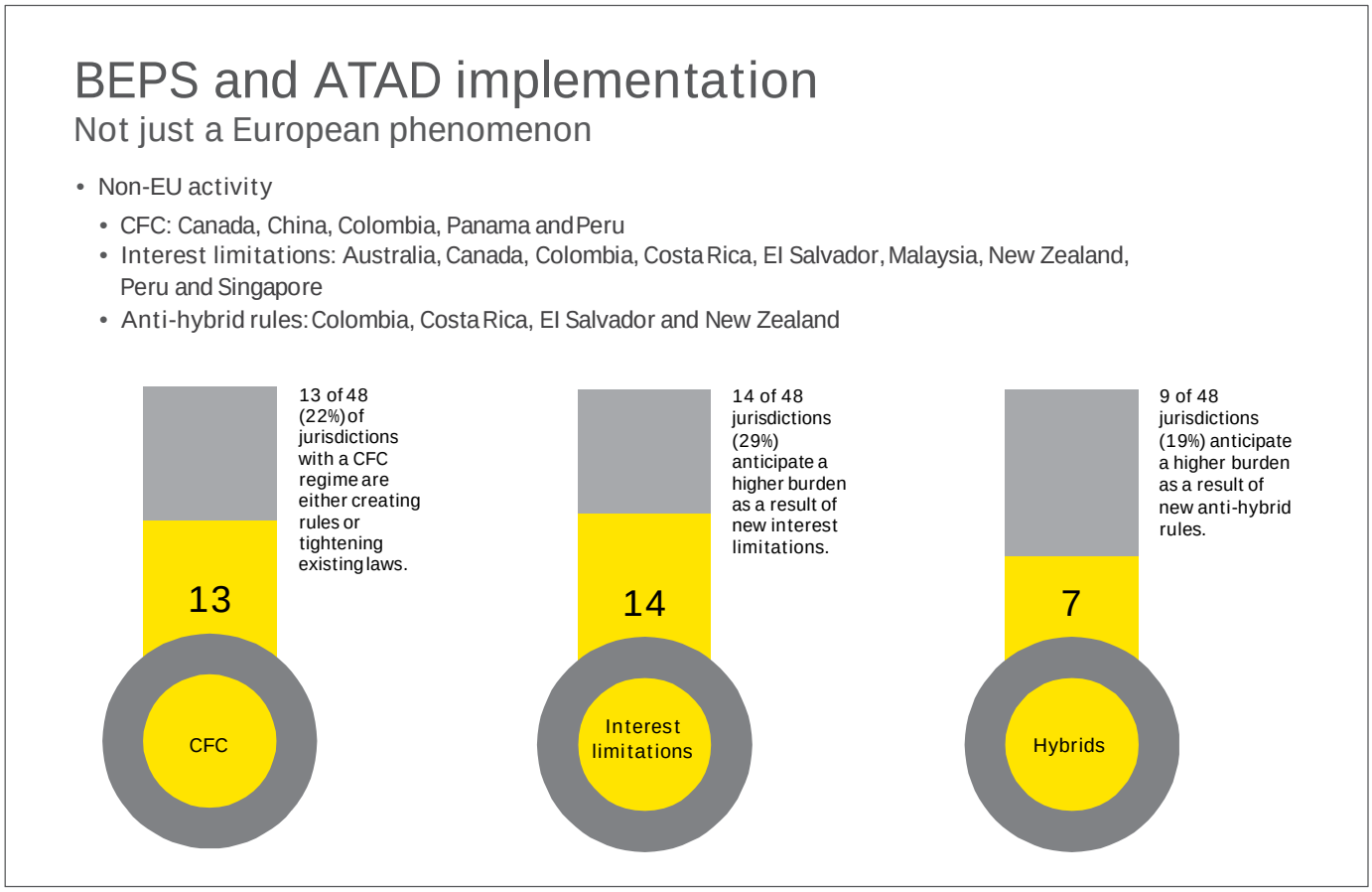
Nine of 48 jurisdictions (19%: Austria, Brazil, Belgium, Colombia, France, India, Luxembourg, Netherlands, Norway) anticipate a lower overall CIT burden this year. This is around the same as 2018 (17%) and slightly lower than 2017's 22%. Five of the 48 jurisdictions (10%: Australia, Costa Rica, Italy, Spain and Vietnam) anticipate a higher overall CIT burden in 2019. The remainder expect the same overall CIT burden in 2019.

BEPS and ATAD implementation

Our data confirm that 2019 is the year during which BEPS and ATAD implementation converge to drive a significantly increased number of new or changed laws at the local level. Here, activity is very much following the contours of the ATAD requirements (anti-hybrid rules, GAAR, interest deductibility rules, CFC rules and exit taxation).

But ATAD-type changes are not limited to EU Member States alone; new or changed law is also occurring among non-EU nations:

- CFC: Changes were implemented by Canada, China, Colombia, Panama and Peru (5 of the 13 implementing change in this area).
- Interest limitations: Here, activity was almost exclusively occurring among non-EU Member States, indicating that the majority of Europe had previously implemented either the OECD's BEPS Action 4 or this part of the EU's ATAD. Australia, Canada, Colombia, Costa Rica, El Salvador, Malaysia, New Zealand, Peru and Singapore (9 of the 14) are all making new or amended laws on interest limitations. Belgium and Slovenia were the only EU Member States tracked to be implementing new law in this area.
- Anti-hybrid rules: Colombia, Costa Rica, El Salvador, Israel and New Zealand are non-EU jurisdictions that are putting in place new or tightened anti-hybrid rules. Belgium and the UK among the EU Member States are tightening anti-hybrid legislation in 2019.



Transfer pricing (TP) is an area of BEPS where much implementation activity has already occurred, but is not yet complete. "This is the end of the beginning, not the beginning of the end," said Luis Coronado, EY Asia-Pacific Transfer Pricing Leader, during a February EY webcast.

While only 12 of 48 jurisdictions (25%) are anticipating a higher TP burden in 2019, against 45% in 2018 and 32% in 2017, our data indicate that transfer pricing risks are increasing.

Transfer pricing is not the measure with the highest incidence of burden-increasing measures, however – new digital taxes, higher levels of tax enforcement, changes to CFC regimes and interest limitation changes all demonstrate a higher incidence of change. But that does not mean that transfer pricing risks are slowing; the opposite is true, indicate our data.

What continues to be concerning, however, is continued unilateral action and inconsistent interpretation and application of the transfer pricing standard.

Tax enforcement

Looking to tax enforcement more widely, 21 of 48 jurisdictions (44%) forecast a higher business tax burden as a result of enforcement in 2019, results were similar in 2018. When one considers the depth and duration of this trend, coupled with the sheer volume of new and untested changes occurring in 2019, this does not bode well for the future.

Seven of 48 jurisdictions (15%) say that their tax authority is viewed as "generally aggressive with taxpayers, applying highly subjective and/or retroactive interpretations or threatening/using criminal sanctions" in 2019.

Tackling the shadow economy is a target in many emerging markets, and in a newly emergent trend, many of our respondents believe that double taxation arising from unilateral digital tax measures will rise in the coming years. Continued implementation of BEPS – including the new Principal Purpose Test in BEPS Action 6 and the new GAAR in the EU's ATAD – is also a factor.

Transparency

Whether transparency is to the tax authorities, such as provided by CbCR, or to the public, as the outgoing European Parliament would like, transparency has already had a major impact on business entities in the "post-BEPS" era.

In 2019, we expect the most significant developments in this area to come from the multilateral organizations; 2019 will be the first full year in with the new Mandatory Disclosure Rules in the EU, and very soon the OECD-level debate on expanding and revising CbCR reports will heat up, in order to meet a 2020 deadline.

All things considered, tax authorities will have more information about taxpayers in 2019 than they have ever had before. Together, this also adds up to a recipe for further controversy and for a fresh rise in reputation risk, as revenue authorities juggle huge volumes of data, new analytics solutions, and ongoing public and political demand for aggressive treatment of taxpayers.

New or unexpected issues in the data

Our first new or unexpected issue actually finds its genesis in 2018 – that of new, unilateral digital taxes. According to country data, 22 of 48 jurisdictions (46%; 2018: 37%) anticipate a higher burden as a result of new digital taxation laws. Since our initial data was sourced, many countries, including Belgium and New Zealand as recent examples, have moved ahead with public consultations or legislative proposals – thought ironically, both have slowed their pace in recent weeks.

A second key change concerns R&D incentives. In 2018 we commented that focus was "shifting onto improving or creating more 'acceptable' incentives." That trend looks to be decelerating quite quickly in 2019. Although 9 of 48 jurisdictions (19%) are making their R&D incentives more favorable, this is almost half the number than in 2018 (35%) and more similar to the 22% figure of 2017. Indeed, not only are fewer countries issuing new or improved R&D incentives in 2019, but some countries (Costa Rica, El Salvador, Honduras and Italy) also making existing incentives less generous. The fact that three of these four are Central American countries, illustrates how policy positions can quickly be replicated among nearby countries.

On the tax administration side of the equation, too, R&D incentives are under pressure; respondents note that R&D incentive compliance issues are also now starting to trigger tax audits, a phenomenon not present in prior years' data. Argentina, Finland and Turkey all mention this phenomenon.

Our final change point is the loss of two items from our top 10 list of most prevalent issues, the tax treatment of losses and capital gains tax (CGT). It will be interesting to see if CGT makes a strong reappearance in coming years as part of countries' "sustainable society" efforts.

What form will corporate tax change take in 2019 and beyond?

All things considered, a major new phase of reform looks to be on the horizon. Whether or not it was the primary objective, much of the major change in corporate tax being debated at multilateral levels centers on digital, as discussed in depth in our next article.

The potential new measures and approaches include changes to the allocation of taxing rights, nexus, some form of global minimum tax and, importantly, potential changes to the internationally accepted transfer pricing framework. These changes are complicated and interlinked, and in many cases are likely to require amendments to income tax treaties and changes to transfer-pricing norms. That, in turn, would seem to indicate a multiyear timeline in advance of significant local tax law change around the world.

Further, with the involvement of the United States, as well as France, Germany and the United Kingdom, the practical likelihood of this discussion moving forward has increased.

The here and now

Activity is not limited to the future though. In 2019, major tax reform is already playing out in many jurisdictions. As illustrated in Image 1 on page 8, sixteen of the 48 (33%) jurisdictions tracked by this publication are undergoing what they describe as either "significant" or "comprehensive" tax reform this year.

Eleven of the 16 say they are undergoing significant tax reform; perhaps that number will be higher in 2020, when a little more time has passed to measure impacts on FDI and tax revenues. Austria, Belgium, Brazil, Costa Rica and New Zealand, meanwhile, say their reform is comprehensive.

For many of the European jurisdictions within the group of 16, much of their reform is being driven by implementation of the EU's Anti-Tax Avoidance Directive, under which Member States had to legislate for a series of related measures by 31 December 2018. But this is not the only driver. Take Latin America, for example, where 6 of the 16 jurisdictions tracked are undergoing reform. Here, the drivers are widely agreed to be populism and politics.

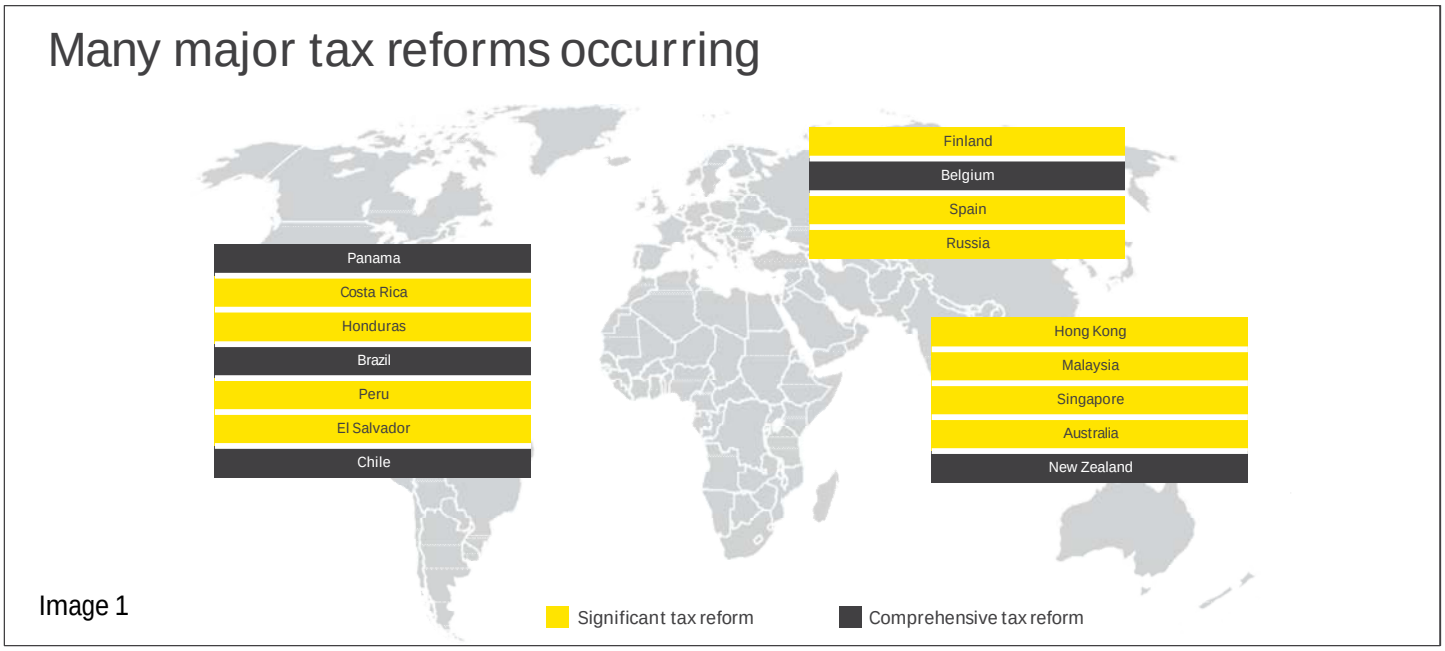


Image 1

Non-corporate considerations

VAT and GST

According to the 2018 OECD Revenue Statistics publication, general consumption taxes presently account for 20.8% of total tax revenues – compared with 13.3% of total tax revenues for corporate income taxes. And while they may not be borne by business as the "final consumer," this "color-blind" tax (i.e., it has to be paid whether the bottom line is black or red!) is of key importance to business as its collector.

Six of the 45 jurisdictions with a federal VAT/GST report a rate increase ahead in 2019, in either the headline/standard rate or the secondary rate. That is a distinct change from 2018, when none of our tracked countries reported an increase.

Additionally, 8 of 45 jurisdictions forecast VAT/GST base expansion in 2019. As a result, 10 of 45 jurisdictions forecast higher VAT/ GST burden while 6 forecast a lower burden overall. So after a couple of relatively quiet years for indirect taxes, changes seem to be front and center again.

Personal income taxes

PIT is a further area where we forecast more activity in 2019 than in recent years. We believe that attempts to reduce inequality (typically by raising top marginal rates while providing more generous tax-free thresholds) foreshadow a wider push in the coming years, which will see wealth taxes, CGT and inheritance taxes all enter the policy discussion. More immediately, 5 of 48 jurisdictions are already proposing or forecasting higher top marginal rates of PIT in 2019, although a different 5 are lowering top marginal rates! Eight of 48 jurisdictions, meanwhile, believe their overall PIT base will contract in 2019, while 11 of 48 jurisdictions are forecasting reduced overall PIT burden in 2019.

So, while the picture is not entirely clear, we expect this to be a busy field of play in coming years. That will likely impact both corporate executives and their expatriate populations in some way.

Stay safe in the water

All data and insight considered, we expect 2019 to be another year of change; and while the beach may still be open, the "High hazard" red flags are flying to indicate a high hazard level. Significant local and multilateral pressures will impact taxpayers, and the "Beyond BEPS" debate will play out at a high pace and have spill-over effects on EU tax policies. Again, this not also indicates change for digital companies, but potentially also any company using intangibles to create value.

Tax professionals need to be aware of the incoming waves and taking action. That means increasing monitoring of all key markets; engaging and influencing at both national and multilateral levels; looking over the horizon for the occasional wave that may be bigger than the others; and taking all precautions – by managing controversies in a global, strategic manner – to stay safe in the water.

One other element for the future is the expansion of the EY Global Tax Policy team, with the return to EY of Barbara Angus to take over the lead on Global Tax Policy, as we widen our work in the policy arena. I'm sure with Barbara at the helm, we'll continue to steer successfully through all the turmoil. Meanwhile, that provides me with the opportunity to spend more time with governments as they too navigate their way forward.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Back where it wants to be: the OECD in 2019

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1 March 2019

In 2019 the OECD sees itself back in the exact spot it wants to be – relevant, in demand and rolling up its sleeves to try and help countries fashion a major global consensus out of thin air.

Addressing the tax challenges brought by the digitization of the economy is at the forefront of OECD activity in 2019, and much movement is underway to try and build a consensus among countries before 2020. In fact, it will be interesting to see whether the whole project is even referenced as "digital" by then, given its ever-widening impacts.

Recent progress

As a result of a January 2019 meeting, the BEPS IF issued a public consultation document[2] ahead of the March meeting of the Task Force on the Digital Economy (TFDE), during which public comment was invited. The consultation document described two main pillars for discussion. Pillar I focuses on how existing rules should be modified to address the right to tax in light of digitization, including nexus rules. Pillar II focuses on what are described as remaining BEPS issues, including a jurisdictional remedy for income subject to no, or only very low, taxation.

While these meetings and consultations do not accelerate the overall timeline for recommendation and then implementation of a solution, they do offer clarity into that solution sooner than expected, with a preliminary report expected this summer, in advance of the G20 finance ministers' meeting.

So stakeholders will not be in the dark waiting for a final report in 2020, and they have also been invited into the discussion.

The interim timeline serves to split up the issues to be addressed in order to try and secure a consensus. In light of this, 2019 is poised to be a very active year for digital and wider discussions. It is significant that the US is joining in these discussions, heightening the likelihood of a concrete outcome. How concrete that outcome is remains to be seen, though; there are three proposals on the table, and only one will shine through (though it may "borrow" elements of the others if that is the price to pay for building consensus). With the US bringing the "marketing intangibles"3 proposal to the table, this proposal has already attracted much attention, with the OECD confirming that the "significant economic presence" proposal was added to the discussion very much at the last minute, by a group of 24 emerging markets.

To reach any kind of consensus, the OECD will have to tread a fine line, particularly as one US official has already said that he "feels that countries would not agree to full formulary apportionment or a tax only on highly digitalized business models."

Whatever the outcome, it will also be interesting to see what the EU proposes in response. Ripe for debate in particular is the EU minimum tax perspective, and how that relates to and influences the global system. This calls into question the whole notion behind tax treaties, the EU internal market, import and export neutrality, worldwide and territorial tax systems, and whether this is a move toward more harmonization.

That's one part of the OECD debate that still requires clarity, and the intention behind this minimum tax is unclear: will it be quite low, and thus akin to an anti-abuse measure? And if the minimum tax is successful, will it result in leaving the sovereignty of countries behind and forcing them to create more worldwide systems, in pretty much direct contrast to the current direction of travel?

The question also arises as to whether the European Commission will continue its attempt to progress both the proposed directive for an EU-wide Digital Services Tax (DST) and the second directive on a "Significant Digital Presence." The former, while not withdrawn, certainly did not pass any further at the most recent FORMAL ECOFIN meeting in March.

While these issues and more are being debated, it is currently unclear as to what form any finished OECD recommendation will take. Will it be issued as a minimum standard, a recommendation, a leading practice or as something else altogether? Will it require significant amendment to the OECD's transfer pricing guidelines? And to what level will it require the MLI as an implementation vehicle? These all remain open questions, and the positioning of the recommendation will depend upon the strength of the consensus.

Broader application

While digital (and beyond) is the undeniable "topic of the year" for the OECD, the issues arising apply to the broader tax landscape in 2019, with the conversation also focused on minimum tax elements.

This is apparent with the OECD already focusing on the US tax reform provisions of foreign-derived intangible income (FDII), Base Erosion and Anti-Abuse Tax (BEAT) and global intangible low-taxed income (GILTI) with the Harmful Tax Practices group. A global version of GILTI was already in the original BEPS plan but was dismissed – but of course, the global minimum tax proposal seems to be gathering momentum again.

The issues, however, are far broader than a minimum tax. As the same US Treasury official said in February, "I think it could make sense to focus this proposal on businesses that ultimately, directly or indirectly, are dealing with individual consumers rather than with other businesses just because I think marketing intangibles are most relevant in that context."

The conversation could therefore be better classified as not digital, then, but rather a wider reallocation of taxing rights with many considerations, including market-facing intangibles, user participation, and how to define and then allocate residual profits.

The question, like BEPS before it, is how will this be implemented, should consensus re reached? Will they use the existing Multilateral Instrument (MLI) or a similar mechanism? The MLI is now starting to have the desired effect of changes coming through, so by then we should know whether it works. But how long after consensus on this reallocation of taxing rights will there be until enforcement arises, double taxation rears its head and we see a steady stream of MAP cases? Many countries among our 48 surveyed for this report are already listing double taxation on digital tax issues as a key audit trigger.

In 2019, it is possible that we are three to four years out from final implementation. But this vacuum of available consensus is already leading to unilateral actions by many countries. We should all hope that the ongoing messaging from the OECD will discourage unilateral action.

Addressing harmful tax practices

US tax reform measures aside, the OECD's process of addressing harmful tax practices is moving forward, with momentum in several areas. The OECD's last report focused attention on zero or near-zero tax jurisdictions[3], a topic that was already on the radar of the European Commission. Outside of the formal OECD review process, the focus seems to be on pushing countries with preferential regimes to abolish them and move instead toward general regimes. The new regimes could be territorial, "box" type or another general regime.

A further quandary is on aggressive territorial regimes that could be de facto ring-fencing, but concern remains about jurisdictions with zero or near-zero tax. Any global minimum tax proposal will have a huge effect on the new regimes of countries that are under consideration as harmful. It will be interesting to see if all these countries are able to meet their obligations.

[3]https://www.ey.com/gl/en/services/tax/international-tax/alert--oecd-releases-2018-progress-report-on-preferential-regimes-under-beps-action-5

Tax administration

The focus on digital will without doubt keep the members of the OECD's Centre for Tax Policy & Administration (CTPA) busy through this year and next.

As I write this piece, the OECD has asked for public input on its eighth batch of Mutual Agreement Procedure (MAP) peer reviews. As the earlier-reviewed countries move from stage 1 (review) to stage 2 (remediation and improvement), it will be interesting to see whether the number of open MAP cases comes down and the number of cases closed continues to go up. The latest data from the OECD, unfortunately, show that, while more cases are being closed than before, the growth rate of new cases is more than double that of case closures! Likewise, it will also be interesting to see the results of these later batches of reviews, particularly as some of the smaller, emerging markets are now under review.

I also expect to hear news from the CTPA on how the 2018/19 International Compliance Assurance Programme (ICAP) pilot went. I very much hope that it will describe some of the

key challenges experienced, as well as having a meaningful discussion on how such challenges might be resolved. It will also be fascinating to hear individual countries' views on the future of this innovative pilot program. Whether or not it survives in its current, administration-heavy form remains to be seen. But for sure, the tax world needs new and novel ways to drive higher levels of tax certainty, a key focus of the G20 and OECD in recent years.

I also understand that we should expect to see a new report on joint and simultaneous audits in 2019. This is welcome news, and is far overdue after the framework for these important processes was first set out some eight years ago.[4] I very much hope that the global assessment of why joint audits are not more prevalent has unearthed some interesting viewpoints and resulting actions. In my view, these are an under-used dispute resolution tool,

And, far from being something a taxpayer should avoid, they are in fact invaluable processes. At a minimum, joint audits can pave the way for an Advance Pricing Agreement (APA), if not memorializing themselves into an APA in the first place!

Transparency is the final topic where I expect to see OECD output this year. Several developments will occur around Country-by-Country Reporting (CbCR). First, I expect the OECD will soon publish consolidated and anonymized summary data with a view to giving what Pascal Saint-Amans, OECD tax leader, has described in December 2018 as "an idea of where profits are located." I very much hope this does not lead to uninformed speculation about taxpayers.

Second, I expect the OECD to meet the G20's request for the OECD to develop a list of non-cooperative jurisdictions, which will have strengthened criteria – including failing to sign the OECD's

multilateral convention [on Mutual Administrative Assistance in Tax Matters] or failing to exchange information. This list is scheduled for June 2019 delivery.

Finally, I expect that there will at least a couple of developments in relation to CbCR. The first was telegraphed by Pascal Saint-Amans back in December 2018 where at a video address to an event in India, he described how the OECD would "soon" publish aggregated CbC data (anonymized) on their stats website, with a view to "showing the public where company profits are located. If that is the case, then I have little doubt that economists, statisticians, academia, the media, and NGO's will all start using this information and drawing their own conclusions

Second, is the OECD's planned 2020 review of CbCR which will commence in 2019. Potentially setting the stage (or at least, part of the stage) for the next half-decade of global transparency requirements, this will be an important issue for taxpayers to provide input on, should they be given the chance to do so.

All things considered, it is heating up to be another landmark year for the OECD. March will see much activity, and, I hope, shed light on the direction of the "digital" work; June, meanwhile will no doubt see the OECD publish a series of papers in advance of the G20 Finance Ministers' meeting in Osaka, Japan.

So the OECD tax unit has definitely "caught its breath" after developing the BEPS project itself, and is now looking to complete the as-yet-unfinished work on digital and beyond. And, as noted, that may yet turn out to deliver a far wider set of global tax reforms. But it will take time and it will not be easy.

[4] Editor's note both reports were published since this article was initially drafted. Analysis can be accessed at https://www.ey.com/gl/en/services/tax/international-tax/alert--oecds-forum-on-tax-administration-announces-international-compliance-assurance-programme---icap---2-0-and-publishes-new-pilot-handbook and https://www.ey.com/gl/en/services/tax/international-tax/alert--oecds-forum-on-tax-administration-announces-international-compliance-assurance-programme---icap---2-0-and-publishes-new-pilot-handbook respectively.

Tax in the European Union in 2019

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2019 is the last year of the current European Commission's mandate, and it is therefore unlikely that any major new proposals will emerge over the coming 12 months. However, that in no way means it will be a quiet year on the tax front within the European Union (the EU). On the contrary, in fact!

The debate in 2019 will be as complex and political, if not more so, than it has ever been. Illustrating this are the ongoing discussions in the Council concerning the Commission's two digital tax proposals, where the outcomes are as much linked to the politics of the rest of the world as they are to Europe's own political ebbs and flows.

Stepping back, it can be useful to stop and make a high level assessment of the overall role any group is playing on the overall tax landscape. Here are a few key points to consider in Europe:

- In 2018, the Commission drove a large part of the global tax transparency agenda; with the implementation of the Mandatory Disclosure Requirements (MDR) program and also the EU listing of non-cooperative jurisdictions for tax purposes (the so-called "tax blacklist") it was very much on the front foot. In that regard, it will be interesting to see if the new European Parliament's members are as keen as the previous group to push forward with those kinds of demands.
- The EU seized the anti- tax avoidance agenda with the EU-wide Anti-Tax Avoidance Directive (ATAD) driving significant implementation of new law in the second half of 2018 in particular. That will continue as elements of ATAD II continue to be implemented.
- The EU was largely responsible for kicking off the digital tax debate in 2018. While a large part of global focus is now on how the OECD Is taking this debate forward, potential outcomes may in turn unblock the Common Consolidated Tax Base (CCTB) debate.

With these points all in mind, what might the year ahead hold for the EU?

A move to qualified majority voting on tax matters?

One of the most significant developments for 2019 may be a new tax per se, but a change to the overall legislative processes that are followed in respect of tax proposals, with the notion of Qualified Majority Voting (QMV) is again under discussion in the European Commission.

The Commission has consistently tried to persuade the Council to accept QMV in the tax area whenever the EU Treaties have been modified but this has never been accepted by the Member States.

As background, all EU legislative proposals – on both direct and indirect tax matters – must achieve unanimity in order to pass. This requirement for unanimity has historically made it difficult for many EU tax proposals, including the Common Consolidated Corporate Tax Base (CCCTB), now nearly a decade on the drafting table, to pass.

There is an opportunity for legislative proposals proceed with a subset of Member States ("enhanced cooperation"), but it is very rarely used, and has only been tried once in the tax area and in fact, has only a couple of times at all.

This is a procedure that can be enacted if the Council fails to secure the necessary level of agreement but a group of nine or more Member States indicate that they still want to do something in the relevant area. The Commission may withdraw its initial proposal and come forward with a new proposal that would only be applicable within those Member States who want to be bound by the new rules. It will only really be used when the discussions have halted, but there has been significant agreement between a significant number of Member States on the type of rules that they would like to see introduced.

Ongoing examples of difficulty in achieving unanimity in tax policies – including perhaps most visibly, the desire for an EU-wide Digital Services Tax - are leading the European Commission to look for alternative methods via which to achieve its goals.

The Commission is now proposing a staged approach. The Commission is suggesting that QMV could be introduced progressively in four stages:

- In respect of measures designed to improve cooperation and mutual assistance between Member States in fighting tax fraud and evasion, as well as for administrative initiatives which would benefit EU businesses, e.g. harmonized reporting obligations
- For measures in which taxation supports other policy goals, e.g., fighting climate change, protecting the environment or improving public health
- For proposals designed to modernize already harmonized EU rules such as VAT and excise duty rules
- For major new tax projects, such as the CCCTB and a new system for the taxation of the digital economy

The Commission has signaled that it would like this issue to be discussed at a summit meeting of EU leaders on 9 May. That's a challenge, and may get subsumed by both Brexit and Euroepan Parliament elections themselves

[4] http://europa.eu/rapid/press-release_IP-19-225_en.htm

[5] ECOFIN is an Economic and Financial Affairs Council configuration – made up of the economics and finance ministers from all member states. Relevant European Commissioners also participate in meetings.

[6] https://www.consilium.europa.eu/en/meetings/ecofin/2019/02/12/

Back to business

In the absence of any new legislative proposals through 2019, the spotlight will fall on the ECOFIN Council and its efforts to adopt, or at least make progress in discussing, the proposals which are already on its table. In this context, a distinction can be drawn between two major proposals which it is safe to say are extremely unlikely to be agreed upon during 2019 – the CCCTB and a Definitive VAT system based on taxation in the country of destination – and other, more targeted proposals where progress could be more possible.

The EU approach to taxation of the digital economy

The challenge related to taxing the profits of digitalized business models is probably the most politically sensitive issue of taxation policy globally in 2019.

At the request of the Council, the Commission presented a Digital Taxation Package in March 2018 which contained, inter alia, two legislative proposals[5]. The first was a proposal to establish what is effectively a "digital permanent establishment" – the Significant Digital Presence or "SDP") as part of the overall CCTB exercise, which would enable the levying of corporate income tax where a company has significant digital presence. The second was a proposal for an interim measure, consisting of an indirect digital services tax on revenues from the provision of certain digital services.

To date, the Council has concentrated its efforts on the second, interim proposal, but despite the efforts of the outgoing Austrian Presidency, no agreement has yet been reached, while some supporting Member States have already moved forward unilaterally. Given its political importance, this matter will be given high priority by the new Romanian Presidency, but agreement still seems distant. At the last ECOFIN Council meeting in, the formal conclusion noted that "Some delegations maintain reservations either on some specific aspects of the proposal or more fundamental objections."

The issue at stake now is largely political, not technical, and there should be a decision one way or another in the Council within the first half of 2019. The discussions are, of course, taking place against the backdrop of discussions at a wider level within the OECD, which plans to adopt a final report and recommendations on the tax challenges of digitalization by 2020.

Nevertheless, numerous announcements of proposals on DST-type legislations by Member States (see for example, Italy, France, Spain and UK) demonstrate the willingness by some governments to execute such a move when driven by the political pressure of its population. This is exactly the scenario the Commission strived hard to avoid and which would drive further compliance complexity not only for tech industry tax directors, but many others who may be unsure of whether they are in or out of scope.

More widely, the outcome of discussions in the OECD are more likely to influence the direction in which the EU moves in respect of both the application of corporate taxation on the digital economy and also on its CCTB deliberations.

[5] https://www.ey.com/gl/en/services/tax/international-tax/alert--european-commission-issues-proposals-for-taxation-of-digitalized-activity

Common (Consolidated) Corporate Tax Base (C(C)CTB)

In 2016 the Commission submitted two proposals – one for a Common Corporate Tax Base (CCTB) and the second for a Common Consolidated Corporate Tax Base (CCCTB). The CCTB proposal lays down proposed common rules for computing the tax base of multinational companies operating within the EU, whilst the CCCTB proposal complements the CCTB proposal by introducing rules for consolidation. For its part, in December 2016, the ECOFIN Council took the view that work on the CCTB proposal should focus as a priority on the "elements of a common tax base" and invited Member States, to "concentrate their efforts on the rules for calculating the tax base and, in particular, on new elements of the relaunched initiative (chapters I to V)".

In respect to the CCCTB proposal, the Council agreed that it would only be examined at a technical level once discussions on the CCTB proposal have been successfully concluded. Against this background, and with a view to advancing discussions, the Austrian Presidency (1 July to 31 December 2018) drew up compromise texts on CCTB chapters I to V, which incorporate the results of discussions throughout 2017 and 2018. Work will no doubt continue in the Council working Group throughout 2019 on this issue.

One of the more relevant changes in the compromise text compared to the original version is the mandatory inclusion of all entities subject to corporate taxation. In order to consider the specificities of small and medium- sized enterprises (SMEs), additional provisions should be drafted. In 2019 it will be interesting to see how the Romanian (current) and Finnish (next) presidencies will cope with the heavily discussed matter of reconciling the German-French declaration dated June 2018 with the newly-proposed compromise text. The German-French declaration expressly deleted all tax incentives, while the compromise text foresees a super deduction for R&D expenses. The developments around the CCTB should be closely monitored by business, even though there is still not sufficient appetite by almost all EU Member States to agree on a common solution. Again, a move to some form of different apportionment of taxing rights among market jurisdictions as part of the OECD consensus that they hope will arise from their digital work may foster momentum in this direction.

It is very unlikely though, that the CCTB will be "put to bed" in 2019; instead, we are more likely to see one more year of debate ahead, resulting in a ten-year-old proposal.

Definitive VAT System

In May 2018, the Commission tabled a detailed proposal for a definitive VAT system based on taxation in the country of destination. However, the Council has not proceeded on an article-by-article examination of this proposal, but has instead focused its discussions on the design of the proposed system. Member States have confirmed their support for the concept of taxation in the country of destination, but are concerned about the possible administrative burdens for taxable persons, the problem of collecting tax from non-established traders, and the risk of new types of fraud. Discussions in 2019 are likely to continue in the same vein and focus on the key elements of the Commission's proposal and the possible development of flanking measures such as the introduction of some form of joint and several liability, which could restrict the customer's right of deduction. An alternative, which has been floated and which will undoubtedly be discussed in 2019, is the idea of a split payment whereby the customer would withhold the VAT and pay it directly to the tax authorities. It appears that detailed discussions on the draft text will continue to be shelved until consensus on the framework for a new VAT definitive system is reached. Though closer now than it ever has been in the past, the introduction of the definitive VAT system therefore still appears to be a considerable way off.

Other VAT proposals

A number of targeted VAT proposals were discussed by the Council in 2018, and several were adopted. Two, however, remain on the Councils' table. The first is the proposal put forward by the Commission in January 2018 to amend the rules which Member States must follow regarding the setting of VAT rates. This proposal is intrinsically linked to the proposal for a definitive VAT system and is therefore very unlikely to make progress in 2019. The second concerns the simplification of VAT rules for SMEs. It is a stand-alone proposal containing simplification measures which the Commission considers necessary under the existing VAT system. Whilst Member States are not in principle opposed to the simplification of VAT obligations for SMEs, they are concerned that they should be accompanied by appropriate safeguards to ensure that tax controls are not weakened with a consequent increase in fraud or evasion. Discussions will therefore continue in 2019 and provided that appropriate safeguard measures can be incorporated, there is a good chance that this proposal will be adopted.

In addition to these two proposals, in December 2018 the Commission tabled implementing provisions for the new VAT system which will apply for distant sales of goods from 1 January 2021 together with draft provisions clarifying the situations in which on-line platforms will be considered to have facilitated sales of goods between non-EU suppliers and EU consumers. Discussion of these proposals will be given high priority in the Council in 2019 since their rapid adoption is essential to allow a smooth introduction of the new distant sales regime in 2021.

Financial Transaction Tax (FTT)

Little progress was made on this proposal in 2018 and little, if any, can be expected in 2019 since the political impetus appears to have subsided. Despite the fact that there are now only 10 Member States participating in the Enhanced Co-operation group which has been established in the Council, agreement appears to be as far off as ever.

Code of Conduct Group (Business Taxation)

This Council Group provides a forum for discussing whether tax measures of Member States are consistent with the political undertakings that had been given. It was very active in 2018, and will continue to be so in 2019. Its current main priority is to monitor commitments taken by countries on the EU list of non-cooperative jurisdictions. Most recently, the Council added 10 new jurisdictions which either did not commit to addressing the EU's concerns or did not deliver their commitments on time, bringing the total number of jurisdictions listed to 15. Also, the Council amended the list of countries included in Annex II of the Council conclusions of 5 December 2017 (jurisdictions with pending commitments) by moving 10 jurisdictions to the EU List, removing 21 and adding 2 new jurisdictions. The Annex II listing was reduced from 63 jurisdictions listed to 34[6]. In addition, it works on the standstill and rollback of harmful preferential tax regimes.
As concerns its ongoing work on the so-called "black" and "grey" lists in 2019, the Group can be expected to focus on the political commitments given by the numerous countries currently listed under the grey category.

A year of transition

Outside the work of the Council – not least due to the fact that the will be a new Commission as well as a new composition of the European Parliament, it can be expected that the focus of the Commission´s tax work in 2019 will lie less on drafting new legislation, and more on monitoring and supervising Member State's implementation of newly-adopted tax directives. Prominent examples to steer the watchdog function of the Commission will be the DAC directives and the ATAD I directive, as well as first support in implementing the new mandatory disclosure rules.

[6]https://www.ey.com/gl/en/services/tax/international-tax/alert--ecofin-publishes-updated-list-of-non-cooperative-jurisdictions-for-tax-purposes---fails-to-gain-agreement-on-digital-services-tax

Glossary of terms

ALP: arm's-length principle

APA: Advance Pricing Agreement

ATAD: Anti-Tax Avoidance Directive

BAPA: Bilateral Advance Pricing Agreement

BEAT: Base Erosion Anti-Abuse Tax

BEPS: base erosion and profit shifting

BEPS IF: BEPS Inclusive Framework

CA: competent authority

CbCR: Country-by-Country Reporting

CCTB: Common Corporate Tax Base

CCCTB: Common Consolidated Corporate Tax Base

CFC: controlled foreign company

CIT: corporate income tax

CRS: Common Reporting Standard

CTPA: Center for Tax Policy and Administration – a unit of the OECD

DPT: Diverted Profits Tax

DST: Digital Services Tax

EC: European Commission

EP: European Parliament

EU: European Union

FA: formulary apportionment

FDI: foreign direct investment

FDII: foreign-derived intangible income

GAAR: General Anti-Abuse Rule (may also refer to General Anti-Avoidance Rule)

GILTI: global intangible low-taxed income

GDP: Gross domestic product

GST: goods and services tax

HNWI: high-net-worth individual

ICAP: International Compliance Assurance Programme

IMF: International Monetary Fund

IP: intellectual property

MAP: Mutual Agreement Procedure

MAPA: Multilateral Advance Pricing Agreement

MBTA: Mandatory Binding Tax Arbitration

MLI: Multilateral Instrument

MNC: multinational company

MNE: multinational enterprise

OECD: Organisation for Economic Co-operation and Development

PE: permanent establishment

PIT: personal income tax

PPT: principal purpose test

R&D: research and development

SME: small or medium-sized enterprise

TCJA: Tax Cuts and Jobs Act

TP: transfer pricing

UN: United Nations

VAT: value-added tax

WB: World Bank

WHT: withholding tax

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