

Tax

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Tax Analysis

Global Minimum Tax Frequently Asked Questions (FAQ)

Introduction

On 10 July the G20 endorsed the key components of the two pillar approach to international tax reform that was recently endorsed by 131 countries and jurisdictions, constituting the vast majority of the OECD/G20 Inclusive Framework (IF) on Base Erosion and Profit Shifting (BEPS). Each of the two pillars addresses a separate concern.

- **Pillar One** targets the largest multi-national groups focussing initially on those with EUR20 billion of consolidated revenue or more and net profits in excess of 10% (profit before tax/revenue) and will require them to pay tax in the locations where their customers and users are located. A formulaic approach will be used to allocate a percentage of profits between each jurisdiction. Pillar One should effectively require in scope multinationals to pay at least some tax in the markets they interact with.
- **Pillar Two**, the key components of which are commonly referred to as the "Global Minimum Tax" or "GloBE" and which is the focus of this FAQ, introduces a minimum effective tax rate of at least 15%, calculated based on a specific ruleset. Groups with an effective tax rate below the minimum in any particular jurisdiction would be required to pay top-up tax to their head office location. The tax would be applied to groups with revenue of EUR750 million or more, making it far more widely applicable than Pillar One.

The Global Minimum Tax attempts to limit tax competition by introducing a globally uniform floor, below which the effect of low tax rates or fiscal policy measures would be largely obviated.

This article is intended to provide high level answers to some of the most frequently asked questions on the Global Minimum Tax. This article is current as of the date of publishing. Please be mindful that this is a rapidly evolving topic.

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How will the Global Minimum Tax operate?

The Global Minimum Tax consists of three principle rules, the Income Inclusion Rule (IIR), the Undertaxed Payments Rule (UTPR) and the Subject to Tax Rule (STTR).

The IIR will apply in priority to the UTPR which will act as a backstop to the IIR. The IIR and UTPR will operate differently but in a complementary fashion. They will reference a broadly similar calculation methodology and ruleset. Both rules will refer to the same minimum effective tax rate, which as outlined above should be at least 15% and will be calculated based on a uniform set of rules specific to the Global Minimum Tax. In combination, the IIR and UTPR are referred to as the GloBE.

The STTR is a treaty based rule and is fundamentally different from the IIR and UTPR. The STTR will reference a rate of 7.5% to 9% and will apply in priority to both the IIR and the UTPR. However, the STTR is narrower in scope and may face implementation obstacles.

What is the Income Inclusion Rule?

The IIR is similar in operation to a controlled foreign companies (CFC) rule. The IIR will be applied by and collected in the jurisdiction of the head office. It will apply in respect of each jurisdiction in which the group has a subsidiary or branch. However, it will not apply to the head office jurisdiction itself.

Under the IIR, the effective tax rate of each jurisdiction, calculated in accordance with specific Global Minimum Tax rules, will be determined based on all of the consolidated companies or branches in that jurisdiction. It will then be compared with the minimum tax rate of at least 15%. Top-up tax will be charged to the head office to make up for any shortfall.

What is the Undertaxed Payments Rule?

The secondary rule under the Global Minimum Tax is proposed to be the UTPR. The UTPR will apply after the IIR and serves as a backstop to the IIR.

One scenario in which the UTPR would apply is where the jurisdiction in which a group is headquartered has an effective tax rate below the minimum tax rate. This is because the IIR itself does not apply to the jurisdiction of headquarters. Any top-up tax would then be collected under the UTPR by the countries in which other group companies are located.

The implementation of the UTPR could be delayed, such that the IIR is implemented before the UTPR. This could offer a temporary reprieve for groups that have their headquarters in low tax jurisdictions.

What is the Subject to Tax Rule?

The STTR is a treaty based rule which may override treaty benefits in existing treaties in respect of certain payments, where those payments are not subject to a minimum level of tax in the recipient jurisdiction.

There are several key differences between the STTR, the IIR and UTPR:

- Firstly, the STTR may apply irrespective of the size of the group (i.e. the EUR750m threshold may not apply).
- Secondly, the STTR only applies to certain categories of related party payments.
- Thirdly, the STTR does not reference the same calculation methodology or rate as generally applied under the Global Minimum Tax. The STTR applies on a payment-by-payment basis and is triggered where the full amount of a payment will not be subject to tax at a nominal rate of least 7.5% to 9%.

Where the STTR applies, treaty relief that would otherwise have been provided may be denied, with the maximum applicable withholding tax being 7.5% to 9%. The STTR applies before the IIR and UTPR and any tax collected

under the STTR should be factored into the Global Minimum Tax calculations used for the purposes of the IIR and UTPR.

The STTR is a treaty based measure and is anticipated to be enacted bilaterally following a request from either party to a treaty. It is also anticipated that the majority of jurisdictions requesting the introduction of the STTR will be developing countries. Accordingly, treaties entered into between larger economies are less likely to be affected by the STTR, or may not be affected at all.

Most of the jurisdictions we operate in have tax rates above 15%, will the global minimum tax affect us?

Whether top-up tax will apply under the Global Minimum Tax will depend on the group's effective tax rate calculated in accordance with the Global Minimum Tax rules in each jurisdiction where it has consolidated subsidiaries or branches.

While the headline rate of tax of a jurisdiction is relevant to this calculation, it is not determinative. We anticipate that the Global Minimum Tax will be relevant and significant to a number of jurisdictions that have headline rates of tax exceeding 15%.

Various factors could influence the application of the Global Minimum Tax, in particular book-tax differences such as exclusions, exemptions and incentives that are offered under a jurisdiction's domestic rules, but are not offered under the Global Minimum Tax rules.

A number of jurisdictions will not participate in the Global Minimum Tax, will moving our head office to one of these mitigate the tax?

The IIR is applied by the head office jurisdiction. If the head office jurisdiction does not adopt the IIR, the immediate subsidiary jurisdiction(s) will have the right to apply the IIR.

Some groups may have a structure to which the IIR does not apply. This could be the case where the head office jurisdiction does not apply the IIR and where there is only a single tier of entities beneath the head office. Or, it could be because no parent entity in the group operates in a jurisdiction that applies the IIR.

Where the IIR does not apply, the UTPR may apply as a backstop measure. The UTPR is still being developed. Whether the UTPR will apply will depend on a number of factors. One particularly relevant factor is the UTPR's date of implementation, which may be deferred.

The impact of moving a group's head office will be complex and involve consideration of a multitude of factors. The Global Minimum Tax rules have design features that mean a change in group head office location may not significantly impact the overall application of the rules. However, there are likely to be exceptions and scenarios where a significant difference could arise.

Are any industries excluded from the Global Minimum Tax?

The Global Minimum Tax applies fairly broadly. At this stage of negotiations it appears that global shipping is likely to be excluded. Fund vehicles subject to certain conditions are also likely to be excluded.

It will be necessary to consider the applicability of exclusions on a case-by-case basis. Other industries are generally in scope of the Global Minimum Tax.

Pillar One, which as outlined above is different from the Global Minimum Tax, currently excludes regulated financial services and extractives.

We currently benefit from tax incentives that are offered under statute or have been guaranteed by particular tax authorities, can we still benefit from these?

The Global Minimum Tax itself should not directly alter any tax incentives that are offered under domestic laws. However, where a tax incentive results in a group falling below the Global Minimum Tax rate, top-up tax could apply. This may have the effect of reducing or eliminating the benefit of the incentive.

Whether incentives continue to be useful may partly depend on the effective tax rate of a group prior to utilizing the incentive. For example, if the effective tax rate of a group in a particular jurisdiction is 30% before opting into an incentive, but 16% after utilizing the incentive, no top-up tax would be applicable, assuming a Global Minimum Tax rate of 15%.

If the starting effective tax rate was 16.5% and it were subsequently reduced to 8.25% by an incentive, the global minimum tax could then apply to increase the effective tax rate to 15%, which would nullify the majority of the benefit provided by the incentive.

While the introduction of the Global Minimum Tax itself should not directly interfere with domestic tax law, we anticipate a number of jurisdictions will respond to the tax by amending their own laws. Accordingly, it is possible that certain incentives may be discontinued by jurisdictions, or jurisdictions could introduce their own domestic minimum taxes that could override incentives.

When will the Global Minimum Tax be effective?

The Global Minimum Tax is intended to be effective in 2023.

The IIR, in theory, can be introduced with only changes to domestic law. Provided there are no political stumbling blocks, a 2023 timeline could be achieved.

The UTPR is still under development. However, we understand that its final form is likely to be implementable through domestic law changes only. However, its introduction may be deferred. If the UTPR is deferred, it may become effective in 2024, 2025 or 2026.

The STTR, which is a treaty based rule, allows a jurisdiction to deny treaty benefits in certain circumstances and will impact the operation of treaties. Therefore, its implementation would require a multilateral instrument. While the drafting of such an instrument and in-principle agreement can be achieved relatively quickly, we have observed delays in ratifying the previous multilateral instrument that was used to implement certain minimum standards in the OECD's previous BEPS project.

A significant coordinated effort will be required to implement the STTR in order for it to be effective in 2023.

Our group has tax losses in a number of jurisdictions, do these count for minimum tax purposes?

The availability of losses incurred prior to the implementation of the Global Minimum Tax and the basis under which they are recognized is still uncertain. In particular, it is unclear whether the losses will be limited based on a particular lookback period, whether they may be limited to operating losses only and whether they will be calculated based on local tax law or the Global Minimum Tax rules.

If local tax losses are available, but they are not recognized for the purposes of the Global Minimum Tax, groups may be required to pay top-up tax which could partially or entirely offset the benefit of the tax losses.

Our head office location already applies CFC rules, could the IIR still apply?

While the IIR is similar to a CFC rule, there are very few limitations to the IIR meaning it may apply more broadly than certain CFC rules. For example, the IIR applies irrespective of the level of substance or activity that a group operates within a jurisdiction. Albeit, some relief will be provided with an exclusion of at least 5% of tangible assets and payroll. This exclusion will be at least 7.5% during a 5-year transition period.

The IIR could be still significant even where groups are already subject to CFC rules.

We are a US headquartered group and already subject to GILTI, will the IIR affect us?

The interaction between GILTI and the IIR is still to be determined. Generally speaking the Global Minimum Tax rules are likely to attempt to cater to US headquartered groups such that they are not subject to both GILTI and the IIR. However, this is a potentially complex area and US headquartered groups will need to consider this matter carefully.

It is also possible that a number of jurisdictions will introduce their own domestic minimum taxes, which could mirror the Global Minimum Tax rules and apply to inbound multinationals. This would allow those jurisdictions to collect top-up tax in respect of multinationals operating in their own jurisdiction that would otherwise be collected in the head office jurisdiction. If these domestic minimum tax rules do not provide a carve-out for US headquartered groups, these groups could be subject to both GILTI and a domestically levied version of the Global Minimum Tax.

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