Tax Insights

from Global Structuring

Germany publishes Pillar Two discussion draft

March 21, 2023

In brief

The Federal Ministry of Finance (MoF) published a draft law on March 20, to implement the 'Pillar Two' Directive ensuring a global minimum taxation for multinational groups and large domestic groups in the European Union (so-called Minimum Tax Directive Implementation Act - MinBestRL-UmsG). The publication of the German draft law follows the formal adoption by the EU Council to adopt Pillar Two on December 15, 2022. (See our prior Tax Policy Alert).

Observation: The discussion draft is largely based on the EU Directive, the OECD Model GloBE Rules (See our Tax Policy Alert) and other OECD publications, such as the Safe Harbour Rules. (See our previous Tax Policy Alert).

In detail

The implementation of the EU Minimum Tax Directive is provided through a separate law, the Minimum Tax Act (MinStG). The discussion draft comprises a total of 89 paragraphs and is divided into 11 parts.

Part 1: General provisions

Similar to the OECD model rules and the EU Directive, the MinStG's scope would include groups that reach the annual revenue threshold of EUR 750 million or more in at least two of the last four consolidated financial statements of the Ultimate Parent Entity. In line with the EU Directive, the discussion draft provides for supplementary taxation not only for MNE groups, but also for groups operating purely in Germany that meet the relevant revenue threshold.

A group within scope of the MinStG includes all entities that are fully (or partially) consolidated in the consolidated financial statements, regardless of their legal form, as well as each of their permanent establishments (Constituent Entities).

As a supplement to the EU Directive, the discussion draft provides for regulations on a minimum tax group (Section 3 MinStG). The minimum tax group consists of the Constituent Entities subject to tax in Germany under the MinStG and the domestic group parent. The various supplementary tax amounts are to be allocated to the group leader, so that the group leader acts as the sole tax debtor vis-à-vis the tax authorities, with the Constituent Entities being jointly and severally liable.

Part 2: Top-up Tax regime

The Top-up Tax can be levied through three different mechanisms:

- The so-called Income Inclusion Rule (IIR) is levied at the level of the Ultimate Parent Entity and, if applicable, at intermediate parent companies.
- If there is no taxation of low-taxed business units via an IIR, the so-called Undertaxed Profit Rule (UTPR) would apply. Under the UTPR, each Constituent Entity in Germany is to be allocated a pro rata supplementary tax amount from the Top-up Tax amount of the entire MNE group.
- For low-taxed domestic Constituent Entities, the discussion draft also provides for the possibility of priority collection of the Top-up Tax through a Qualified Domestic Minimum Top-up Tax (QDMTT) (governed by Part 10).

Parts 3 to 5: Determination of GloBE income or loss, adjusted covered taxes, effective tax rate and Top-up Tax amount

Part 5 of the discussion draft regulates the determination of the effective tax rate and the Top-up Tax amount. A Top-up Tax arises for Constituent Entities that are located in a tax jurisdiction where the effective tax rate is lower than the minimum tax rate of 15%. The effective tax rate is the ratio of the total amount of adjusted covered taxes to the total GloBE income or loss, and is determined on a jurisdictional basis.

Part 3 of the discussion draft regulates the determination of the GloBE income or loss. The starting point for the calculation of the GloBE income or loss is the accounting profit or loss per Constituent Entity determined for the financial year on the basis of the accounting standard applicable for the preparation of the consolidated financial statements of the Ultimate Parent Entity. The starting point of the calculation must be adjusted for numerous additions and deductions.

Part 4 of the discussion draft regulates the so-called adjusted covered taxes which consists of the current taxes recognized in accounting profit or loss and the so-called deferred taxes of the respective Constituent Entity and must also be adjusted for certain additions and deductions. The difference between the effective tax rate and the minimum tax rate results in the Top-up Tax percentage to apply to the so-called total GloBE income or loss of the jurisdiction adjusted for substance-based exceptions. The result is the Top-up Tax amount per tax jurisdiction.

Parts 6 to 7: Restructuring and shareholding structures as well as special features of Ultimate Parent Entities, deducible distribution regimes and investment entities

Parts 6 and 7 of the discussion draft contain special provisions. These relate, among other things, to rules for dealing with changes in the group related to entities joining and leaving the group, rules for joint ventures, special rules for certain Ultimate Parent Entities, and rules for dealing with investment entities.

Parts 8 to 11: Administration, Special Provisions for the Transition Year, Transition Period, and Initial Period, Taxation Procedure, and Other Provisions

The draft MinStG provides for various administrative requirements to be fulfilled by the MNE group. In principle, each Constituent Entity subject to tax under the MinStG is required to submit the so-called globe information return for the fiscal year to the Federal Central Tax Office (BZSt). However, under certain circumstances, the globe information return may be submitted by certain Constituent Entities on behalf of the other Constituent Entities. The globe information return must be submitted to the BZSt no later than 15 months after the end of the fiscal year (in the first year, however, the deadline is 18 months).

If the globe information return is intentionally not submitted, not submitted on time, or not submitted in full, this constitutes an administrative offense. However, the amount of the fine resulting from the administrative offense has been left open in the discussion draft.

In addition to the globe information return, the discussion draft generally provides for the filing of a tax return by each domestic taxable Constituent Entity with the tax office responsible for its income taxation. If there is a domestic minimum tax group, in deviation from the aforementioned principle, only the group leader has to file a tax return for the minimum tax group. The tax must be calculated by the taxpayer. Therefore, the Top-up Tax is only determined by the tax authority if this results in a different tax or if the Constituent Entity does not submit the tax return.

The Top-up Tax for a fiscal year arises at the end of the calendar year in which the fiscal year ends. According to the explanatory memorandum to the discussion draft, the general provisions of the General Fiscal Code (Section 149 GFC) are generally applicable to the submission of the tax return. The tax is due and payable one month after submission of the tax return.

The discussion draft includes the OECD safe harbour rules, such as the transitional safe harbour rules based on country-by-country reporting (CbCR). If the safe harbour requirements are met, the Top-up Tax will be reduced to zero. However, the obligation to file the globe information return and the tax return under the MinStG remains unaffected in this case.

In addition, the discussion draft provides for further optional rules to simplify the calculation of the GloBE revenue, the GloBE income or loss, the adjusted covered taxes for immaterial business entities, as well as a relief in case the minimum tax has already been levied by way of a QDMTT. Also, if the MNE group only performs so-called subordinate international activities, it is exempt from the Top-up Tax for the first five years.

In addition, the discussion draft includes provisions for determining the effective tax rate in the transition year and subsequent years, as well as the treatment of deferred taxes and the transfer of assets between Constituent Entities after November 30, 2021.

The MinStG is to apply for the first time to fiscal years beginning after December 30, 2023. The UTPR regulations are to be applied for the first time for fiscal years beginning on or after December 30, 2024.

See also

- PwC's Data Input Catalog
- The Belgian P2 update webcast replay from March 16 - Maggie has this link - let's update for the title
- Cross-border tax talks: Pillar Two: A German Perspective
- PwC Insight: UK publishes draft Pillar Two legislation
- PwC Insight: Japan's 2023 tax reform proposals include an outline for Pillar Two legislation
- PwC Insight: South Korea becomes first to pass Pillar Two global minimum tax rules in its domestic legislation

Let's talk

For a deeper discussion of how the draft German Pillar Two rules might affect your business, please contact:

International Tax Services, Germany

Thomas Loose
+49 211 981 7884
thomas.loose@pwc.com

Arne Schnitger
+49 30 2636 5466
arne.schnitger@pwc.com