WHY SHOULD LATIN AMERICA AND THE CARIBBEAN BE AWARE OF THE EUROPEAN UNION TAX INITIATIVES?

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1. INTRODUCTION

The European Union (EU) has become a relevant player in the international tax arena and may influence the tax agenda setting in third jurisdictions. This is why Latin America and the Caribbean (LAC) should be aware of the EU tax initiatives.

On the one hand, the EU Standard of Tax Good Governance (comprising three key criteria: tax transparency, fair taxation and the implementation of the OECD Base Erosion and Profit Shifting minimum standards) and the establishment of the so-called "EU list of non-cooperative jurisdictions for tax purposes" may push non-member jurisdictions with economic ties with the EU to adopt certain tax policy choices that otherwise they would not have adopted. For instance, in Latin America, Uruguay and Costa Rica would not have probably modified their long-standing application of the source principle if it were not for the process of scoring, screening and listing pursued by the EU Code of Conduct Group on Business Taxation (CoCG).[2] Or Saint Lucia and Curaçao would not have introduced economic substance requirements to their foreign source income exemption regimes.[3] Furthermore, the EU may condition the agenda-setting at international organizations or bodies (e.g. UN, OECD, G20, G7). For example, EU members have shown a common position during the debates under the current UN process for the promotion of inclusive and effective international tax cooperation.[4]

On the other hand, EU legislation such as Directives and other non-binding instruments such as Communications from the European Commission, may also inspire non-EU jurisdictions' tax policy and systems and serve these jurisdictions' interests.

In this line and based on two of the latest Directives adopted by the EU, the aim of this contribution is to share some insights on how the EU may influence LAC tax policy decisions in the near future. Specifically, the initiatives referred to are: the Minimum Tax Directive and the Public Country-by-Country Reporting Directive. This contribution is not at all intended to be an exhaustive analysis of this matter but only an illustration of how the EU tax policy may impact LAC tax systems and, therefore, why it may be relevant for the region to be aware of what is going on in the EU.

2. THE MINUMUM TAX DIRECTIVE

On 14 December 2022, the Council of the European Union approved the Directive 2022/2523 "on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union"[5], formalizing the EU's implementation of the so-called "Global Minimum Tax" (GMT) – technically speaking, the GloBE rules of Pillar Two – of the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy that was agreed by the Inclusive Framework

on BEPS of the OECD/G20 (OECD/G20 IF) in October 2021. The Directive established the application of the new rules as of fiscal years starting in January 2024, placing EU jurisdictions among early adopters of the GMT. How may this Directive impact LAC tax policy?

First, the early adoption by the EU contributed to the critical mass of jurisdictions that needed to introduce the model rules to materialize the OECD/G20 IF initiative. Once a Directive is adopted, EU jurisdictions are obliged to transpose it to national law.[6] The GMT can still be object of criticism but no one can question that the "GloBE machine" started working, deploying its global effect, including in the LAC region.

Second, the EU implementation of the GloBE rules and more precisely the so-called Income Inclusion Rule has an immediate and significant effect on the LAC region. Europe host many in-scope multinational groups that operate either via foreign subsidiaries or permanent establishments located across the Atlantic Ocean. This has put immediate pressure on LAC jurisdictions to abandon their "wait and see" position so far maintained. Though incipient, some jurisdictions already showed concrete implementation actions (Colombia, Curaçao, Barbados, Brazil, Bahamas and Puerto Rico), and steps by other jurisdictions may probably not wait in 2025.

Third, from a very practical point of view the adoption by the EU of a Directive that is available in all EU official languages and whose rules are transposed to national law by some EU members in Spanish, French, Portuguese or Dutch, may help LAC jurisdictions to overcome the difficulty of translating hundreds of pages of official documents (model rules, commentaries, administrative guidance and other relevant texts) available almost exclusively in English. This is undoubtedly of great help for jurisdictions that face significant resource constraints and, in no case, can legislate by reference. Except for the "Minimum Tax Implementation Handbook (Pillar Two)" no other official document is in Spanish. Meanwhile, a few have been translated to French, Italian or German.

Fourth, while deciding how to react, LAC jurisdictions should also monitor the future EU reaction in respect of third jurisdictions that do not get on board with the GMT. While the GloBE rules are not mandatory for OECD/G20 IF members, but a so-called “common approach”, it is relevant to bear in mind that OECD and EU standards have differed in the past. In this regard, there have been some signs that in the near future the adoption of the GloBE rules may be considered as a new component of the EU Standard of Tax Good Governance which may, therefore, be assessed for purposes of elaborating the EU list of non-cooperative jurisdictions.

Indeed, in July 2020 the European Commission, issued a Communication – which is in any case a non-binding instrument – to the European Parliament and the Council of the European Union on tax good governance in the EU and *beyond*, proposing the reform and modernisation of the Code of Conduct for Business Taxation and stating in relation to the timing of such reform that

[t]he timing of the Code reform must be carefully considered, to ensure that the result is as ambitious and effective as possible. The ongoing international discussions on the reform of corporate taxation, steered by the OECD, could have a major impact on the accepted limits of tax competition in the future. In particular, if minimum effective taxation becomes a global standard, there will be a new floor on how low countries can go in using their tax rates to attract foreign businesses and investment. This will clearly have to be integrated into the EU's actions on fair tax competition, within a reformed Code of Conduct. At the same time, if there is no consensus on minimum taxation at global level, this concept needs to be introduced in the Code as an EU standard, to modernize and clarify the concept of harmful tax competition and to ensure that all businesses pay their fair amount of tax when they generate profits in the Single Market.[7]

Furthermore, in respect of a review of the EU listing criteria,[11] the Communication stated that:

[d]iscussions at international level on taxation of the digital economy and global tax reform will also need to be taken into account in the EU listing criteria. This is particularly important if there is a global consensus on minimum effective taxation. This issue should be looked at in tandem with the future reform of the Code, once the outcome of the international tax reform discussions [is]... clearer.[8]

Later in time, the multiannual work package as agreed by the CoCG in October 2023, stated:

[a]s for minimum effective taxation, the Group could explore how to facilitate the proper functioning of the Pillar Two rules by making use of the EU listing process. This work will commence only after the Pillar Two rules start applying, in coordination with the OECD and possibly based on a future peer-review process.[9]

During 2024, in February, the work programme under the Belgian Presidency (of the Council of the European Union) as agreed by the CoCG established that "the Group will also work on... the interaction between the OECD/G20 BEPS Inclusive Framework GloBE rules under Pillar Two and the criterion 2.2 of the EU list on fair taxation"[10], criterion that concerns jurisdictions that have no or very low corporate income tax, while in October, the work program under the Hungarian Presidency established that:

"[t]he Group intends to continue the work at the technical level to evaluate possible impacts of the international agreement that was reached on a minimum effective taxation (OECD Pillar 2) on its work, *including on the EU listing criteria*".[11]

3. THE PUBLIC COUNTRY BY COUNTRY REPORTING DIRECTIVE

On 24 November 2021 the European Parliament and the Council of the European Union signed the Directive 2021/2101 – the "Public Country-By-Country Reporting (CBCR) Directive" – "amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches"[12]. As per this Directive, multinational groups significantly active in the EU and with global revenues exceeding EUR 750 million have to publish, starting in year 2026, how much corporate income tax they pay in each EU member jurisdiction as well as in non-cooperative jurisdictions for tax purposes.[13] The public reports will also include other information per jurisdiction such as the nature of activities, the list of subsidiaries, revenues, the number of employees, retained earnings, and profit before tax, as well as similar information on an aggregate basis for other third-country operations. The arguments put forward under this initiative are manifold: (i) to enhance the transparency on corporate income tax paid by large multinational groups; (ii) to encourage greater corporate accountability; (iii) to achieve better informed public debate; and (iv) to strengthen trust in the fairness of national tax systems.[14] How may this Directive impact LAC tax policy?

First, as mentioned in the preamble of the Directive itself "[b]y introducing public country-by-country reporting with this Directive, the Union becomes a global leader in the promotion of financial and corporate transparency". Increasing corporate transparency and enhancing public scrutiny may be a desirable outcome worldwide, including for LAC jurisdictions in respect of multinational groups significantly active in their territories. Furthermore, public country by country reporting has been supported for many years by non-governmental organisations such as Tax Justice Network.[15]

Second, these public reports may serve LAC jurisdictions that have no access to non-public country by country reports under BEPS Action 13. Indeed, some jurisdictions may not be able to receive information under the automatic exchange of information standard, due to confidentiality and data safeguard requirements. These jurisdictions may benefit from the EU initiative by accessing and making use of information from public reports that otherwise they would not have had access to. For example, such data may serve a jurisdiction's economic impact assessment of the GloBE rules.

4. CONCLUDING REMARKS

From referencing two of the latest EU initiatives adopted, this contribution intended to identify some potential effects on LAC tax policy, demonstrating that it is relevant for tax authorities and taxpayers in LAC jurisdictions to keep update with the work developed by the EU. What has been discussed and done so far? What is currently being debated for future action? Such an exercise enables to (i) identify in due course immediate effects; (ii) anticipate future demands under either the EU Standard on Tax Good Governance or other international initiatives (OECD/UN) that may be influenced by the EU, as well as (iii) be aware of practices from which the region can eventually take advantage of.

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[2]For further analysis please see: Riccardi Sacchi, A.L., Is Latin American and Caribbean Tax Policy in the Hands of the European Union? A Three-Country Case Study: The Source Principle under Attack, Bulletin for International Taxation, 2023 (Vol. 77), No.9, 2023, https://www.ibfd.org/shop/journal/latin-american-and-caribbean-tax-policy-hands-european-union-three-country-case-study (accessed 29.12.2024). After the article was elaborated, Costa Rica introduced a legislative reform mirroring in general the Uruguayan reform. Meanwhile, Panama -still blacklisted- may have decided to commit and to amend in the near future the application of the source principle.
[3]For further analysis please see: Casano, F. The EU tax list of non-cooperative jurisdictions: A Caribbean Experience, Caribbean Tax Law Journal, Edition 5, 2024, https://caribbeantaxlawjournal.com/wp-content/uploads/2024/02/CTL-5_Federica-Casano.pdf (accessed 29.12.2024).
[4]For instance, please see: Council of the European Union, Position on behalf of the European Union and its Member States on tax cooperation at the United Nations, 22 September 2023, https://data.consilium.europa.eu/doc/document/ST-12967-2023-INIT/en/pdf (accessed 19.12.2024); Promotion of international cooperation on tax matters: Position of the European Union and its Member States for the 79th session of the UN General Assembly, 27 September 2024, 13895/24, https://data.consilium.europa.eu/doc/document/ST-13895-2024-INIT/en/pdf (accessed 19.12.2024).
[5]Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, https://eur-lex.europa.eu/eli/dir/2022/2523/oj/eng (accessed 29.12.2024).
[6]Five of the 27 EU members (Estonia, Latvia, Lithuania, Malta, Slovakia) elected to delay the application of the GloBE rules under the article 50 of the Directive.
[7]The author's highlight; European Commission, Communication from the Commission to the European Parliament and the Council on Tax Good Governance in the EU, 15.7.2020, COM(2020) 313 final, p. 3-4, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0313 (accessed 29.12.2024).
[8]Id., p. 7.
[9]The author's highlight; Council of the European Union, Outcome of proceedings, Brussels, 5 October 2023, 13649/23, p. 8, https://data.consilium.europa.eu/doc/document/ST-13649-2023-INIT/en/pdf (accessed 19.12.2024).
[10]The author's highlight; Council of the European Union, Code of Conduct Group (Business Taxation) - Work Programme under the Belgian Presidency, 13 February 2024, 6496/24, p. 7, https://data.consilium.europa.eu/doc/document/ST-6496-2024-INIT/en/pdf (accessed 29.12.2024).
[11]The author's highlight; Council of the European Union, Code of Conduct Group (Business Taxation) - Work Programme under the Hungarian Presidency, 1 October 2024, 13998/24, p. 6, https://data.consilium.europa.eu/doc/document/ST-13998-2024-INIT/en/pdf (accessed 29.12.2024).
[12]Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021L2101 (accessed 29.12.2024).
[13]The reference comprises tax jurisdictions included in both Annexes, I and II, to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes.
[14]Nonetheless there are also opposing arguments. Please see: IBFD, Promotion of Inclusive and Effective Tax Cooperation at the United Nations, 1 June 2023, p. 402, https://financing.desa.un.org/input-paper-international-bureau-fiscal-documentation-ibfd (accessed 29.12.2024).
[15]Please see: https://policytracker.taxjustice.net/policy/country-by-country-reporting (accessed 29.12.2024).