TAX ALERT

DST update: U.S. companies subject to the DST should benefit from a tax credit if they have paid too much French DST compared to what they would have to pay under the global tax agreement of Pillar 1

On October 21, 2021, France, Austria, Italy, Spain and the United Kingdom announced in a joint statement with the United States, a compromise on the withdrawal of their national DST.

This agreement provides that when the new global tax regime on digital business tax reform (Pillar 1) comes into effect in the next two years, European countries that have implemented a DST at the national level will withdraw their national tax and will offer a credit to effectively offset any overcharge of DST collected with their national tax compared to what companies would have to pay under the global tax agreement.

In exchange, the United States agree to remove the trade sanctions measures they had raised against several countries that had decided to impose taxes on digital services. These trade sanctions had been suspended by Joe Biden's administration to give a chance to the negotiations on a global tax reform, which led to an international agreement this month.

More specifically, this compromise specifies that a tax credit will be provided against the portion of the CIT liability as computed under Pillar 1 if the national DST that accrue to Austria, France, Italy, Spain, and the United Kingdom with respect to existing Unilateral Measures during a defined period after political agreement is reached, and before Pillar 1 takes effect, exceed an amount equivalent to the tax due under Pillar 1 in the first full year of its implementation (prorated to achieve proportionality with the length of the Interim Period i.e. the period beginning on January 1, 2022, and ending on the earlier of the date the Pillar 1 multilateral convention comes into force or December 31, 2023).

The joint written statement on the compromise on unilateral measures is attached hereafter.

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MINISTÈRE
DE L'ÉCONOMIE
DES FINANCES
ET DE LA RELANCE

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JOINT STATEMENT FROM AUSTRIA, FRANCE, ITALY, SPAIN, THE UNITED KINGDOM, AND THE UNITED STATES REGARDING A COMPROMISE ON A TRANSITIONAL APPROACH TO EXISTING UNILATERAL MEASURES DURING THE INTERIM PERIOD BEFORE PILLAR 1 IS IN EFFECT

A. Background

1. On October 8, 2021, Austria, France, Italy, Spain, the United Kingdom, and the United States, joined 130 other members of the OECD/G20 Inclusive Framework in reaching political agreement on the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy.

2. From the outset, a key impetus of the OECD/G20 Inclusive Framework's negotiations was to stop the proliferation of "Digital Services Taxes and other relevant similar measures" (collectively "Unilateral Measures") by replacing them with a consensus-based reallocation of taxing rights among Inclusive Framework ("IF") members. See Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy (October 8, 2021).

3. In line with this objective, Austria, France, Italy, Spain and the United Kingdom have agreed that as part of Pillar 1, they will withdraw all Unilateral Measures on all companies and refrain from imposing new Unilateral Measures. In general, Austria, France, Italy, Spain and the United Kingdom had preferred for withdrawal of Unilateral Measures to be contingent on implementation of Pillar 1, while the United States had preferred withdrawal of Unilateral Measures immediately as of October 8, 2021, the date political agreement with respect to Pillar 1 was reached.

4. This joint statement describes a political compromise reached among Austria, France, Italy, Spain, the United Kingdom, and the United States, on a transitional approach to existing Unilateral Measures while implementing Pillar 1 (hereinafter, the "Unilateral Measures Compromise"). Under the Unilateral Measures Compromise, Austria, France, Italy, Spain, and the United Kingdom, countries which have all enacted Unilateral Measures before October 8, 2021, are not required to withdraw their Unilateral Measures until Pillar 1 takes effect. However, to the extent that taxes that accrue to Austria, France, Italy, Spain, and the United Kingdom with respect to existing Unilateral Measures during

a defined period after political agreement is reached, and before Pillar 1 takes effect, exceed an amount equivalent to the tax due under Pillar 1 in the first full year of Pillar 1 implementation (prorated to achieve proportionality with the length of the Interim Period), such excess will be creditable against the portion of the corporate income tax liability associated with Amount A as computed under Pillar 1 in these countries, respectively. As part of the Unilateral Measures Compromise, the United States agrees to terminate proposed trade actions and commit not to impose further trade actions against Austria, France, Italy, Spain, and the United Kingdom with respect to their existing Digital Services Taxes until the end of the Interim Period. Austria, France, Italy, Spain, the United Kingdom, and the United States, will remain in close contact to ensure that there is a common understanding of the respective commitments under this agreement and endeavor to resolve any further differences of views on this matter through constructive dialogue.

B. Definitions

The following definitions apply for purposes of this joint statement:

1. The "Credit Amount" is the amount by which taxes, which were accrued during the Interim Period (and regardless of whether they were actually paid during the Interim Period) with respect to Unilateral Measures enacted before October 8, 2021, exceed the Interim Pillar 1 Amount.

2. The "Interim Period" is the period beginning on January 1, 2022, and ending on the earlier of the date the Pillar 1 multilateral convention comes into force or December 31, 2023.

3. The "Interim Pillar 1 Amount" is the product of (a) the amount of tax that is owed by the taxpayer as a result of Pillar 1 Amount A during the first taxable year that Pillar 1 is in effect in the Relevant Country in respect of the taxpayer; and (b) a fraction the numerator of which is the number of days during the Interim Period and the denominator of which is 365.

4. "MNE group" has the meaning provided in the Glossary of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

5. "Relevant Country" is the jurisdiction that has imposed the Unilateral Measure with respect to which the Interim Credit is to be provided.

C. Framework for Unilateral Measures Compromise

1. In the case of Austria, France, Italy, Spain, and the United Kingdom:

   a) Each country agrees to provide a credit ("Interim Credit") equal to the Credit Amount. The Interim Credit shall be applied in the first taxable year that a taxpayer that is part of an MNE group is subject to Amount A tax liability after the Interim Period, and only against corporate income tax liability arising from the new taxing right under Pillar 1. In the case of a taxpayer that is not a member of a MNE group that is subject to Amount A tax liability with respect to Pillar 1 in the first taxable year in which Pillar 1 is in effect in the Relevant Country, the Interim Credit shall be determined on the basis of the first year in which Pillar 1 applies to such taxpayer and shall become available at such time, except that Interim Credits shall

not be available for a MNE group that first becomes subject to Pillar 1 more than four years after Pillar 1 comes into effect in the Relevant Country. If the Interim Credit exceeds the liability arising from the new taxing right under Pillar 1 in a taxable year, the excess Interim Credit amount shall be carried forward, credited against tax liability arising from the new taxing right under Pillar 1, and commensurately reduced in each subsequent taxable year until the entire Credit Amount has been fully utilized.

2. In the case of the United States:

   In recognition of the Unilateral Measures Compromise, the United States will terminate trade actions proposed under Section 301 and commit not to impose further trade actions with respect to the existing Digital Services Taxes imposed by Austria, France, Italy, Spain, or the United Kingdom during the Interim Period, provided that the country follows through on the agreement described in subsection C.1 of this joint statement.

3. The parties will meet regularly to discuss progress implementing Pillar 1 and any implications that may have for the appropriate application of the agreement.

Attachment: Annex

ANNEX

This annex to the joint statement from Austria, France, Italy, Spain, the United Kingdom, and the United States regarding the Unilateral Measures Compromise provides an example of the framework described in subsection C.1 of the joint statement.

Assumed facts: During the Interim Period, XYZ, a corporate taxpayer, pays €100x in taxes to Country A, one of the countries identified in subsection C.1, with respect to its digital services tax, a Unilateral Measure. For Country A, the Interim Period ends on December 31, 2023. On January 1, 2024, Country A implements Pillar 1 (effective for calendar year beginning 2024 and all subsequent years) and repeals its digital services tax. XYZ is a member of a MNE group that is subject to Pillar 1 tax liability in TY 2024. XYZ's corporate income tax liability with respect to Pillar 1 is €20x in calendar TY 2024 and €25x in calendar TY 2025. XYZ's Interim Pillar 1 Amount is €40x (i.e., the product of the €20x Amount A tax liability for TY 2024 and 730/365). XYZ's total corporate income tax liability (including but not limited to Pillar 1 liability) with respect to TY 2024 and 2025, before application of the Interim Credit, is €110x and €70x, respectively.

Result: XYZ's Credit Amount with respect to Country A is €60x (i.e., €100x digital services tax liability less €40x Interim Pillar 1 Amount). XYZ's TY 2024 corporate income tax liability in Country A with respect to Pillar 1 Amount A of €20x is reduced to €0x by the Credit Amount. The €40x remainder of the Credit Amount (i.e., €60x Credit Amount less €20x Amount A tax liability for TY 2024) is carried forward and reduces XYZ's TY 2025 Country A corporate income tax liability to €0x with respect to Pillar 1 Amount A. Accordingly, an Interim Credit of €15x (i.e., €40x Credit Amount carry forward less €25x Amount A tax liability for TY 2025) is carried forward to TY 2026. XYZ's total corporate income tax liability for 2024 and 2025 after application of the Interim Credit is €90x (i.e., €110x total corporate income tax liability less €20x Interim Credit) and €45x (i.e., €70x total corporate income tax liability less €25x Interim Credit carryforward), respectively.