Effects of *Pillar II* and the new U.S. tax policy on Spanish ETVEs and parent entities

The latest Executive Orders issued by the U.S. President require an analysis of the *Pillar II* effects on Spanish ETVEs and parent entities that are part of U.S. MNE groups.

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The latest Executive Orders issued by the President of the United States of America ("U.S.") compel companies to analyse the recent implementation of *Pillar II* in Spain and the European Union. Amongst the announced policy measures, noteworthy are the *OECD Global Tax Deal* and the *America First Trade Policy*, which deem the Global Tax Deal (that would include Action 1[1] of the OECD[2] BEPS Plan[3]) as "extraterritorial" and "discriminatory," stating that it has no force or effect within the U.S. absent an act by Congress.

Furthermore, these measures establish a 60-day period (beginning on 20 January) to investigate

[1] Action 1 addressed the tax challenges of the digital economy and evolved into a two-pillar solution: *Pillar I*, which has tried to ensure a fairer allocation of economic benefits, and *Pillar II*, which has intended to play a role in limiting tax competition by setting out a global minimum tax of 15% on income obtained by large MNE groups.

[2] Organisation for Economic Co-operation and Development.

[3] The BEPS Plan is a 15-action project to address base erosion and profit shifting.

whether any foreign countries are not in compliance with a tax treaty with the U.S. or have any tax rules in place – or are likely to put tax rules in place – that are "extraterritorial" or "discriminate" against or "disproportionately" affect U.S. companies. Depending on the findings of any such investigation, the U.S. could set tariffs or other measures that would affect the countries it considers falling under any of those conditions. Additionally, the President is authorised to use the power to double the tax rates on citizens and corporations of such countries (according to section 891 of Title 26, United States Code[4]).

The aforementioned setting raises a degree of uncertainty for multinational enterprise ("MNE") groups with business in Spain due to the domestic implementation of *Pillar II* through the passage of Act 7/2024 of 20 December, which established a top-up tax ("Top-Up Tax") to ensure a global minimum level of taxation for MNE groups and large-scale domestic groups, complying with the mandatory transposition of Directive (EU) 2022/2523. Specifically, the current setting would affect both Spanish parent entities that, directly or indirectly, own a controlling interest in U.S. entities and Spanish entities that, even when they do not own an interest in U.S. entities, are part of the same MNE group as them (as Spanish intermediate parent entities, e.g., Spanish holding companies "ETVE") and their ultimate parent entity is a tax resident in the U.S.

In the first case, the Spanish parent entity could be required to pay a Top-Up Tax to the Spanish tax authority if other entities of its group, tax residents in the U.S. or third jurisdictions, earn income taxed at a level lower than the minimum level of tax (set by *Pillar II* at 15%). Consequently, the U.S. could conclude that one or more of the conditions it has ordered to investigate are met and could trigger corrective measures against Spanish entities or citizens.

Anticipate possible effects arising from Pillar II rules currently in force in Spain

In the second case, the Spanish intermediate parent entity – which could be an ETVE – that is part of a U.S. MNE group, in addition to being required to pay the Top-Up Tax in Spain, could be obliged to collect, process, and prepare the group information to comply with *Pillar II* obligations which, due to not being the group´s controlling entity, is not without difficulties. In particular, the information collection could be affected by confidentiality and local regulatory limitations and a substantial increase in compliance costs, which could result in a failure to comply with Top-Up Tax filing and/or paying obligations in Spain or the loss of opportunity to benefit from a safe harbour or income exclusion that would reduce or even cancel the Top-Up Tax (e.g., the *de minimis* exclusion provided by Act 7/2024).

Moreover, failure to comply with Top-Up Tax obligations in Spain raises questions from a liability standpoint, such as who would be liable for

[4] Section 891 of Title 26, United States Code, originally enacted in 1934, applies to extraterritorial and discriminatory taxes, can be initiated solely by the U.S. President, and has never been invoked.

the non-compliance, what are the effects on the group´s corporate governance, etc.

In the existing scenario, MNE groups with business in Spain should evaluate their compliance structure to anticipate possible effects arising from *Pillar II* rules currently in force in Spain, considering it has been a mandatory transposition of Directive (EU) 2022/2523, which in turn incorporated the OECD approach.