13.01.2022

Q&A on the implementation of the OECD minimum tax rate in Switzerland

What is provided for by the OECD rules on minimum taxation?

The so-called GloBE rules (Global anti-Base Erosion rules) provide for a minimum tax rate of 15% for multinational companies with an annual turnover of at least EUR 750 million according to an internationally standardised assessment base, whereby the minimum tax rate of 15% must be reached in each jurisdiction. If the minimum taxation is not achieved in a given jurisdiction, a top-up tax is to be imposed on the difference between the effective tax burden and the required minimum in the jurisdiction in which the ultimate parent entity of the company concerned is located (primary rule, so-called Income Inclusion Rule, or IIR). If that jurisdiction has not introduced the primary rule, taxation should be ensured on a subsidiary basis in the jurisdictions with subsidiaries of the company in question by means of the denial of deductions or equivalent adjustments (subordinate rule, so-called Undertaxed Payment Rule, or UTPR).

Why did Switzerland agree to this minimum tax rate?

The OECD minimum tax rate is supported by 137 of the 141 member jurisdictions in the OECD's Inclusive Framework on Base Erosion and Profit Shifting (BEPS). Switzerland joined them to ensure that multinational active companies based in Switzerland do not suffer any disadvantages. In addition, if Switzerland did not implement it, other countries would impose additional tax on the companies concerned if the minimum taxation was not achieved in Switzerland. Switzerland would thus forego receipts in favour of foreign countries.

To what extent can the OECD prescribe and control a uniform assessment base?

The OECD rules on minimum taxation are a so-called common approach. This means that jurisdictions are under no political or legal obligation to adopt these rules. However, if they decide to write them into national law, they should follow the model rules and guidance of the OECD. Moreover, they must accept the application of the rules by other jurisdictions.

It is planned that the OECD will use peer reviews to check the jurisdictions' implementation of the model rules. Detailed information on the procedure is not yet available.

What is the OECD's timetable, when will the OECD's final rules and guidance on the minimum tax be available and what does this mean for Switzerland?

The OECD's timetable for the minimum tax rate envisages that the primary rule (Income Inclusion Rule) will be applied from 2023 and the subordinate rule (Undertaxed Payment Rule) from 2024 onwards.

The corresponding model rules have already been approved in the OECD and were published in December 2021. Aside from these rules, further guidance is to be adopted by the end of 2022 at the latest to facilitate the coordinated implementation of the minimum tax rate across the jurisdictions.

For Switzerland, as for other countries, this means that some points will remain open until the end of 2022 and that a certain degree of uncertainty will remain, particularly with regard to actual implementation.

Why should implementation of the OECD minimum tax rate in Switzerland be addressed with a constitutional basis, of all things, and why is a law not sufficient?

Firstly, the procedure chosen by the Federal Council allows the new rules to come into force as of 1 January 2024. An ordinary legislative procedure would not achieve this goal. Due to the national elections, any referendum would have to be held as early as June 2023, and Parliament would have to adopt a bill during the autumn session in 2022. This would mean that all time frames, including the consultation, would be drastically reduced. At the same time, there would be considerable risks with regard to the quality of the bill, as the national rules must be closely coordinated with the OECD/G20 requirements, and these will only become available during the course of 2022.

Secondly, the new constitutional provision should legitimise the unequal treatment of the companies affected, which is the basis of the OECD project, and give the legislator the power to deviate from other constitutional taxation principles if need be.

Will the OECD recognise the "Swiss way" and what will happen if the OECD rules enter into force as of 1 January 2023, but the ordinance does not enter into force in Switzerland until 1 January 2024?

There is no international pressure for Switzerland to introduce the minimum tax rate. If it refrains from doing so, however, other jurisdictions can derive taxing rights for themselves. 2023 will be a transitional year in which the jurisdictions can already assert certain taxing rights, but not yet all of them. For Swiss group companies that do not reach the minimum tax level in Switzerland, there is generally no risk of higher taxation in Switzerland in 2023. However, the situation is different for foreign group companies that do not reach the minimum tax level in Switzerland.

What does the minimum tax rate generally mean for tax competition among the cantons?

Most companies, namely purely domestically focused companies and SMEs, are not directly affected by the new taxation rules. Nothing will change here.

For those affected by the new rules, intercantonal tax competition will be reduced, but not eliminated. The implications for intercantonal tax competition will depend on various factors that have yet to be examined in detail. The Federal Council has not yet made any decisions in this regard. The existing fiscal equalization rules can take the effects of the reform into account, but it is still unclear whether this will be sufficient. This will have to be analysed at a later stage.

What does the minimum taxation mean for cantons that have applied a corporate tax rate of less than 15% up to now?

If a canton offers a tax burden that falls below the minimum level, the company's tax burden will be raised to the level of the minimum tax rate. Whether the tax falls below the minimum rate depends on the specific case. The new minimum tax rate of 15% cannot be compared with a tax rate of 15% under Swiss tax law. A company in a low-tax canton can reach the minimum rate in individual cases, and a company in a high-tax canton can fall below it in some cases.

Individual cantons will generate additional receipts with the introduction of the minimum tax rate. How can they use them?

The cantons will decide at their own discretion how they wish to use the additional tax receipts. Implementation of the minimum tax rate will provide them with fiscal policy leeway to counteract the impending loss of attractivity as a business location. They will decide whether to take locational measures and, if so, which ones. The cantons' plans are to be set out in the Federal Council dispatch on the constitutional basis.

Which locational measures are available to the cantons and how is it possible to ensure that certain measures cannot be "hidden"?

The cantons are generally free to decide whether they wish to take locational measures and, if so, which ones. However, they have to take the OECD rules on minimum taxation into account. For example, profit or capital tax reductions would not be conducive to reaching the minimum taxation for the companies affected. Cantonal locational measures could thus be more keenly focused on the non-tax area than in the past. In this regard, the cantons will have to observe Switzerland's obligations under international law, such as WTO conformity.

Can the Confederation ensure that the cantons formulate their locational measures transparently?

The Federal Council dispatch on the constitutional amendment will provide transparency concerning the cantons' plans in this regard.