The Two Sides of the Story: The United States, the European Union and the Side-by-Side Agreement

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Carla Valério **| EU Tax Law Study Group, IBFD Knowledge Group**

The author can be contacted at c.valerio@ibfd.org

Wooje Choi **| IBFD Knowledge Group**

The author can be contacted at w.choi@ibfd.org

1. From "Turned Backs" to "Side-by-Side"

On the same date that Donald Trump took office for his second term as US President, 20 January 2025, the United States raised concerns that the "Global Tax Deal" was extraterritorial and limited US tax sovereignty. The months that followed were marked by tensions between the two sides of the Atlantic. But while, during the first semester of 2025, EU-US relations were marked by words such as "tariffs", "retaliatory taxes" and "discrimination", the second semester saw a shift in the transatlantic relations narrative, with words like "respect" and "certainty" beginning to emerge. An amicable "side-by-side solution" was negotiated, and, earlier this year, on 5 January 2026, 147 jurisdictions participating in the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) reached an agreement on the "side-by-side package" (SbS package).

This note briefly outlines the content of the SbS package, its legal consequences for US businesses and how EU players are reacting to this agreement.

2. Overview of the SbS Package

The SbS package was published as an additional set of administrative guidance to be incorporated into the Commentary on the GloBE Model Rules. It includes the following safe harbours:

- A **side-by-side (SbS) system,** including an SbS safe harbour and the ultimate parent entity (UPE) safe harbour.

The **SbS Safe harbour** provides "a mechanism for recognising cases when an MNE Group is headquartered in a jurisdiction with a tax system that imposes minimum tax requirements with respect to domestic and foreign income".

In order to be eligible to qualify as a "qualified SbS regime", a jurisdiction's domestic tax regime must comply with three requirements:
(1) there must be a nominal statutory corporate income tax rate of at least 20%;
(2) there must be a qualified domestic minimum top-up tax (QDMTT) or a corporate alternative minimum tax based on financial statement income of at least 15%; and

(3) there must be no material risk that the group's effective tax rate (ETR) on domestic operations will be below 15%.

Additionally, the jurisdiction's worldwide tax regime must also comply with three requirements:
(1) there must be a comprehensive tax regime (broad and not subject to material exclusions) applicable to all corporations on foreign income (active, passive, distributed or not);
(2) there must be mechanisms in place to address significant BEPS risks; and
(3) there must be no material risk that the group's ETR on collective foreign operations may fall below 15%.

The jurisdiction must also allow a foreign tax credit (FTC) for QDMTTs on the same terms as any other creditable covered tax.

Where the safe harbour applies, the income inclusion rule (IIR) and undertaxed profits rule (UTPR) top-up taxes are deemed to be zero with respect to all the group's constituent entities. The United States is currently the only jurisdiction listed as a qualified SbS regime.

On the other hand, the **UPE safe harbour** allows an MNE group with the UPE located in a jurisdiction with a "qualified UPE regime" to elect that the UTPR top-up tax for that jurisdiction is deemed to be zero, thereby exempting the constituent entities in that UPE jurisdiction from UTPR liability. Currently, no jurisdiction is listed as a qualified UPE jurisdiction.

Both safe harbours constituting the SbS system are available to MNE groups for fiscal years starting from 2026.

- The **Substance-Based Tax Incentive Safe Harbour**:

This aims to allow MNE groups to continue benefitting from certain tax incentives that are connected to economic substance in that jurisdiction. Tax incentives that are generally available to taxpayers and are calculated based on expenditures incurred (expenditure-based incentive) or on the amount of tangible property produced in the jurisdiction (production-based tax incentive) can qualify as "qualified tax incentives". Qualified tax incentives are treated as an addition to the covered taxes but are limited by a "substance cap". The cap is equal to the greater of 5.5% of the payroll costs or the depreciation of tangible assets in the jurisdiction. At the election of the group, an alternative cap corresponding to 1% of the carrying value of tangible assets in a jurisdiction can be used. This safe harbour is available for fiscal years starting from 2026.

- The **Simplified ETR Safe Harbour**:

This is a permanent framework aiming to reduce the compliance burden associated with the global minimum tax (GMT) by allowing MNE groups to calculate their effective tax rate with simpler calculations. Calculation of income (simplified income) and taxes (simplified taxes) will rely on financial accounting data used to prepare consolidated financial statements, with minimal adjustments. This safe harbour will be available for fiscal years starting from 2027, with the possibility of early adoption from 2026 in certain circumstances.

- The **Transitional Country-by-Country Reporting (CbCR) Safe Harbour**:

This rule extends by an additional year the existing transitional CbCR safe harbour, applying also to fiscal years starting in 2027.

3. US Tax System and SbS Package Effects

This section analyses the implications of the SbS package for the United States, focusing first on the extent to which the SbS eligibility criteria align with the existing US tax system and, secondly, on the practical consequences for US-headquartered and foreign-headquartered MNE groups with US operations.

a. US Tax System Alignment

As the OECD released the SbS package following negotiations with the United States to address US concerns regarding Pillar Two, the eligibility criteria for a jurisdiction to qualify for the SbS safe harbour broadly mirror the US tax system. This subsection examines relevant US tax rules applicable for fiscal years beginning in 2026 and thereafter.

- **Statutory tax rate:** The current US statutory tax rate is 21%, which applies to the worldwide income of US corporations and the US business income of foreign corporations with US operations.

- **Corporate alternative minimum tax (CAMT)**: Corporations are subject to the CAMT if the corporation's average annual adjusted financial statement income (AFSI) for the 3 preceding tax years exceeds USD 1 billion. If 15% of the corporation's AFSI exceeds the sum of: (i) its regular income tax; and (ii) its base erosion and anti-abuse tax (BEAT) for the tax year, then the difference must be paid as additional tax, which is the CAMT.

- **Net CFC-tested income (NCTI):** US corporations that own controlled foreign corporations (CFCs) must pay tax on the NCTI, which generally refers to the active business income earned by the CFCs, at the rate of 12.6%. US corporations may claim an FTC for 90% of foreign taxes paid by the CFCs on the NCTI. As a result, a foreign tax imposed at a rate of 14% or above does not generate an additional US tax on the NCTI, because 90% of 14% equals 12.6%. The NCTI replaces the global intangible low-taxed income (GILTI), which, for tax years beginning after 31 December 2017 and before 1 January 2026, was subject to tax at the rate of 10.5%. An FTC was available for 80% of foreign taxes attributable to the GILTI, such that no additional US tax was imposed where the foreign tax rate was 13.125% or above.

- **Subpart F income:** US corporations are subject to tax at the regular rate of 21% on Subpart F income, which primarily refers to passive income earned by their CFCs. US corporations may claim a 100% FTC for foreign taxes paid by the CFCs on the Subpart F income.

- **BEAT:** Corporations that make substantial payments to foreign related parties that are deductible against their US income tax are subject to the BEAT if they have average annual gross receipts of USD 500 million or more over the 3-taxable-year period ending with the preceding tax year. Generally, if 10.5% of the corporation's regular taxable income, as unreduced by the otherwise deductible payments to foreign related parties, exceeds the corporation's regular tax liability, as reduced by certain tax credits, then the difference must be paid as additional tax, which is the BEAT.

- **FTC for QDMTT**: Guidance issued by the US Internal Revenue Service (IRS) regarding the creditability of Pillar Two indicates that QDMTTs may be eligible for an FTC if other FTC requirements are met, whereas IIR and UTPR taxes generally are not creditable.

b. SbS Package's Implications for US Operations

This subsection discusses the operational impact of the SbS package on US-headquartered MNE groups and on US operations within foreign-headquartered MNE groups, including the availability of safe harbours, compliance implications and potential risks of double taxation.

- **SbS Safe Harbour**
  - **US-headquartered MNE groups:** For fiscal years beginning on or after 1 January 2026, US-headquartered MNE groups may elect the SbS safe harbour on their GloBE Information Return (GIR) on an annual basis, so that the top-up tax is deemed to be zero for IIR or UTPR purposes group-wide. Electing the SbS safe harbour also simplifies GIR reporting by removing the need to complete data points related solely to the IIR and UTPR. However, US-headquartered MNE groups remain subject to the QDMTT and QDMTT-related compliance rules if the group has constituent entities in a jurisdiction that has adopted a QDMTT. The US MNE group may claim an FTC for the QDMTT against its US tax on the NCTI. If a jurisdiction delays the enactment of legislation adopting the SbS safe harbour, the legislation is expected to apply retroactively from 1 January 2026 or the earliest practical date thereafter.
  - **US operations in foreign-headquartered MNE groups:** MNE groups are not eligible for the SbS safe harbour if the group's UPE is located in a jurisdiction ineligible for the SbS safe harbour (i.e. all jurisdictions other than the United States, as of 15 February 2026). This is true even for the group's constituent entities located in, and the group's profits earned in, the United States. The same rule applies to US corporations that own foreign subsidiaries (i.e. CFCs) as sub-group parent entities but are themselves owned by a foreign parent entity. Such US corporations are subject to Subpart F tax and NCTI tax under US CFC rules, in addition to Pillar Two taxes (i.e. IIR, UTPR and QDMTT), potentially giving rise to double taxation. US corporations with CFCs are generally subject to the same US tax rules, regardless of whether their UPE is US-headquartered or foreign-headquartered.

- **Substance-Based Tax Incentives (SBTI) Safe Harbour**
  The SBTI safe harbour allows MNE groups with US entities (regardless of the location of the group's UPE) to benefit from various US tax incentives, particularly those related to research and development (R&D) expenses, without reducing the group's ETR and thus triggering Pillar Two taxes. This safe harbour is especially valuable in the United States, because tax credits and other tax incentives for business operations are generally non-refundable, unlike in Europe. Without the SBTI safe harbour, such non-refundable tax credits could lower the group's ETR and thus trigger Pillar Two taxes.

- **Simplified ETR Safe Harbour**
  For fiscal years beginning after 31 December 2026 (or 31 December 2025 in jurisdictions opting for early adoption), the ETR safe harbour permanently eases compliance for MNE groups with US operations, whether US-headquartered or foreign-headquartered, provided the group has a sufficiently high ETR or loss in a specific jurisdiction. For 2024-2027 fiscal years, the transitional CbCR safe harbour is available, as the SbS package extends it to include fiscal years beginning on or before 31 December 2027.

4. EU Conundrum and SOS to 2029

The European Commission immediately welcomed the agreement on the SbS package, noting that it "safeguards the minimum effective taxation of multinational enterprises, and it enhances legal certainty and predictability for European businesses, while reinforcing the stability of the international tax system".

On 12 January 2026, the Official Journal of the European Union included a Commission Notice acknowledging the Inclusive Framework agreement on the SbS package and confirming its application in the European Union under article 32 of the Minimum Taxation Directive (2022/2523). This provision establishes that "the top-up tax due by a group in a jurisdiction shall be deemed to be zero for a fiscal year if the effective level of taxation of the constituent entities located in that jurisdiction fulfils the conditions of a qualifying international agreement on safe harbours".

However, not everyone is cheering on the right side of the Atlantic.

First, EU tax experts are raising alarms about the reception of the SbS package in the EU legal order under article 32 of the Minimum Taxation Directive. Points of criticism include the introduction of fundamental changes to the GloBE system, as mirrored in the Directive, without following the legislative procedure required to amend the Directive, as well as the use of article 32 well beyond its legislative purpose.

Moreover, across different spheres, it has been noted that the SbS solution might impair the competitiveness of EU businesses and the European Union as an economy, as it allows the United States to "enhance its competitive position". While businesses support the restoration of "stability and predictability in transatlantic tax relations", higher compliance costs when doing business compared to US competitors are more than ever an argument for EU-level intervention.

The pace at which an agreement on the SbS package was achieved in a multilateral setting was extraordinary. This is especially true if one considers that, in terms of the Pillar Two framework, the outcome is not a win-win for all (big) players involved and that it signals an EU concession to US pressure and interests. Actually, this outcome might just reflect the urgency to achieve a temporary fix to a temporary inflexibility.

The Inclusive Framework will undertake a "stocktake" to assess "unintended effects" of the GMT and SbS system, such as "any emerging material competitive imbalances" between MNE groups and "any negative trends in taxpayer behaviours". This evidence-based stocktake is expected to be concluded by 2029 and will inform further action.

In fact, the Inclusive Framework has already committed under the SbS package to addressing *any* substantial identified risks to the level playing field or BEPS and to "consider targeted solutions where more concentrated level playing field risks arise".

The European Union might have just placed an SOS message in a bottle, hoping it will have crossed the Atlantic by 2029. And, maybe, the next US administration taking office then will agree to save it.

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