



Mazars BEPS & International Tax journal Newsletter n°3 – April 2021

Edito

This newsletter provides you with regular insights about the OECD's BEPS initiative and the ongoing international tax reforms.

This third edition deals with the new measures published in March 2021 by the OECD, the EU, the UN and in 35 countries: Angola, Argentina, Australia, Belgium, Brazil, Canada, China, Colombia, Costa Rica, Cyprus, Denmark, Dominican Republic, Ecuador, Germany, Ghana, Ireland, Italy, Japan, Kenya, Mexico, Netherlands, Nigeria, Norway, Philippines, Puerto Rico, Russia, Spain, Taiwan, Turkey, UAE, Uganda, UK, Ukraine, USA, Vietnam.



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OECD

The OECD published the Arbitration Profiles of 30 jurisdictions applying Part VI (mandatory binding arbitration) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI). The Arbitration Profiles provide taxpayers with additional information on the application of Part VI of the MLI for each jurisdiction that chose to apply arbitration. They also allow jurisdictions to make publicly available clarifications on their position on arbitration under the MLI.

The Committee of Fiscal Affairs (CFA) of the OECD released as a public consultation document a discussion draft proposing changes to the Commentaries on the OECD Model Tax Convention (OECD Model). The document contains the recommendations on the interpretation and application of Article 9 (Associated Enterprises) and other related articles of the OECD Model, made by Working Party 1 (the subgroup of the OECD CFA responsible for work on the Model) in consultation with Working Party 6 (the subgroup of the OECD CFA responsible for work on the taxation of multinational enterprises, including transfer pricing matters) and the Forum on Tax Administration's Mutual Agreement Procedure (MAP) Forum. The consultation document indicates that the CFA has examined various issues related to the interpretation of Article 9 of the OECD Model. In essence, the proposed changes would specify that the conditions for the deductibility of expenses are a matter to be determined by domestic law. Under the proposed changes, if domestic law rules would result in fewer expenses being deductible than the arm's-length amount, this would not be considered to cause economic double taxation of the type that the provisions of the OECD Model seek

to eliminate and there would be no obligation on the other Contracting State to make corresponding adjustments under Article 9 of the OECD Model in these circumstances. The OECD invites interested parties to submit comments on the discussion draft before 28 May 2021.

The OECD published the OECD Secretary-General tax report to the G20 Finance Ministers and Central Bank Governors (the report). One of the areas covered by the report is the project on the tax challenges arising from the digitalization of the economy. It reiterated the aim of the G20/OECD Inclusive Framework on BEPS to achieve a global and consensus-based solution by mid-2021. The COVID-19 pandemic and the economic recovery from the crisis caused by the pandemic are also at the top of the G20 agenda. The report highlights that a key priority in the short run will be to improve the targeting of tax relief to ensure that support is channeled to those who need it most and to carefully withdraw support where it is no longer needed. Moreover, the report indicates that the OECD has worked over the past years to tackle international tax evasion and avoidance. This work has resulted in the end of bank secrecy, enhanced tax transparency and enduring international cooperation between tax administrations. Lastly, the report also notes that the international tax agenda has become truly global. Out of the 139 members of the G20/OECD Inclusive Framework on BEPS, 68 are developing countries. Members participate on an equal footing and it is considered crucial that all members benefit from tax transparency standards and the BEPS project.

The OECD released the third annual peer review on Action 6 (prevention of treaty abuse) and a revised peer review documents on Action 6 to carry out the peer review

process beginning in 2021. The peer review report includes information available as of 30 June 2020 and covers the 137 jurisdictions that were members of the Inclusive Framework by such date. Overall, the majority of the Inclusive Framework members are translating their commitment to prevent treaty shopping into actions and are modifying their treaty networks. The peer review also indicates that, of the three alternative methods to address treaty shopping, the majority of the jurisdictions have chosen to implement a Principal Purpose Test (PPT). With respect to the peer review process documents, the Action 6 minimum standard remains unchanged, and the terms of reference for the peer review remain largely unchanged with the exception of the establishment of a framework through which in certain situations assistance would be given to an Inclusive Framework member that has non-compliant agreements.

The G20 Finance Ministers and Central Bank Governors met via videoconference under the Italian G20 Presidency. At the conclusion of the meeting, they issued a joint communiqué on key topics discussed at the meeting. With respect to the ongoing G20/OECD project on addressing the tax challenges arising from the digitalization of the economy (the BEPS 2.0 project), the communiqué reaffirms the G20's commitment to reach a global and consensus-based solution building on the solid basis of the Reports on the Blueprints for Pillar One and Pillar Two, by mid-2021. The G20 Finance Ministers and Central Bank Governors acknowledge the progress made to date and urge the G20/OECD Inclusive Framework on BEPS to address the remaining outstanding issues with a view to achieving an agreement by the set deadline.

The staff of the International Monetary Fund and the OECD Secretariat released a joint report discussing the current and potential

use of carbon pricing and actions that jurisdictions can take to advance global coordination of a climate solution. The report discusses the need for climate pricing to meet the goals of the 2015 Paris Agreement and states that current emissions commitments and policies are not sufficient to meet those goals. The report also details the strengths of carbon pricing. Such strengths are described as including the appeal to reduce greenhouse gas emissions and increase green energy use, encouragement of private investment in clean technologies, more flexibility than regulatory approaches, long-range effectiveness, and increased government revenue. The Report lists key elements of a comprehensive mitigation strategy. Border Carbon Adjustment is one of such policy options considered for preventing carbon leakage and protecting loss of competitiveness of domestic firms. The Report also discusses potential challenges and items to consider in designing options effectively.

The OECD released the fourth batch of Stage 2 peer review reports relating to the outcome of the peer monitoring of the implementation by Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand, and Portugal (the assessed jurisdictions) of the Base Erosion and Profit Shifting (BEPS) minimum standard on dispute resolution under Action 14 of the BEPS project. These Stage 2 reports focus on evaluating the progress made by the assessed jurisdictions in addressing any recommendations that resulted from the Stage 1 peer review reports that were released on 30 August 2018. In addition, jurisdictions can request feedback on their adoption of the best practices. Australia, Japan, Malta and New Zealand made such a request and therefore the OECD also released four accompanying best practices reports. The outcomes of the Stage 2 peer review process demonstrate

overall positive changes across the assessed jurisdictions. Australia, Ireland, Japan, Malta, and New Zealand addressed almost all of the deficiencies identified in the Stage 1 peer review and Mexico and Portugal addressed some of them. According to the peer review report, Israel meets most of the elements of the Action 14 minimum standard but it has not yet addressed any of the deficiencies identified in the Stage 1 peer review.

European union

On 15 April 2021, the European Court of Justice (ECJ) released its decision in Case C-868/19 M-GmbH responding to a German referral on whether Article 11 of the European Union (EU) value-added tax (VAT) Directive is to be interpreted as precluding national legislation which prohibits a partnership (in this case a limited liability partnership, the partners of which, apart from the controlling company, are not exclusively persons financially integrated into the controlling company's undertaking) from being a "controlled company" and eligible for VAT grouping.

United Nations

The United Nations released a document presenting an update of the UN Model Double Taxation Convention between Developed and Developing Countries (UN Model). In particular, the document includes a revised version of the proposal for inclusion of computer software payments in the definition of royalties and a draft Commentary. The update to the UN Model is presented for discussion and decision at the 22nd session of the UN Committee to be held online from 19 to 28 April 2021.

On 6 April 2021, the UN released a final draft of the new Article 12B (Income from Automated Digital Services) of the UN Model Tax Convention after the UN Committee of Experts on International Cooperation in Tax Matters held its 21st session. According to the

draft provision, income from automated digital services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. However, income from automated digital services arising in a Contracting State may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the income is a resident of the other Contracting State, the tax so charged shall not exceed a specific percent to be established through bilateral negotiations of the gross amount of the income. The draft provision defines automated digital services as "any payment in consideration for any service provided on the internet or an electronic network requiring minimal human involvement from the service provider." At its 22nd session, the UN Committee is invited to approve the final draft of Article 12B for inclusion in the 2021 version of the UN Model Tax Convention.

Angola

The Law introduced a new VAT Regime - Simplified VAT Regime - which is applicable to taxpayers whose annual turnover and/or import operations of the previous 12 months was equal to AOA350 million or less.

Argentina

Argentine entities with controlling ultimate parent entities in the United States should determine whether they have to file the local CbC report.

Australia

Australian Taxation Office issues draft guidance regarding the imported hybrid mismatch rule impacting large global groups.

Belgium

In two recent decisions, the Belgian Court of Appeal of Ghent ruled on the tax treatment of a dividend distribution by a Belgian company to its Luxembourg holding vehicle. In both

cases, the tax exemptions applied at source were denied on the basis of general anti-abuse principles. The dividend distributions were the result of a series of steps where, among others, a double-tier holding structure was set-up, companies were capitalized through contributions of shares and thereafter merged – further to which shares were funded with external debt and transferred within the group on non-at arm’s-length terms, debt was reallocated and cash could be distributed to the shareholders in a tax-exempt manner. The Court of Appeal of Ghent applied the same methodology as the Court of Justice of the European Union in its Danish cases. In particular, the Court of Appeal of Ghent reviewed the facts to assess whether there is tax abuse based on “objective” and “subjective” criterion. In both cases, the taxpayers presented multiple business motives to justify the transaction steps and the tax treatment applied. The Court of Appeal of Ghent, however, ruled that those were not convincing and could not outweigh the apparent and predominant tax motives.

Brazil

The double taxation agreement (DTA) between Switzerland and Brazil has come into force on 16th March 2021 and will apply as of 1st January 2022.

Canada

Canada issues Federal budget 2021-22.

China

Following the release of Huifa [2020] No. 14 in August 2020, China’s State Administration of Foreign Exchange (SAFE) recently provided guidance on the principles and procedures that banks should follow when verifying and processing requests for cross-border payments in certain scenarios, including cross-border payments relating to transfer pricing (TP) adjustments. The SAFE

has also clarified various administrative issues related to foreign currency receipts/payments categorized as services. In the detailed guidance, the SAFE clarified that banks should verify the authenticity and legal compliance of the commercial transactions and ensure that requests for foreign currency receipts/payments are consistent with and reflective of the underlying transactions. The SAFE also specified the documentation requirements for the following three types of adjustments:

- For TP adjustments, supporting documents such as written documents from the tax authority or customs authority, profit adjustment agreements, invoices, and other related documents should be submitted to the bank. The payments should be processed under the same category as that of the original commercial transaction (e.g., trade or services).
- For cost sharing adjustments, banks should follow the same principles and review supporting documents, including distribution agreements, financial statements, invoices, and other related documents.
- For other adjustments relating to profit true-ups or true-downs, banks are required to verify and process foreign currency receipt/payment requests by following the same principles as noted in Circular 14.

The guidance provided by the SAFE is seen as a positive sign of an increase in flexibility for cross-border transactions, including TP adjustments. However, as the development of detailed documentation requirements is delegated to local SAFEs and banks, practical uncertainties still exist. For example, it is unclear if local SAFEs and banks would allow payments for TP adjustments initiated by taxpayers and their related parties (i.e., TP self-adjustments) in the absence of written documents from tax authorities. Moreover, customs duty and import VAT implications

should also be considered for TP adjustments relating to buy/sell transactions.

Colombia

Colombia's Executive branch submitted tax reform bill to Congress.

Costa Rica

Costa Rica's Tax Administration publishes resolution on Advance Pricing Agreements.

Cyprus

Cyprus published Law N. 41(I)/2021 to transpose the EU Directive 2018/822 (DAC6 or Directive) into domestic law. In general, the Law is aligned with DAC6 with only a few differences. One of these differences is that the Law includes a provision that allows the Cypriot Tax Department to require under written notice, the provision of documents and/or information regarding a specific arrangement within 14 days from the date of such notice. Another difference is that the Law provides for an "EU-nexus" main benefit test, with the tax advantage being limited to tax advantages obtained in Cyprus or another EU Member State. The Law entered into effect as of 1 January 2021. For those cross-border arrangements concluded on or after 25 June 2018, it will have a retrospective effect provided that one of the prerequisites triggering events is met.

Denmark

Danish Government revises proposed CFC legislation.

Dominican Republic

Dominican Republic issues amendments to transfer pricing regulations.

Ecuador

Ecuador and the United States sign Tax Information Exchange Agreement

Germany

German Federal Ministry of Finance tightens marketplace liability rules.

The Federal Cabinet approved a draft bill to fight tax avoidance and unfair tax competition. The bill aims to encourage jurisdictions that do not meet recognized standards in the areas of transparency in tax matters, unfair tax competition and the implementation of the BEPS minimum standards to make adjustments to comply with international standards. To achieve this aim, the bill introduces administrative as well as substantive tax law measures, such as tightened CFC rules or even denial of deductible payments made to entities resident in "blacklisted" jurisdictions. The draft bill is yet to be approved by both the lower house of the Parliament and the Federal Council. If approved, the bill would enter into force on 1 July 2021. First measures could be applied as of 2022, while the denial of deductible payments would not be applicable before 2025.

The German Federal Ministry of Finance published the final decree providing guidance on the German Mandatory Disclosure Rules (MDR) legislation. The final decree is broadly in line with the latest draft decree issued on 14 July 2020 and has only a few changes. The final decree clarifies that the rules for the basis of the reportable cross-border arrangement are not the German MDR rules but the ones dealing with the tax consequences between Germany and any other EU Member State (e.g., the specific provisions of those Corporate Income Tax Acts). Further, the report must include the rules applying to the arrangement as well as the rules which are prevented from application due to the execution of the tax arrangement. Moreover, the final decree includes a new appendix that contains an indicative list of preferential tax regimes and

a list of third-country jurisdictions which have been assessed by EU Member States collectively or within the framework of the OECD as lacking transparency respectively considered as non-cooperative. Deductible payments made to associated enterprises in such non-cooperative jurisdictions may be reportable under the conditions of hallmark C1. The final decree is immediately applicable.

The German Government agreed on the draft bill implementing the EU “Anti-Tax Avoidance-Directive” (ATAD). The draft bill covers anti-hybrid rules, taxation of cross-border asset transfers/exit taxation, and CFC rules. The anti-hybrid and exit taxation rules are based on the ATAD rules proposed by the EU Directive 2016/1164 of 12 July 2016, and EU Directive 2017/952 of 29 May 2017, although in certain respects they go beyond the mandated minimum standard. Regarding the CFC rules, the draft bill significantly extends the application of the German rules by broadening the concept of control, as well as by imposing CFC taxation on foreign (nonresident) taxpayers owning CFCs through a German PE. The draft bill also suggests changes to the definition of active income. In particular, dividends from portfolio investments (ownership below 10% as of the beginning of the calendar year) no longer qualify as active income and could be subject to a CFC pick-up. Further, the so-called CFC “motive test” or anti-abuse test has been tightened. The draft bill now requires the presence of a substantial business activity, which the CFC needs to pursue “on its own” on the basis of appropriate operating substance and qualified personnel. The anti-hybrid rules are planned to be applicable retroactively for expenses accruing after 31 December 2019. The CFC rules would apply to all CFCs with a fiscal year beginning in 2022.

German Ministry of Finance publishes final MDR guidance.

Germany Updates Real Estate Transfer Tax Rules.

Ghana

Ghana enacts Financial Sector Recovery Levy and introduces other tax reforms.

Ireland

Irish Revenue published updated guidance (eBrief 068/21) on anti-hybrid rules.

Italy

The Italian Tax Authorities issued Circular No. 3/E to provide guidance on the application of the Digital Services Tax (DST). In particular, the ITA provided specific clarifications with respect to the scope of application of the DST, including:

- definition of qualifying taxable persons and qualifying digital services;
- the adopted geolocation criteria;
- the calculation of taxable revenues; and
- administrative obligations.

The ITA also clarified that the DST is not a tax on income so it is not generally covered by tax treaties concluded by Italy and, where the same taxable income is also subject to a DST in another country, no tax credit would be granted for the DST paid abroad. However, the DST paid may be deducted from taxable income subject to corporate income tax in Italy in the year in which it is paid.

Japan

Japan’s 2021 Tax Reform introduces tax incentives for carbon neutrality and digital transformation.

Kenya

Kenya’s Tax Appeal Tribunal provides guidance on taxation of professional and

managements fees under Double Tax Treaty Agreement.

Mexico

Mexican Congress approves labor reform addressing outsourcing services.

Netherlands

The Dutch Government released a proposal introducing a withholding tax of 25% on dividend payments to low-taxed jurisdictions. The withholding tax is also applicable in abusive situations. Payments to affiliated entities resident in a low-taxed jurisdiction with a statutory tax rate lower than 9% or a jurisdiction on the EU list of non-cooperative jurisdictions are in scope of this proposal. In respect of dividend payments in abusive situations, the withholding tax also applies to (deemed) payments to intermediate holding companies. For example, where a dividend distribution is made by a Dutch entity to a conduit company (e.g., that lacks economic substance) located in a non-low taxed jurisdiction which then makes a distribution to an (ultimate) recipient in a low-taxed jurisdiction. Relevant substance in a conduit company provides a presumption that the arrangement is not abusive. The proposal is currently under review by the Dutch Parliament and is subject to the regular parliamentary proceedings. If enacted, the new rules will take effect as of 1 January 2024.

The Netherlands and Germany amended Tax Treaty.

Nigeria

On April 15, 2021, the Federal Inland Revenue Service (“FIRS”) issued a public notice by which it directed all approved enterprises operating within Nigeria’s Export Processing and Oil & Gas Free Zones (the “Free Zones”) to: (i) file income tax returns for 2021 and subsequent years of assessment;

and (ii) compute income tax and pay the tax due, if any.

Norway

Norwegian Tax Authority announces digital VAT reporting will be implemented for 2022.

Philippines

Philippines enacts law reducing corporate income tax rates and rationalizing fiscal incentives.

Corporate Recovery and Tax Incentives for Enterprises (CREATE) Act passed into law.

Puerto Rico

Puerto Rico's Treasury Department extends due date for filing income tax returns to 17 May 2021.

Russia

Russian Government submits bill on termination of tax treaty with the Netherlands to State Duma.

Spain

The Spanish Government approved the Regulations setting forth Spanish MDR. The Regulations were published in the State Official Gazette on 7 April 2021 and enter into force on 8 April 2021 and are also effective as from that same date. The final Spanish MDR Regulations are generally aligned to the requirements of the EU Directive on the mandatory disclosure and exchange of cross-border tax arrangements.

The Spanish Tax Authorities published an official notice announcing a second deferral of the Financial Transaction Tax (FTT) payment and submission deadline. In accordance with this announcement, the FTT returns for the period of January to May can be submitted between 10 and 20 June 2021.

A new double taxation agreement between Spain and China has been published.

Taiwan

Taiwan extends validity period of withholding tax relief at source for certain foreign institutional investors.

Turkey

Turkey increases corporation tax rate for 2021 and 2022 tax years.

UAE

UAE introduces fundamental amendments to Tax Procedures Law.

Uganda

Uganda issues Tax Amendment Bills 2021.

UK

HMRC published a manual on the tax treatment of cryptoassets to help understand the tax implications that can arise from transactions involving cryptoassets. The manual makes a distinction between individual and businesses. According to the manual, HMRC's position is that cryptoassets are not money or currency, but instead should be treated for tax purposes in the same way as other assets. For individuals, income tax would apply to trading in such assets and a capital gains tax would apply once a cryptoasset is disposed of. For businesses, different taxes (e.g., capital gains tax, corporate tax, value-added tax) may apply depending on the specific activity. More complex areas (e.g., cryptocurrency mining) are also addressed. Lastly, the manual devotes a section to compliance.

The UK Government launched a consultation on TP documentation. This consultation explores potential changes to TP record keeping requirements for the largest businesses and the introduction of a new tax filing requirement for all businesses affected by TP regulations. Under the proposed changes, HMRC would require UK businesses to keep certain information relating to TP matters in standardized

formats. Upon request by HMRC, UK businesses will be required to provide this information to HMRC promptly and in a consistent manner. The consultation also discusses the introduction of a mandatory requirement for multinationals within country-by-country reporting (CbCR) groups to provide, within 30 days, HMRC with a copy of the master file (MF) upon request and to keep (and produce on request) a local file (LF). Failure to provide these documents in due time would be taken into account by HMRC when considering whether reasonable care had been taken in the preparation of the tax return. The consultation also requires businesses to file an annual schedule reporting data about cross-border transactions through some form of International Dealings Schedule (IDS), in addition to any requirement for an MF and LF. In this respect, the consultation explores the idea that all UK businesses that are in scope of UK TP legislation would be required to file an IDS providing details about cross-border, intragroup transactions where the counterparty is in another territory. The consultation runs until 1 June 2021.

The UK, in an unexpected but very welcome development, introduced amending regulations that will largely remove any obligation for UK asset managers to comply with the EU's DAC6 mandatory disclosure regime.

Ukraine

The Ministry of Finance published a press release announcing the implementation of the three-tier TP documentation, including a MF, a LF and a CbC report.

USA

US IRS extends time for submitting APA and MAP requests with e-signatures.

In its first 100 days, the Biden Administration has moved rapidly and firmly to introduce the

policy proposals that President Joe Biden announced during his election campaign. In doing so, the new administration has presented its position on international taxation. There are two areas in tax where other countries and international organizations were keenly waiting for the United States to take position: the area of green taxation and on BEPS 2.0. In both areas, the US has now undertaken important initiatives. The US has started bi- and multilateral conversations on addressing climate change.

U.S. Treasury removes United Arab Emirates from list of boycotting countries.

The United States Trade Representative (USTR), Katherine Tai, announced that the US is considering implementing up to 25% retaliatory tariffs on certain products of Austria, India, Italy, Spain, Turkey, and the United Kingdom for the Digital Services Taxes (DSTs) adopted or under consideration by those countries. Indeed, USTR found that the DSTs were subject to action under Section 301 of the Trade Act of 1974 because they discriminated against U.S. digital companies.

Vietnam

Vietnam released a draft Circular, which provides guidance on the implementation of a number of articles of the Law on Tax Administration, addressing implementing rules for taxation of e-commerce activities. The draft includes the definition of “e-commerce activities” (conducting part or the entire process of commercial activities by electronic means) and “digital-based business” (provision of services via the internet or an electronic network where the nature of the provision is automated with little to no human intervention). The persons in scope for e-commerce activities are the following:

- nonresident suppliers that do not have a fixed place of business in Vietnam and conduct e-commerce activities;
- entities in Vietnam purchasing goods or services from nonresidents;
- tax organizations and agents operating in Vietnam that are authorized by overseas suppliers to perform e-commerce activities; and
- commercial banks and intermediary payment service providers.

With respect to tax registration, filing and payment, these will be handled through a website managed by the Vietnamese tax authorities if a nonresident supplier opts to file tax directly with the Vietnamese tax authorities. Alternatively, nonresident suppliers can appoint organizations or authorized tax agents to handle the tax registration, filing, payment. The draft Circular also proposes that commercial banks, intermediary payment services providers will be responsible for withholding, paying of taxes in respect of payments made to nonresident suppliers by individual buyers.

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About Mazars

Mazars is an internationally integrated partnership, specialising in audit, accountancy, advisory, tax and legal services^[1]. Operating in **91 countries and territories** around the world, we draw on the expertise of **40,400 professionals** – 24,400 in the Mazars integrated partnership and 16,000 via the Mazars North America Alliance - to assist clients of all sizes at every stage in their development.

^[1] Where permitted under applicable country laws

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