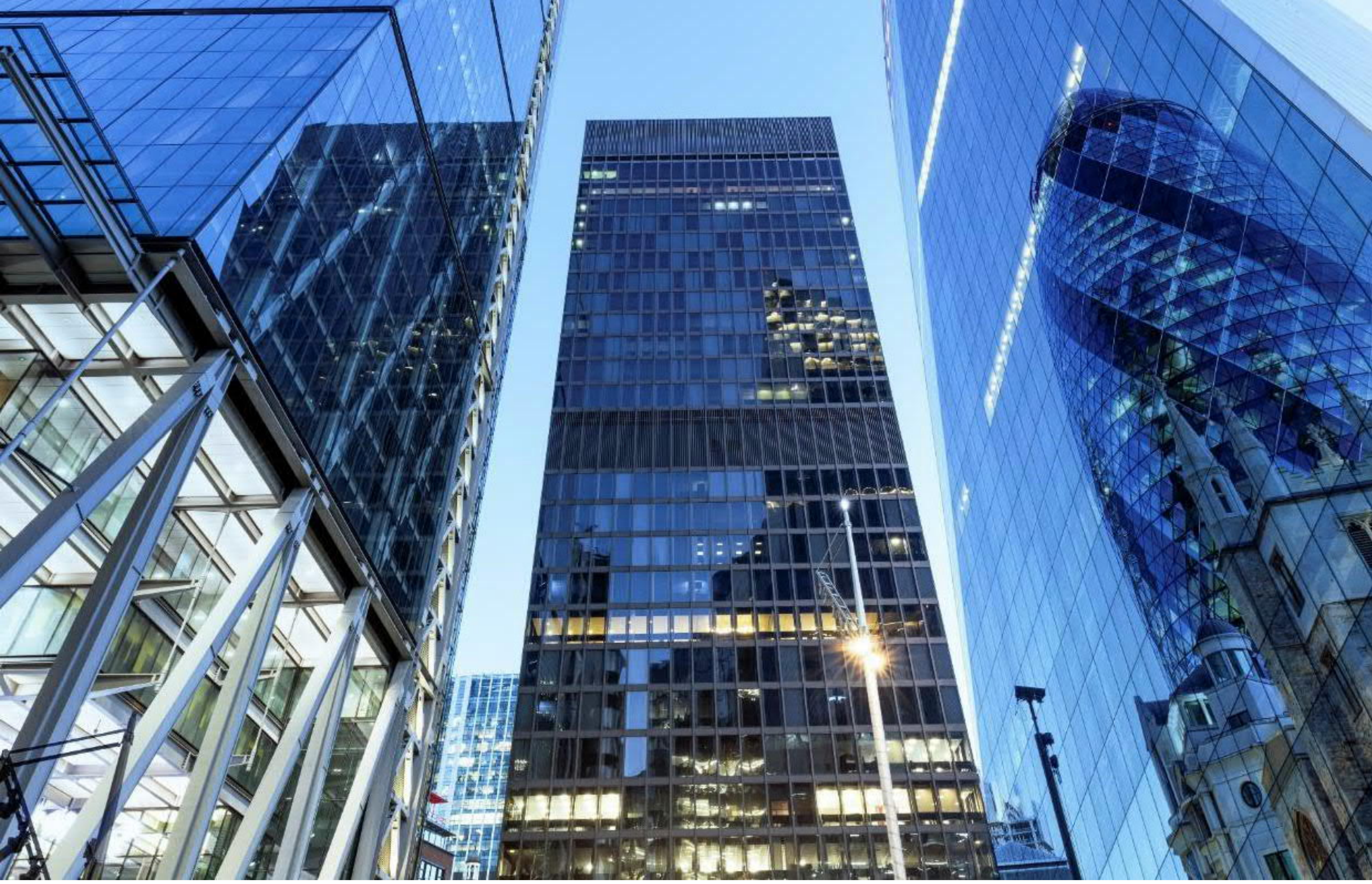

BEPS and international tax newsletter

Edition 9 – October 2021

mazars

Introduction

This newsletter provides regular updates and insights on the OECD's BEPS initiative, and ongoing international tax reforms.

Our ninth edition deals with the new measures published in October 2021 by the OECD, EU and UN; specifically covering 13 countries: Austria, Bulgaria, Canada, Dominican Republic, Germany, France, Hong Kong, Italy, Jordan, Netherlands, Spain, Taiwan, and Uganda.

If you have any questions, please don't hesitate to get in touch with a member of our team.

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OECD

The G20 issued a communication on key issues following its meeting on 12-13 October 2021. The announcement endorses the proposed two-pillar solution to the tax challenges arising from the digitalisation of the economy and the detailed implementation plan published by the Inclusive Framework on 8 October 2021. The G20 called for early ratification of the provisions being developed to ensure that the new rules enter into force in 2023. The announcement also endorses the OECD report, Tax and Fiscal Policies after the Covid-19 Crisis. This report assesses the emergency tax and budget measures introduced by countries in response to the Covid-19 pandemic.

The OECD has issued a statement outlining the agreement reached by 136 of the 140 members of the Inclusive Framework on the key features of the two-pillar solution developed under the BEPS 2.0 project. The statement describes the agreed elements concerning both pillars of the project, namely:

- The first pillar on revisions to the nexus and profit allocation rules (with companies having to pay more tax where they operate rather than where they are headquartered); and
- Pillar Two on new global rules that seek to introduce a minimum tax.

The statement builds on the publication of the July 2021 report, which provides clarification on some key aspects.

Among other items, the statement provides that the amount of residual profit to be re-allocated to market jurisdictions under Pillar One is 25% (compared to 20-30% as provided in July). The rate for the “GloBE” minimum tax under Pillar Two has now been agreed at 15% (compared to “at least 15%” as provided in July). Further, a two-year stand still on imposing any new digital services taxes (DSTs) to the end of 2023 was agreed, along with the removal of all existing DSTs for all companies through the adoption of a multilateral convention.

The OECD announced that Namibia signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI), bringing the total number of jurisdictions to 96. At the time of signature, Namibia submitted a list of its tax treaties in force that it would like to designate as covered tax agreements (CTAs). Together with the list of CTAs, Namibia also submitted a preliminary list of its reservations and notifications in relation to the CTAs (MLI positions) with respect to the various provisions of the MLI. The definitive MLI positions for Namibia will be provided upon the deposit of its respective instrument of ratification, acceptance, or approval of the MLI. As part of the options contained in the MLI, jurisdictions may opt into mandatory binding arbitration, an element of BEPS Action 14 on dispute resolution. Namibia opted in for mandatory binding arbitration.

The OECD published two opinions of the Conference of the Parties of the MLI. The opinions of the Conference of the Parties seek to address questions arising as to the interpretation or implementation of the MLI to ensure its proper interpretation and application.

The first opinion clarifies the implementation of Article 16 (Mutual Agreement Procedure) of the MLI where questions had been raised on the compatibility of existing provisions of CTAs and the provisions of Article 16 of the MLI in the context of BEPS Action 14 peer reviews.

Regarding the second opinion, it clarifies the application of the entry into effect of Part VI (Arbitration) of the MLI in specific situations.

The OECD published the fifth annual Progress Report on the OECD/G20 Inclusive Framework on BEPS. The Progress Report describes the progress made to deliver on the mandate of the OECD/G20 Inclusive Framework, covering July 2020 to September 2021. The Progress Report contains three parts:

- Part 1 describes the implementation of BEPS minimum standards.
- Part 2 describes the progress on other BEPS Actions; and
- Part 3 describes the response to Covid-19.

The Progress Report also contains an appendix to include the statement on a two-pillar solution to address the tax challenges arising from the digitalisation of the economy. According to the Progress Report, notable progress has been achieved under Actions 5, 6, 13 and 14, which comprise the four BEPS minimum standards. Among other things, the Progress Report mentions that 300 preferential tax regimes have been reviewed under Action 5 and over 36,000 tax rulings have been exchanged among members of the Inclusive Framework. As of September 2021, the MLI covers 97 jurisdictions and effectively modified over 650 treaties concluded among the 68 jurisdictions, which have ratified, accepted, or approved it. As for Action 13, over 100 jurisdictions have already introduced country-by-country reporting (CbCR) legislation. Finally, there has been a significant increase in the number of resolved Mutual Agreement Procedure (MAP) cases in almost all jurisdictions under review, and access to MAP has been expanded and streamlined.

Andorra and Spain deposited their instrument of ratification of the MLI with the OECD. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, Andorra added its tax treaty with United Arab Emirates to its list of CTAs and changed its preliminary positions by removing the reservation to Article 35 (entry into effect). Spain added its tax treaties with Belarus, Cabo Verde, Romania to its list of CTAs and did not make any changes to its preliminary MLI positions. The MLI will enter into force for these jurisdictions on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit of their instrument of ratification (1 January 2022).

EU

On 5 October 2021, the Council of the European Union updated the European Union (EU) list of uncooperative countries. In this update, Anguilla, Dominica, and the Seychelles were removed from Annex I (the EU blacklist). As a result, the revised EU blacklist includes nine countries: American Samoa, Fiji, Guam, Palau, Panama, Samoa, US Virgin Islands, Trinidad and Tobago and Vanuatu. The update of the EU list of uncooperative countries also includes Appendix II (the EU grey list). Australia, Eswatini, and the Maldives have been removed from the EU grey list as they have met all their commitments. Costa Rica, Hong Kong, Malaysia, Northern Macedonia, Qatar, and Uruguay were added to the EU grey list. In addition, Turkey remained on the EU grey list.

The Council of the European Union ("Council") formally adopted the proposed public CbCR directive. The adopted Council's position is broadly in line with the compromise text provisionally agreed on 1 June 2021 and most of the changes are linguistic. One of the main updates is the clarification of the conditions for CbCR in respect of countries on Annex II of the EU list of non-cooperative jurisdictions. The jurisdictions in scope are those that were mentioned in that Annex on 1 March of the financial year for which the report on income tax information is to be drawn up and on 1 March of the preceding financial year. Another main update is the commencement date for reporting. The wording has now been amended to ''at the latest as of the first financial year starting on or after two years and six months after the date of entry into force of the Directive.'' The next step after the formal adoption by the Council of the EU is the approval by the European Parliament in plenary session. The exact time of the vote in plenary is yet unknown, but it will possibly take place later in autumn 2021.

The European Commission has published the September infringement package. In this package, the European Commission announced that it had sent a letter of formal notice to Cyprus on the grounds of incorrect transposition of the interest limitation rule of the Anti-Tax Avoidance Directive (ATAD). Cyprus grants the possibility to exempt financial undertakings from the interest limitation rule, including securitisation entities, which are not considered financial undertakings. If Cyprus does not act within the next two months, the European Commission may decide to send a reasoned opinion. The package also mentions that the European Commission has sent a letter of formal notice to the Czech Republic for failure to communicate all the required national measures fully implementing ATAD I as regard hybrid asymmetries with third countries. The Czech Republic has only partially notified the measures in question and now has two months to act and take the other necessary measures. Otherwise, the Commission may issue a reasoned opinion.

On 6 October 2021, the Court of Justice of the European Union (CJEU) delivered its judgment in several cases concerning the Spanish tax depreciation regime for financial goodwill related to a foreign direct holding and also dismissed the appeals against the earlier judgment of the European Union Court of Justice. The CJEU dismissed the appeals brought against the judgments of the General Court upholding the classification of the Spanish tax rules on the amortization of financial goodwill as state aid incompatible with the internal market.

United Nations

On 7 October 2021, the United Nations published the Manual on Prevention and Resolution of Tax Disputes. The Manual represents the outcome of work undertaken on dispute avoidance and resolution in a practical way, both at the national and international level. In particular, the Manual focuses on mechanisms for avoiding and resolving disputes arising at the domestic level; ways to ensure that the MAP operates as effectively and efficiently as possible; and issues associated with arbitration clauses and other means as options to complement the MAP.

Austria

On 7 October 2021, the Austrian Ministry of Finance published a revised version of the Austrian transfer pricing guidelines. The main updates follow the BEPS project and focus on the actual conduct of the parties and the economic circumstances. The guidelines are to be used as a basis for interpreting the arm's length principle and the application of tax treaties. As for the content of the guidelines, it includes all the new elements of the 2017 OECD guidelines on:

(i) hard-to-value intangibles;

(ii) low value-added intra-group services;

(iii) financial transactions;

(iv) group synergies; and

(v) corporate restructuring.

In addition, the guidelines also include a section on transfer pricing documentation and reporting requirements. In particular, they deal with CbCR, master file and local file, as well as cross-border agreements falling within the scope of the EU Directive on mandatory disclosure and exchange of information (DAC6). The revised Austrian Transfer Pricing Guidelines come into force on 7 October 2021.

Bulgaria

On 5 October 2021, the Ministry of Finance of Bulgaria launched a public consultation on hybrid mismatches and controlled foreign company (CFC) rules. The consultation on hybrids intends to implement the Anti-Tax Avoidance Directive, namely on reverse hybrid mismatches. The proposed amendments suggest that certain local hybrid entities, which are in principle outside the scope of the Bulgarian Corporate Income Tax Act (CITA), will be equated to Bulgarian taxable persons under the following conditions:

- One or more related foreign entities should hold, directly or indirectly, 50% or more of the voting rights, the share capital or the right to share in the profits of the Bulgarian hybrid entity; and,
- The jurisdictions in which these foreign entities are located should treat the Bulgarian hybrid entity as a Bulgarian taxable person. Using this approach, the legislator aims to ensure the treatment of such hybrid entities as taxable persons within the meaning of the Bulgarian CITA and, thus, to prevent the occurrence of hybrid mismatches and the application of the respective measures. It is envisaged that the proposed rules will not apply to collective investment schemes that are an investment fund or scheme that simultaneously meets the conditions to have multiple owners, are a diversified portfolio of securities and are subject to investor protection regulations in the country in which is established.

As for the CFC rules, the draft rules broaden the scope of the CFC rules and would apply to taxpayers in Bulgaria with a CFC regardless of their form of taxation. The respective changes have been introduced to correct the established discrepancy with the Anti-Tax Avoidance Directive, which currently allows taxable persons whose CFCs in their jurisdiction of incorporation or establishment are taxed with alternative forms of taxation to the corporate tax not to be captured by the present CFC rules. The consultation period runs until 4 November 2021. If enacted, the rules would enter into force as of 1 January 2022.

Canada

On 8 October 2021, following the announcement the same day of the international agreement reached by the OECD on the core design features of the two-pillar solution developed in the BEPS 2.0 project, Deputy Prime Minister and Finance Minister, Chrystia Freeland, issued a statement confirming that the Canadian Federal Government intends nevertheless to move ahead with legislation finalising the enactment of a Digital Services Tax (DST) by 1 January 2022. This step is in-keeping with a proposal first announced in the 2020 Fall Economic Statement and again in the 2021 Budget. However, the statement added that the DST would only be imposed as of 1 January 2024, rather than 1 January 2022 (as originally announced), and only if the convention implementing the BEPS 2.0 tax regime under the international agreement has not come into force by 31 December 2023. This change is consistent with the agreed statement released by the OECD under which no newly enacted DSTs or other relevant similar measures will be imposed on any company from 8 October 2021 until the earlier of 31 December 2023 or the coming into force of the implementing convention. In the event that the implementing convention does not come into force by 31 December 2023, the Canadian DST would be payable as of 2024 in respect of revenues earned as of 1 January 2022. The statement added that it is the Deputy Prime Minister’s sincere hope that the timely implementation of the new international system will make this unnecessary.

Dominican Republic

The Dominican Republic issued regulations on CbCR.

Germany

The German Ministry of Finance (MoF) issued the Administrative Principles regarding Transfer Pricing (AP TP) in July 2021. This guidance provides, among others, that for loans to German borrowing group affiliates the acceptable interest margin for a foreign financing company is limited to the current risk-free market return unless the financing company is “able and authorised” to control the financial investment and bear the corresponding risks. To the extent interest payments out of Germany result in higher compensation at the level of the foreign financing company, they are not deductible according to the position of the MoF. The German Federal Fiscal Court (BFH) contradicted the position of the MoF as set out in the AP TP in a ruling published on 21 October 2021 regarding the calculation of an arm's-length interest rate on intercompany loans (BFH, ruling dated 18 May 2021, I R 4/17). According to the ruling, the interest rate should be based on the economic circumstances of the borrower (and not the lender). Further, the comparable uncontrolled price (CUP) method is to be applied with priority over the cost-plus method. The priority of the CUP method should also apply if (comparability) adjustments are required and appropriately performed. Essentially, the decision stipulates that the appropriate interest rate is the rate the borrower would have to pay to a third-party lender and that there is no restriction to a risk-free interest rate for certain intercompany lenders - as opposed to the view set forth by the MoF in the AP TP.

France

In two decisions dated October 4, 2021 (nos. 443130 and 443133), the French High Court (*Conseil d'Etat*) delivered its judgment in cases concerning the regime of presumed profit shifting.

As a reminder, when the French tax authorities find that the prices charged by a company established in France to a foreign related company are lower than those charged to third parties, they may presume the existence of a profit shifting, unless the company can justify that it has benefited from a compensation (French Tax Code, art. 57).

The High Court has established the principle that the price difference observed may be justified by the risks that the company has to assume and that affects its profitability. In this case, the company must justify that, by virtue of its functions within the group, it had a duty to assume these risks, and that the difference between its financial ratios and those of comparable companies can be explained by the occurrence of these risks.

The taxpayer must be able to demonstrate that its functions within the group enable it to assume these risks, and that the difference between its financial ratios and those of similar companies is explained by the realisation of these risks. Referring to the OECD TP Guidelines, the taxpayer must have effective control and mitigation functions and the financial capacity to assume these risks in order for a group company to be considered as having the ability to assume an economic risk that the group's transfer pricing policy leads it to bear.

Hong Kong

Following the OECD statement (8 October 2021) on the agreement on the core design features of the two-pillar solution developed in the BEPS 2.0 project, the Hong Kong government reiterated its earlier position that it will implement the BEPS 2.0 package based on the BEPS 2.0 model rules to be finalised by the OECD. The two pillars are:

- Pillar One on revisions to nexus and profit allocation rules; and,
- Pillar Two on new global rules that seek to introduce a minimum tax.

The Hong Kong Government plans to consult stakeholders during the domestic legislative exercise. The Hong Kong government acknowledged that the two-pillar solution would reduce the ability for jurisdictions to introduce exemptions or low rates to enhance their tax competitiveness in the future. However, Hong Kong would be able to reinforce its competitive advantages under a more level playing field. In addition to implementing the two-pillar solution, once finalised, Hong Kong is expected to make changes to its long-established territorial-source regime for passive income (e.g., interest and royalties) by the end of 2022, which would allow it to be removed from the EU’s grey list.

Italy

On 15 October 2021, the Italian Government shared a draft Law Decree (Draft Decree) with a series of urgent economic and tax measures, including repealing the old patent box regime. While it will be immediately effective from the day after its publication in the Official Gazette, the Law Decree will have to be converted into law (with potential changes) within 60 days from its publication to remain in force. Some implementing measures will follow. Article 7 of the Draft Decree repeals the old patent box regime by shifting from a profit-based incentive (50% exemption) to a cost-based incentive by introducing a super deduction for R&D expenses (190% deduction of qualifying expenditures). The patent box changes should be effective for 2021, but the current language of the Draft Decree leaves room for interpretation about retroactive effects, putting at risk patent box elections for 2020. The business community is pushing for an amendment of the Draft Decree language that would establish that the new rules do not affect 2020 patent box elections. There are discussions going on at the institutional level with expectations that the Draft Decree will be amended. Because of the uncertainty regarding the application of the new rules to 2020 patent box elections, some companies have decided to file an early 2020 tax return (i.e., before the enactment of the new rule, which may occur in the upcoming days) for the sole purpose of electing the patent box regime, although it is unclear whether early filing may be a clear solution for all cases.

Double tax treaty concluded between Colombia and Italy will be effective 1 January 2022.

Jordan

The Hashemite Kingdom of Jordan published Executive Instructions No. (3) of 2021 (the Instructions) in the Official Gazette providing details and clarifications on the TP regulations, which became effective in July 2021. Among other items, the instructions provide details on the format of the BEPS Action 13 reports (CbCR, Master File, and Local File) and specifies that these reports should be submitted to the Jordan tax authority within 12 months from the end of the financial year concerned. The instructions provide that the TP regulations apply to any taxpayers with related party transactions exceeding JOD 500,000 (approximately USD 705,000). Further, the templates for table 1, table 2 and table 3 of the CbCR are in line with the OECD format. The instructions confirm that Jordan resident entities of groups headquartered outside Jordan may also be required to submit the CbCR in Jordan in certain cases. The information to be included in the master file and local file is aligned with the OECD TP Guidelines.

Netherlands

On 1 October 2021, the Dutch Ministry of Finance published Letter No. 2021Z16552 proposing changes to the interest limitation rules. The proposal intends to reduce the earnings before interest tax depreciation and amortization-based interest deduction from 30% to 20% to contribute to a more equal fiscal treatment of equity and debt. Moreover, the Dutch Ministry of Finance announced an anti-avoidance measure to combat the split-up of companies to stay below the safe harbor interest deduction (EUR 1 million). Moreover, there are rumors that the corporate income tax rate may slightly increase from 25% to 25.8%. Next steps in this legal process are a draft legislative proposal in the lower chamber, after which it will follow the same legislative path as the other proposals, i.e., discussions in lower chamber/amendments, discussions in senate, and if approved the signing and publication in the Official Gazette.

The Dutch government published draft legislation to implement specific reverse hybrid entity provisions. The current proposed legislation revises and refines the reverse hybrid entity provisions that were already implemented in 2019 (with effective date of 1 January 2022). The proposal would ensure that all reverse hybrid entities would be fully liable to corporate income tax in the Netherlands except for certain collective investment vehicles. The proposal would allow a deduction for taxable profit of the reverse hybrid entity equal to the profit allocable to the partners that consider the entity as transparent, provided this profit is subject to a profit tax at the level of those partners. As the reverse hybrid entity becomes a Dutch taxpayer, the entity would be subject to regular compliance obligations for Dutch corporate taxpayers (e.g., filing of a corporate income tax return). Reverse hybrid entity provisions are also introduced in other tax laws (e.g., the general tax act, dividend withholding tax act, the conditional withholding tax on interest and royalties). With respect to dividend withholding tax and the conditional withholding tax, reverse hybrid entities are treated as Dutch corporate taxpayers insofar as its partners consider the reverse hybrid entity a non-transparent (taxable) entity. The proposed legislation, if enacted, applies to fiscal years starting on or after 1 January 2022.

The Dutch government published draft legislation regarding the application of the arm's-length principle in the Netherlands. Under current TP rules, a unilateral upward or downward TP adjustment must be made to the extent that the transfer price agreed between related parties is not in accordance with the arm's length principle. Based on Dutch case law, such adjustment subsequently results in the recognition of either an informal capital contribution or a deemed dividend distribution. Whereas this doctrine is consistently applied in the Netherlands, it may result in international mismatches and potential double (non-) taxation. Hence, the proposed legislation would deny such a downward adjustment of the taxable income of the Dutch taxpayer to the extent a corresponding upward adjustment is not included in the taxable basis of a profit tax in the country of the foreign counterparty. The proposed legislation does not require such inclusion to be effectively taxed (e.g., because of a specific exemption or a statutory corporate income tax rate of 0%) but the burden of proof for such inclusion lies with the Dutch taxpayer. The proposal has been sent to the Dutch Parliament and would be effective for fiscal years starting on or after 1 January 2022.

Spain

On 4 October 2021, the Spanish tax authorities published the CbCR statistics reflecting information for the year 2018. The main conclusions include the following:

- A higher number of Spanish Ultimate Parent Entities submitted the CbCR in Spain compared to 2017.
- The information includes 15,000 subsidiaries, 10,200 of which are foreign. The total income amounts to EUR 858,500 million and the worldwide corporate income tax amounts to EUR 16,800 million; and,
- 46% of the UPE's subsidiaries are located outside the EU Member States.

On 28 September 2021, Spain deposited its instrument of ratification of the Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting (the MLI) with the OECD. The provisions included in the MLI will have a significant impact on most of the treaties in the Spanish tax treaty network.

Taiwan

The Taiwan Ministry of Finance issued a ruling (Tai Tsai Shuei Zi No. 11004585970) that proposes amendments to the "Regulations Governing the Scope of Core Business Revenues from the Banking and Insurance Business of the Banking and Insurance Industries". To align the tax burdens on different sectors of the financial services industry, the amendment would expand the 2% business tax rate for banks and insurance companies to income derived from investments in the trading and holding of short-term notes and certificates of deposit (reduced from the business tax rate of 5%).

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Uganda

Uganda's Value Added Tax (Designation of Withholding Agents) Notice 2020 has implications for newly announced agents.

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About Mazars

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*where permitted under applicable country law

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