BEPS and international tax newsletter

Edition 11 – December 2021

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Introduction

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

Our eleventh edition deals with the new measures published in December 2021 by the OECD, the EU, and in 19 countries: Argentine, Armenia, Australia, Belgium, Colombia, Costa Rica, Cyprus, Denmark, France, India, Italy, Mexico, Netherlands, Philippines, Poland, Portugal, Spain, Taiwan, and the UK.

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 Organization for Economic Co-operation and Development (OECD) held its third OECD Tax Certainty Day. During the event, the OECD released the 2020 statistics on Mutual Agreement Procedures (MAP) and presented the 2020 MAP awards. For 2020, the statistics include information from all members of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) that joined the Inclusive Framework before 2021 and have submitted their MAP statistics for a total of 118 jurisdictions, an increase from the 105 jurisdictions covered in 2019 data. The 2020 data covers almost all MAP cases worldwide. Separate statistics are provided for transfer pricing cases and "other" cases (i.e., non-transfer pricing cases) for 2020 concerning the:

- Opening inventory and ending inventory of MAP cases;
- Number of new MAP cases started;
- Number of MAP cases completed;
- Cases closed or withdrawn; and,
- Average cycle time for cases completed, closed, or withdrawn.

The 2020 MAP statistics include the number of MAP cases that each jurisdiction has with each of its treaty partners. Moreover, each reporting jurisdiction's performance concerning key indicators for each type of case can be compared through an interactive tool. In addition, at the event, the OECD announced the 2020 MAP awards recognizing the efforts of competent authorities across a range of metrics. This year, a new category (most improved jurisdiction) was introduced to recognize the jurisdiction that has the greatest increase in cases closed with unilateral relief or full agreement.

On December 20, 2021, the OECD published its model rules on the agreed Pillar 2 minimum tax.

EU

EU Public CbCR Directive enters into force on 21 December 2021.

The Council of the European Union reached a political agreement on 7th December 2021 for the adoption of a directive aiming at modernising and harmonising the rules for the application of reduced VAT rates.

While most of the European Anti-Hybrid Rules took effect on 1st January 2020, the last anti-hybrid provision – targeting the reverse hybrid mismatch – will enter into force in relevant EU jurisdictions (such as Luxembourg and Ireland) on 1st January 2022. The new anti-reverse hybrid rule could give rise to an unexpected tax liability for tax-transparent EU funds, so a review of any such funds is recommended before year-end. This may affect funds set up as partnerships, unit trusts, or other contractual/tax transparent entities. The European Anti-Hybrid Rules derive from the Council Directive (EU) 2016/1164 of 12th July 2016 (known as “ATAD 1”), as amended by Council Directive (EU) 2017/952 of 29th May 2017 amending Directive (EU) 2016/1164 (known as "ATAD 2"). A reverse hybrid mismatch would occur if one or more of the investors/partners in a partnership fund are treated as associated entities of the fund by holding in aggregate a direct or indirect interest of 50% or more of the (i) voting rights, (ii) capital interests or (iii) rights to a share of profit in a transparent entity, established in an EU Member State, and are located in a jurisdiction or jurisdictions that regard the fund as an opaque entity. In that case, the entity shall be regarded as a tax resident of the EU Member State where it is established and taxed on its income to corporate income tax to the extent that that income is not otherwise taxed under the laws of the relevant Member State or any other jurisdiction. An exemption for the charge to tax can apply to a fund regarded as a collective investment vehicle (the "CIV Exemption"). The CIV Exemption is available to an investment fund or vehicle that:

- is widely held,
- holds a diversified portfolio of securities and
- is subject to investor-protection regulation in the country in which it is established.

On December 22, 2021, only two days after the OECD published its model rules on the agreed Pillar 2 minimum tax, the European Commission has proposed a Directive "on ensuring a global minimum level of taxation for multinational groups in the Union." The Directive will require all EU member states to implement the minimum tax rules accordingly. The proposal delivers on the EU's pledge to ensure swift and harmonized implementation of the historic international agreement on global tax reform and to build on it so that corporate tax systems work fairly and soundly. In general, the Directive reflects the global OECD agreement with some adjustments which aim to guarantee conformity with EU law. The timetable towards implementation envisaged by the Commission may raise concern against the timetable contemplated by the OECD. The Commission proposes that the Directive be finalized by mid-2022 and transposed into domestic law of the member states effective on 1 January 2023. The OECD envisages an explanatory Commentary to the Model Rules to be released in January or February 2022 and detailed implementation guidance to be released in late 2022 or early 2023. The proposed rules will apply to any large group, both domestic and international, including the financial sector, with combined financial revenues of more than €750 million a year, and with either a parent company or a subsidiary situated in an EU member state. As indicated by the Commission itself, the implementation of the GloBE Model Rules in the EU could have implications for existing provisions of the EU Anti-tax Avoidance Directive (ATAD)2 and specifically for the Controlled Foreign Company (CFC) rules. The CFC rules implemented by the EU Member States may interact with the primary rule of Pillar 2 – the Income Inclusion Rule (IIR). According to a statement made by the Commission, it has explored how to best accommodate the interaction between the CFC rules and the IIR. The Commission concluded that it is not necessary to amend the ATAD in this regard. Moreover, the Commission believes that it is consistent with the OECD Model Rules to continue the application of the CFC rule in parallel to the GloBE Model Rules. As to the practical application, the Directive stipulates that the ATAD and CFC rules will apply first and any additional taxes paid by a parent company under a CFC regime in a given fiscal year will be taken into consideration in the GloBE Model Rules by attributing those to the relevant low-taxed entity to compute its jurisdictional effective tax rate. Under the Commission's proposal, the calculation of the effective tax rate will be made by the ultimate parent entity of the group (unless the group assigns another entity) following what has been agreed upon at the international level. The effective tax rate is established per jurisdiction by dividing taxes paid by the entities in the jurisdiction by their income. If the effective tax rate for the entities in a particular jurisdiction is below 15 percent, the group must pay a top-up tax to bring its rate up to 15%. While the scope of OECD Pillar Two is limited to multinational groups, and a parent entity subjects only its foreign subsidiaries to the income inclusion rule, the Commission's proposal adjusts the scope of the international agreement to also include purely domestic groups.

Argentine

Argentine Government issues new regulations on tax on financial transactions.

Armenia

Armenian National Assembly ratifies Law introducing the concept of electronic services in the Tax Code.

Australia

Australian Taxation Office releases final guidance on imported hybrid mismatch rule.

Belgium

The double tax treaty with the Netherlands is now subject to MLI.

Belgium and France sign a new double tax treaty.

The Belgian Supreme Court recently clarified the scope of application of the Belgian general anti-abuse provision (GAAR) and its interaction with the EU GAAR and the general principle of EU law prohibiting abuse. The Court confirmed that the "new" Belgian GAAR can only be applied to a series of acts provided that all acts are carried out after the date of entry into force of the provision. The Court also held that in the determination of whether a structure amounts to tax abuse, the EU GAAR is in any case not relevant when such structure was set up before the entry into force of the EU GAAR. Finally, the Court confirmed that the general EU principle prohibiting abuse is not applicable in a purely domestic law context.

Colombia

Colombia and Uruguay sign a double tax treaty.

Costa Rica

Costa Rica enacts laws to promote investment in and development of international film productions in Costa Rica.

Costa Rica's Tax Authority publishes a list of industries and economic activities to be considered as a criterion for selecting taxpayers for tax audits.

Cyprus

Cyprus Finance Minister announces Government's plan for tax reform in 2022.

Denmark

Denmark adopts new rules relaxing transfer pricing documentation requirements for domestic controlled transactions and addressing the application of benchmarking.

France

France implements automatic reverse charge for import VAT as of 1st January 2022.

The Administrative Court of Appeal of Versailles issued a decision on November 18, 2021 (n°19VE017227, Min. c/ SA Bureau Veritas) concluding that insufficiencies in selling price objectively justified by constraints resulting from the protectionist legislation of the third country does not constitute a profit-shifting.

The Administrative Court of Lyon, in a decision dated October 26, 2021, SAS Arrow Génériques (n° 2005396), considers that the administration is required to investigate whether the royalties invoiced are irregular and constitute an indirect transfer of profits, even if the intangible assets are not recorded in the balance sheet of the related companies.

India

India and US agree on a transitional approach for India's 2% Equalization Levy before implementation of Pillar One rules. The final terms of the Agreement shall be finalised by 1st February 2022.

Italy

Italy issues guidance on transfer pricing documentation.

Mexico

Mexico City's 2022 economic proposal includes the imposition of new taxes on certain digital services.

Netherlands

On 15th December 2021, the Dutch government launched a public consultation regarding six alternative measures to counter dividend stripping. The public consultation closes on 26th

January 2022. The next steps are expected to be presented to the Dutch Lower House in the spring of 2022.

Philippines

Philippines introduces a new Economic Zone Authority (PEZA) visa.

Poland

Poland publishes statistics on Mandatory Disclosure Regime information submitted between January 2019 and September 2021.

New Tax Incentives Package for investments in Poland from 1st January 2022.

Portugal

With the publication of Decree-Rulings 267/2021 and 268/2021, both dated 26th November 2021, significant changes have been made to Portugal's advance pricing agreement regime, provided for in Article 138 of the Corporate Income Tax (CIT) Code, and to the regulation of transfer pricing in transactions carried out between Personal Income Tax or CIT taxpayers and any other entity, under Article 63 of the same code.

Spain

Spain's amendments to CFC rules (Controlled Foreign Companies) and participation regime may require action by multi-tier international structures under Spanish holdings.

Taiwan

A tax treaty with Saudi Arabia enters into force.

Taiwan and UK sign protocol to amend tax treaties.

UK

The UK issues consultation on regulations to implement OECD mandatory disclosure rules.

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About Mazars

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