BEPS and international tax newsletter

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Introduction

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

Our twelfth edition deals with the new measures January 2022 by the OECD, the EU, and in 26 countries: Algeria, Azerbaijan, Argentina, Belgium, Canada, Colombia, Costa Rica, Cyprus, Denmark, Ecuador, Germany, Greece, Ireland, Italy, Kazakhstan, Kora, Mexico, Netherlands, Peru, Romania, Singapore, Spain, Switzerland, Thailand, Turkey, and Vietnam.

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

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OECD

In the Annex to the 8 October Statement by the Inclusive Framework on BEPS, a one-and-a-half-page "detailed" implementation plan is included. In this plan, it is announced that by the end of November 2021, the OECD will publish the model rules which give effect to the core of the global minimum tax rules, i.e. the Global Base erosion (GloBE) rules. Such publications have not been issued as of today.

OECD

As a reminder, following its first publication in 1979, the original version of the OECD Transfer Pricing Guidelines (OECD TP Guidelines) was approved by the OECD Council in 1995. A limited update was issued in 2009, primarily to reflect the adoption of the arbitration clause in the 2008 update of the Model Tax Convention. In the 2010 edition, Chapters I-III was substantially revised, with new guidance on (i) the selection of the most appropriate transfer pricing method for the circumstances of the case; (ii) the practical application of transactional profit methods; and (iii) the performance of comparability analyses. The 2010 edition also included the addition of Chapter IX on the transfer pricing aspects of business restructurings. The 2017 edition incorporated substantial revisions to reflect clarifications and revisions contained in the 2015 BEPS Reports on Actions 8-10 (Aligning Transfer Pricing Outcomes with Value Creation) and Action 13 (Transfer Pricing Documentation and Country-by-Country Reporting).

On 20 January 2022, the OECD published the 2022 edition of the TP Guidelines. This latest edition consolidates the changes made to the 2017 edition resulting from three reports:

- The report “Revised Guidance on the Application of the Transactional Profit Split Method” was published on 21 June 2018.
- The report “Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles”, was published on 21 June 2018.
- The report “Transfer Pricing Guidance on Financial Transactions”, was published on 11 February 2020.

Regarding the first report, the revised guidance was developed under the mandate of BEPS Action 10 and was approved in 2018. This guidance amends the guidance on the transactional profit split method in Chapter II of the 2017 edition of the OECD TP Guidelines. The basic premise of the profit split method remains unchanged (i.e., to apply it where it is found to be the method most appropriate to the particular case). The revised guidance is intended to clarify and expand on when a profit split method may be the most appropriate method. It also expands on how the profit split method should be applied, including determining the relevant profits to be split and the appropriate profit-splitting factors. The revised guidance also includes several examples illustrating the principles discussed.

Regarding the second report, the treatment of Hard-to-Value Intangibles (HTVI) for transfer pricing purposes was addressed in the report of BEPS Actions 8-10 and incorporated in the 2017 edition of OECD TP Guidelines. The guidance was developed to tackle the asymmetry of information available between taxpayers and tax administrations regarding the potential value of an HTVI, when it is transferred. In summary, the HTVI approach authorizes tax administrations to use ex-post evidence on the financial outcomes of an HTVI transaction (i.e., information gathered in hindsight about how valuable an intangible has turned out to be) as presumptive evidence on the appropriateness of the ex-ante pricing arrangements.

The new guidance for tax administrations was approved in 2018 and now has been incorporated into the 2022 edition of the OECD TP Guidelines. This guidance aims to reach a common understanding and practice on how to apply adjustments for HTVI. As a result, the guidance is intended to improve consistency and mitigate the risk of economic double taxation. The guidance contains three main components: (i) an outline of principles underlying the application of the HTVI approach; (ii) a number of examples clarifying the application of the HTVI approach; and (iii) specifics on the interaction between the HTVI approach and access to the mutual agreement procedure.

The third report on the transfer pricing guidance on financial transactions contained follow-up guidance concerning BEPS Action 4 (Limiting Base Erosion Involving Interest Deductions and Other Financial Payments) and Actions 8-10. The guidance now has been incorporated in the 2022 edition of the OECD TP Guidelines, mainly in new Chapter X. The guidance covers the accurate delineation of financial transactions, in particular concerning capital structures of multinational enterprises. The guidance also addresses specific issues related to the pricing of financial transactions such as treasury functions, intra-group loans, cash pooling, hedging, guarantees, and captive insurance. In addition, it addresses the determination of risk-free rates of return and risk-adjusted rates of return where an associated enterprise is entitled to such a return under the guidance in Chapter I and Chapter VI of the OECD TP Guidelines.

The release of the 2022 edition of the OECD TP Guidelines consolidates the changes that have been adopted since the 2017 edition.

Individual countries take different approaches concerning whether and how they incorporate the OECD TP Guidelines into their domestic tax systems. For example, in some countries, the domestic rules explicitly refer to the TP Guidelines so that updates are automatically incorporated, while in other countries it requires some form of administrative or other action to incorporate a new version of the TP Guidelines into their domestic law.

The substantive changes in the 2022 update were approved by the OECD earlier when the underlying reports were published. Companies should understand and analyze the implications of this development for each jurisdiction in which they operate. For example, companies should review the amendments to the OECD TP Guidelines concerning their global operations and their current transfer pricing policies and approaches. There will likely be increased scrutiny by tax authorities from OECD member countries and non-OECD member countries on the application of the concepts reflected in the amendments to cross-border intercompany transactions.

On 24 January 2022, the OECD released the eighth batch of Stage 2 peer review reports relating to the outcome of the peer monitoring of the implementation by Brunei Darussalam, Curaçao, Guernsey, Isle of Man, Jersey, Monaco, San Marino, and Serbia (the assessed jurisdictions) of the minimum standard on dispute resolution under Action 14 of the BEPS project. The Stage 2 reports include four main sections: (i) preventing disputes; (ii) availability and access to Mutual Agreement Procedures (MAP); (iii) resolution of MAP cases; and (iv) implementation of MAP agreements. They cover any relevant developments from the assessed jurisdictions between 1 April 2019 and 31 December 2020. In addition, jurisdictions can request feedback on their adoption of the best practices. Guernsey and the Isle of Man made such a request and therefore the OECD also released accompanying best practices reports for each of those jurisdictions. The Stage 2 reports focus on evaluating the progress made by the assessed jurisdictions in addressing any of the recommendations that resulted from the Stage 1 peer review reports that were released on 24 February 2020. The outcomes of this batch of Stage 2 peer review reports generally demonstrate positive changes across the assessed jurisdictions. According to the peer review reports, Curaçao, Guernsey, Jersey, Monaco, San Marino, and Serbia have addressed either all or most of the deficiencies identified in the Stage 1 peer review. In addition, Brunei, Darussalam, and the Isle of Man addressed some of the identified deficiencies. The assessed jurisdictions have committed to continue working to resolve the remaining deficiencies identified during the peer review process.

EU

The European Commission (“The Commission”) published a legislative proposal for a Directive setting forth rules to prevent the misuse of shell entities for tax purposes (Anti-Tax Avoidance Directive (ATAD) III). To protect the European tax base, ATAD III would introduce a look-through approach to deny benefits of intra-European Union (EU) tax treaties and Directives to “shell companies.”

At first glance, the measures target a limited group of companies in the EU. Under the proposal, an entity is generally regarded as a shell company if established to obtain tax benefits while earning specific types of cross-border income, provided it has outsourced its day-to-day administration, lacks substance, and does not conduct genuine economic activities.

However, a closer look at the initiative indicates that the impact will be more significant.

First, the proposed framework will require all entities to self-assess the extent to which they are in the scope of the proposed rules. Under the seven-step analytical framework of the draft Directive, a large number of European companies will have to provide tax authorities with specific information on their nature and characteristics. Tax authorities in the EU will exchange this information automatically, potentially sparking a new wave of tax audits.

Second, the Commission has already announced that it will supplement the proposal with an initiative that will address entities in third states. This would level the playing field between the EU Member States and third states, but also underline the Commission's objective to lead in global tax standard setting. La proposition de directive ATAD III is now subject to negotiation between the 27 Member States. Businesses and investors should prepare for the new reporting requirements and review existing structures. Though it remains to be seen whether ATAD III will be adopted at the EU level, national legislators in the EU and beyond may take inspiration from the proposal and develop similar initiatives, riding the new wave of tax reporting requirements.

The Commission published a legislative proposal for a Directive setting forth rules to ensure a global minimum level of taxation for multinational groups. The proposed rules are generally consistent with the agreement reached by the Inclusive Framework on BEPS on 8 October 2021, and closely follow the Model Rules published on 20 December 2021.

This draft Directive aims at consistently implementing among all 27 Member States, the Model Rules that include an Income Inclusion Rule (IIR) and an Under Taxed Payments Rule (UTPR), referred to collectively as the “GloBE rules.’’ However, it also extends its scope to large-scale purely domestic groups, to ensure compliance with the fundamental freedoms. In addition, the draft Directive makes use of an option contemplated by the Inclusive Framework whereby the Member State of a constituent entity applying the IIR is required to ensure effective taxation at the minimum agreed level not only for foreign subsidiaries but also for all constituent entities resident in that Member State.

The proposal will now move to the negotiation phase among the Member States to reach a final agreement. In the EU, the adoption of tax legislation requires unanimity between all 27 Member States. The Commission proposes that the Member States shall transpose the Directive into their national laws by 31 December 2022 for the rules to come into effect as of 1 January 2023, except the UTPR, for which the application will be deferred to 1 January 2024.

Furthermore, the Commission published a Communication on the next generation of the EU own resources for the EU budget. This follows the establishment of the €750 billion EU recovery instrument (NextGenerationEU) in 2020 and the agreement to introduce new EU-own resources that will generate revenues to help repay the financing of the NextGenerationEU. The Communication outlines the Commission's proposals to use portions of revenues from the EU emissions trading system, the carbon border adjustment mechanism, and the taxation of reallocated profits of large multinationals under Pillar One of the Inclusive Framework BEPS 2.0 project to finance the EU budget. The Communication provides the revenue estimates for new own resources and percentages of the revenues that will become own resources, and it details how each levy would operate as an own resource.

Together with the Communication, the Commission also published the proposal for amendments to the EU-own resources decision to reflect the three new EU-own resources and the proposal for revisions of the Regulation establishing the 2021 to 2027 multinational financial framework. The Communication finally mentions that the Commission will present a proposal for a second basket of new own resources by the end of 2023, which will include a Financial Transaction Tax and another own resource linked to the corporate sector.

Eventually, the Commission released a series of legislative proposals as a continuation to the "Fit for 55" package announced in July 2021. The proposals aim to pave the way towards renewable and low carbon fuels and create a hydrogen market. The package also contains provisions related to methane emissions, providing for obligatory tracking and reduction of methane released into the atmosphere from the energy sector. Furthermore, the Commission set forth the principles around sustainable carbon cycles and for efficient and green mobility and introduced another proposal aiming to foster the decarbonization of the building sector. The new measures are viewed as another milestone in delivering the goals of the European Green Deal. Ahead of implementation, the measures are expected to significantly accelerate the business transformation toward sustainability in the gas, agriculture, and transportation sectors.

Algeria

Algeria's 2022 Finance Act introduces new tax measures.

Azerbaijan

Azerbaijan adopted a law to amend the Tax Code. Among other items, the amendments include the introduction of a Controlled Foreign Corporation regime and changes to the Transfer Pricing (TP) rules.

Argentina

Argentina's Tax Authority launches a comprehensive system for monitoring payments abroad for services.

Belgium

The Belgian Tax Authorities published Circular 2021/C112 updating the list of lowtax jurisdictions and non-cooperative states. As part of the tax obligations in Belgium, taxpayers need to report in their tax returns any payments exceeding €100,000 to any jurisdiction regarded as a tax haven under Belgian tax law.

From a Belgium tax perspective, a jurisdiction is regarded as such if: (i) the nominal tax rate is less than 10%; (ii) does not follow the OECD standards on transparency and exchange of information; or (iii) is listed on the EU list of non-cooperative jurisdictions.

Accordingly, payments made to a jurisdiction considered as a tax haven and not reported in the tax return are considered as non-deductible payments.

The updated list includes Abu Dhabi, Ajman, American Samoa, American Virgin Islands, Anguilla, Bahamas, Bahrain, Barbados, Bermuda, Botswana, British Virgin Islands, Cayman Islands, Dominica, Dubai, Fiji, Fujairah, Ghana, Guam, Guatemala, Guernsey, Isle of Man, Jersey, Kazakhstan, Liberia, Malta, Marshall Islands, Micronesia (Fed.), Monaco, Montenegro, Nauru, Palau, Panama, Pitcairn Islands, Ras al Khaimah, Saint-Barthélemy, Samoa, Seychelles, Sharjah, Somalia, St. Maarten, Trinidad and Tobago, Turkey, Turkmenistan, Turks, and Caicos Islands, Umm al Quwain, Uzbekistan, Vanuatu and Wallis, and Futuna Islands.

Canada

Canada's Deputy Prime Minister and Minister of Finance tabled in the House of Commons a notice of ways and means motion to implement a Digital Services Tax (DST).

Colombia

Colombia-France double tax treaty entered into force on 1 January 2022.

Costa Rica

Costa Rica's Congress will discuss a bill that would modify the Permanent Establishment (PE) definition.

Cyprus

Cyprus published in the Official Gazette the bills amending the Income Tax Law and the Special Contribution for the Defense of the Republic Law. The changes introduced include among others the following:

- The definition of corporate tax residency has been extended to include the incorporation test, on top of the management and control criteria, which will apply to companies that are not resident for tax purposes in any tax jurisdiction.
- A withholding tax on outbound payments of dividends, interest, and royalties made to companies resident or registered in jurisdictions included on the EU list of non-cooperative jurisdictions on tax matters. The tax rate differs depending on the income type (17% on dividends, 30% on interest, and 10% on royalties).

Denmark

Denmark published Law No. 2613 to update the list of non-cooperative jurisdictions subject to the Danish defensive measures. Such measures include a withholding tax on dividend payments and the denial of deductions for payments to non-cooperative jurisdictions. In this update, Denmark removed Anguilla, Dominica, and Seychelles from the list and added Trinidad and Tobago. The updated list is aligned with the EU list of non-cooperative jurisdictions.

Ecuador

Ecuador modifies cross-border transaction rules.

Germany

Germany published in the Official Gazette the Tax Haven Ordinance listing the non-cooperative jurisdictions for tax purposes. The list is in line with the EU list of non-cooperative jurisdictions and includes American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands, and Vanuatu. This list is relevant for the defensive tax measures taken by Germany. For example, payments made to the listed jurisdictions can be denied and German taxpayers are required to provide extended information

Greece

The Greek Government published Decision A. 1246 to update the domestic list of non-cooperative jurisdictions for the fiscal year 2020. The updated list includes the following jurisdictions for the entire 2020 fiscal year: Anguilla, Antigua and Barbuda, Barbados, Benin, Botswana, Burkina Faso, Cambodia, Chad, Djibouti, Dominica, Eswatini, Gabon, Ghana, Guatemala, Guinea, Guyana, Haiti, Honduras, Ivory Coast (Cote d'Ivoire), Jordan, Kazakhstan, Lesotho, Liberia, Madagascar, Maldives, Mali, Mauritania, Namibia, Niger, Oman, Palau, Panama, Papua New Guinea, Paraguay, Philippines, Rwanda, Seychelles, Sint Maarten, Tanzania, Thailand, Togo, Trinidad and Tobago, and Vanuatu. Further, some jurisdictions have been included in the list for part of the fiscal year 2020 starting 1 January such as Kenya considered as a noon-cooperative jurisdiction until 31 October 2020 and Cape Verde, Mongolia, Montenegro until 30 April 2020.

Ireland

The Irish Department of Finance issued a public consultation seeking input on the potential move to a territorial system of taxation. The purpose of the consultation is to obtain views from stakeholders on the issues detailed in the public consultation document which will be useful for potential further consultation on this matter in the future.

Following a period of reform to Ireland's corporation tax framework and wider global reforms, including the recent Agreement at OECD to address the tax challenges arising from digitalization, the Department of Finance considers that it is timely to revisit the possible transition to a participation exemption and/or branch exemption regimes. The consultation period runs from 22 December 2021 until 7 March 2022.

Italy

Italian Tax Authorities provide clarifications on the VAT treatment of derivatives.

Italy issues 2022 Budget Law.

Kazakhstan

Kazakhstan | VAT obligations for nonresidents engaged in the e-commerce sale of goods and providing digital services to individuals enter into force on 1 January 2022.

Korea

The Korean National Tax Service issued an updated version of the Guidance on Mutual Agreement Procedure (MAP). The updated version of the Guidance aims to comply with international standards. The Guidance consists mainly of an overview of the MAP, the MAP's application, procedure and closing, and the implementation of the MAP's outcome. The Guidance also includes the forms relevant for MAP documentation.

Korea enacts the 2022 tax reform bill.

Mexico

Mexico issued the 2022 budget bill.

Among the measures, the possibility for maquiladoras to obtain APAs is abolished as of January 1, 2022, and a new obligation is introduced for certain taxpayers to obtain, maintain and provide to the tax authorities information on their beneficial owners.

Netherlands

the Netherlands published in the Official Gazette Decree No. 48346 to implement several tax measures. Among other items, the Decree updated the list of low-tax jurisdictions for purposes of the application of the conditional withholding tax on interest and royalties on payments to a related party. The updated list includes jurisdictions that have a corporate income tax rate lower than 9% (i.e., Anguilla, Bahamas, Bahrain, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man, Jersey, Turkmenistan, Turks and Caicos Islands, Vanuatu and the United Arab Emirates). Also, the list contains the jurisdictions that are included on the EU list for non-cooperative jurisdictions.

Peru

Peru publishes thin capitalization regulations.

Romania

The Romanian President promulgated Decree No.14/2022 ratifying the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). The instrument of ratification still needs to be deposited before the MLI will enter into force concerning its covered tax agreements. Romania submitted its provisional MLI positions at the time of signature, listing its reservations and notifications as well as the 91 tax agreements it wishes to be covered by the MLI. A definitive list of reservations and notifications will also need to be provided upon depositing the instrument of ratification.

Singapore

Singapore enacts Income Tax (Amendment) Act 2021.

Spain

Spain approves State Budget Bill for 2022.

Spanish Tax Authorities deny withholding tax exemption on interest payments to EU residents based on GAAR.

Switzerland

Switzerland plans to implement OECD/G20 Inclusive Framework minimum tax rate for large multinational companies from 2024.

Thailand

Thailand extends the deadline for submission of transfer pricing Country-by-Country reports.

Turkey

Turkey introduces a bill that postpones inflation accounting and announces new corporate income tax exemptions on gains in case of conversions into Turkish Lira.

Vietnam

Vietnam initiates a review of policies governing tax treaties.

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About Mazars

Mazars is an internationally integrated partnership, specialising in audit, accountancy, advisory, tax, and legal services*. Operating in over 90 countries and territories around the world, we draw on the expertise of more than 42,000 professionals – 26,000+ in Mazars' integrated partnership and 16,000+ via the Mazars North America Alliance – to assist clients of all sizes at every stage in their development.

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