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 twenty-second edition deals with the new measures published in November 2022 by the OECD, the EU and in 16 countries: Australia, China, Colombia, Cyprus, Czech Republic, Ecuador, Germany, Hong Kong, Israel, Italy, Mexico, Netherlands, Romania, Singapore, Slovenia and Spain.

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

Gertrud Bergmann,
Partner, Transfer Pricing
Mazars in Germany
gertrud.bergmann@mazars.de

Frédéric Barat,
Partner, Transfer Pricing
Mazars in France
frederic.barat@avocats-mazars.com

OECD

On 22 November 2022, the OECD held its fourth annual Tax Certainty Day. Speakers at the virtual meeting included members of the OECD Secretariat, country delegates representing finance ministries and tax authorities, company tax executives and academics.

The meeting began with an introductory session, with speakers from the OECD Secretariat and the Business at OECD Tax Committee who highlighted the continued importance of tax certainty and the need for long-term transparency and collaboration to achieve this. It was acknowledged that the tax certainty landscape faces challenges. On the dispute prevention side, these include timing and coordination with respect to Advance Pricing Arrangements (APAs) and the observed decrease in coordinated joint audit activity in recent years. The importance of risk assessment was also highlighted, with reference made to coordinated risk assessments and initiatives such as the International Compliance Assurance Program (ICAP). On the dispute resolution side, challenges mentioned include the time taken to close Mutual Agreement Procedures (MAPs) and the small number of countries committed to arbitration (although it was noted that a substantial portion of the current MAP inventory is covered by arbitration).

The session on MAP statistics and latest developments began with the release of the 2021 MAP statistics and included discussion of the current landscape with respect to tax certainty, with speakers from the OECD Secretariat, country delegates and a company tax executive.

Since 2016, the OECD has published annual MAP statistics as part of Action 14 “Making Dispute Resolution Mechanisms More Effective” of the Base Erosion and Profit Shifting (BEPS) project. Under Action 14, countries committed to a minimum standard to resolve treaty-related disputes in a timely, effective and efficient manner and this commitment included annual reporting of MAP statistics to provide transparency around dispute resolution efforts and progress. For 2021, the statistics include information for a total of 127 jurisdictions. Key highlights in the 2021 statistics include:

- 2021 saw an increase of approximately 7% for all cases compared with 2020. This consists of a 5% increase for new transfer pricing cases and 10% increase for new Other cases. There is a relatively even split between TP cases and Other cases. In 2021, a high number of old cases (pre-2016) were closed; this resulted in a 25% decrease in the old cases in the MAP inventory. Taking old and new cases together, the overall MAP inventory stabilized for the first time in 2021. The time to close MAP cases is relatively similar to previous years with an average of 32.3 months for transfer pricing cases and 20.7 months for Other cases in 2021. The OECD Secretariat messaged that this average needs to go down. It was further noted that an uptake of binding arbitration would likely impact timeframes by encouraging timely resolution of cases.
- Around 70% of total MAP cases are concentrated in the top 10 countries and around 40% in the top 5 countries (Germany, France, Italy, Spain, and India). Each reporting jurisdiction’s

performance with respect to key indicators for MAP cases can be seen in separate breakdown reports and compared through an interactive tool developed by the OECD. In 2021, 77% of total MAP cases closed and resolved the issue under dispute, either through:

- Agreement to fully resolve the taxation not in accordance with the tax treaty (53%);
- Agreement to partially resolve the taxation not in accordance with the tax treaty (2%);
- Grant of unilateral relief (12%);
- Domestic remedy (10%).

- No agreement was reached in only 2% of the MAP cases closed (including agreement to disagree). It was noted that these outcomes help to build taxpayer confidence in the MAP process.

During the fourth annual Tax Certainty Day, there were also updates on the activities of the MAP Forum. The MAP Forum met on regular basis in 2022 with attendance of at least 130 country delegates at each meeting. Speakers provided a progress update on various workstreams, as follows:

- In 2022, the MAP Forum completed the Stage 2 Peer Review Reports with a total of 82 jurisdictions peer reviewed. The peer review process established under BEPS Action 14 allows countries to provide and receive constructive feedback to and from peers on dispute resolution mechanisms. Speakers indicated that this drives progress, encouraging countries to address recommendations and areas for improvement. To help administer Action 14 more efficiently going forward, the MAP Forum continued to review the minimum standard with a focus on enhancing the assessment methodology for conducting peer reviews and the collection of statistics;
- The MAP Forum released the Manual on Bilateral APAs (BAPAM). A representative of the United Kingdom's HM Revenue and Customs (HMRC) spoke about the process and highlighted some of the best practices;
- The MAP Forum worked during 2022 on management of multilateral MAP and APA cases, which speakers indicated can be legally and practically difficult. A companion manual to the BAPAM is expected to be released soon. This manual will provide information on best practices and recommendations on the effective handling of multilateral MAP and APA cases;
- Beginning in 2023, MAP training workshops will be delivered by the OECD Secretariat and a diverse range of competent authority representatives with a view to sharing best practices among competent authorities;
- Beginning in 2023, the MAP Forum will explore APA-like agreements for areas outside of Transfer Pricing, with the aim of helping to increase tax certainty and prevention of disputes in areas that are not conventionally covered by APAs. It will also continue to explore innovative ways for moving forward the tax certainty agenda, such as ICAP.

The OECD publishes the fourth edition of "Corporate Tax Statistics". This report illustrates that the corporate income tax remains an important source of tax revenue for most countries. It also illustrates the efforts made to reduce and stabilise rates, from an average of 28% in 2000 to an average of 20% in 2022. The new data also highlights the continuing risks of base erosion and profit shifting and thus the increased need for a rapid introduction of the two-pillar solution.

European Union

The European Court of Justice (ECJ) overturned the ruling of the General Court and annulled the Commission's decision finding that Luxembourg had granted illegal state aid to Fiat Finance and Trade Ltd, SA, by accepting the transfer pricing methodology proposed by Fiat in relation to intra-group financing transactions. In doing so, the ECJ has put an end to the Commission's attempt to apply its own version of the arm's length principle, rather than the national tax framework, to determine whether a measure confers a selective advantage under state aid rules and has reaffirmed the national autonomy of EU member states in the field of direct taxation.

During the last ECOFIN meeting, the EU Finance Ministers approved a revised Code of Conduct for Business Taxation. As a reminder, the Code of Conduct is used primarily to identify and assess preferential tax measures (i.e. measures that provide for a lower level of taxation than the level which is applicable in general) that are possibly harmful. In this update, the scope of the Code of Conduct was broadened to to include not just preferential tax measures, but also 'tax features of general application', which create opportunities for double non-taxation or can lead to the double or multiple use of tax benefits. This means that EU Member States will now be subject to assessments under this new criterion that could trigger more changes and impose greater constraints on the policy options of Member States.

The European Parliament recently approved the Foreign Subsidies Regulation which could impact Merger & Acquisition activity and procurement processes in the EU. With this new tool, the EU will have the power to investigate financial contributions by non-EU governments which benefit companies engaging in an economic activity in the EU, including tax incentives. This new regulation should be considered in the context of growing attention for the EU trading relationship and the incentives regime included in the United States Inflation Reduction Act.

The activity on public Country-by-Country reporting (CbCR) has been very dynamic during the past few weeks. Some EU Member States have already prepared draft legislation, generally in line with the EU Directive, to be discussed and approved under domestic law. To this end, Romania went above and beyond by implementing public CbCR legislation into domestic law with an earlier date of entry into effect. As a result, in-scope groups of multinational entreprises (MNE) should start thinking about their tax reporting strategy in the EU earlier than anticipated. In addition, it seems that Australia has been inspired by the EU since it has proposed to report publicly the CbCR, not only for Australian Multinational Enterprises but also for MNEs headquartered outside Australia.

The European Commission has opened a public consultation on the Business in Europe: Framework for Income Taxation (BEFIT). Comments, initially expected from 13 October 2022 to 5 January 2023, can now be submitted until 26 January 2023. The initiative aims to establish a common set of rules that allow EU companies to calculate their tax base on a formula basis while ensuring a more efficient allocation of profits between EU countries. It also aims to reduce compliance costs and bring about a coherent approach to company taxation in the EU.

Australia

The Australian Federal Treasurer handed down the second 2022-23 Federal Budget, outlining the new Labor Government's priorities. Among other items, the Budget includes a multinational tax integrity package comprising details of three sets of measures: (i) changes to Australia's interest deduction limitation rules; (ii) new rules denying tax deductions for certain intangible and royalty payments; and (iii) tax transparency measures.

China

The multilateral instrument (MLI) will be applicable to certain payments as of 1 January 2023.

Colombia

On 17 November 2022, the Colombian Congress approved the tax reform bill submitted by the Colombian Government. The bill is expected to be signed by the Colombian President and then published in the Official Gazette to enter into force.

Cyprus

Cyprus Tax Authority issues clarification regarding Competent Authority Agreement with the United States for exchange of CbC reports.

Czech Republic

Czech Republic releases list of non-cooperative jurisdictions for Controlled foreign companies (CFC) purposes.

Ecuador

Ecuador enacts new regulations on Income Tax, including lower income tax rates for new investments.

Ecuadorian Tax Authority reforms definitions and tax treatment for "Tax Havens".

Germany

Germany updates the list of non-cooperative states and territories, adding Turks and Caicos islands, Anguilla and Bahamas.

Federal Ministry of Justice of Germany releases draft bill on implementing the public CbCR into national law.

Hong Kong

The Hong Kong Government introduced the Inland Revenue (Amendment) Bill 2022 relating to the foreign source income exemption (FSIE) on 2 November 2022 and subsequently submitted committee stage amendments on 10 November 2022 in response to the European Union's latest comments to the FSIE regime. The Hong Kong Inland Revenue Department (IRD) also published on its website administrative guidance with "Frequently Asked Questions" and "Illustrative Examples" to assist taxpayers to better understand the proposed refined FSIE regime.

Israel

On 25 October 2022, the Tel Aviv District Court ruled in favor of the Israeli Tax Authorities (ITA) in the appeal of CA Software Israel Ltd. against Tel Aviv's Tax Assessing Office #3. The tax authorities claimed that the IP of CA Software Israel Ltd valued at ILS111m should in fact be as high as ILS667m. The Court ruled that CA Israel was not successful in shifting the burden of proof to the ITA, since it did not bring before the Court all of the relevant documentation necessary to support its claim.

In fact, the Court came to the conclusion that the Company did not bring any documentation or proof from the time of the deal (which took place back in 2010), to support the position that the IP was close to the end of its economic life and that its value was decreasing. The ITA, on the other hand, presented the court an old application from

2009, that the Company filed with the Israeli Innovation Authority (formerly known as the Israeli Office of the Chief Scientist), in which the Company described a market size of at least US$1b for the IP-based products, their big potential and the considerable effort and expense incurred in the further development of such IP (all of which undermined the Company's position). Israeli companies which sell IP or other assets should ensure that they have sufficient documentation to support any value they claim before the ITA, and also that any documentation from the time of sale does not contradict their position.

Italy

Italian Government approves 2023 Budget draft document and proposes further suspension of Sugar Tax and Plastic Tax for 2023.

Mexico

Mexico publishes the Multilateral Instrument (MLI) in Federal Official Gazette. The entry into force will be triggered once the instrument of ratification is deposited with the OECD.

Netherlands

The Netherlands launches consultation on BEPS 2.0 Pillar Two implementation.

An updated Decree on national anti-hybrid mismatch legislation was released.

Romania

Romania implements the EU Public CbCR Directive with early application as of 1 January 2023.

Singapore

Inland Revenue Authority of Singapore releases fourth edition e-Tax Guide on CbCR.

Slovenia

Slovenian Government submits Bill implementing DAC7 Directive into national law to the Parliament.

Spain

Spain implements reverse hybrid mismatches rule under EU ATAD 2.

Spanish Supreme Court rules on dynamic interpretation of tax treaties and characterizes the remuneration agreed in consideration for transfer of client data as royalty.

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Contacts

Gertrud Bergmann,
Partner, Transfer Pricing
Mazars in Germany
gertrud.bergmann@mazars.de

Frédéric Barat,
Partner, Transfer Pricing
Mazars in France
frederic.barat@avocats-mazars.com

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