# BEPS and international tax newsletter

## Edition 32 – September 2023

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# Introduction

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

Our thirty-second edition deals with the new measures published in September 2023 by the European Union and in 19 countries: Argentina, Bangladesh, Brazil, Canada, Costa Rica, France, Germany, Hong Kong, Ireland, Israel, Italy, Kenya, Luxembourg, the Netherlands, New Zealand, Nigeria, Peru, Saudi Arabia, and the United States.

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

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## European Union

On 12 September 2023, the European Commission (the Commission) published two new legislative proposals: a Directive “Business in Europe: Framework for Income Taxation” (BEFIT) and a Directive on Transfer Pricing (Directive on TP).

The BEFIT proposal sets forth rules introducing a common framework for corporate income taxation in the European Union (EU), with the aim of replacing the current Member States’ various ways for determining the taxable base for groups of companies that have annual combined revenues exceeding EUR 750 million. The BEFIT proposal would also apply to non-EU-headquartered groups exceeding specific thresholds. The Commission announced this initiative in its Communication on Business Taxation for the 21st century published in May 2021. The rules on determining the tax base included in the Directive resemble those contained in the Minimum Tax Directive (i.e., starting from financial accounts), though with fewer adjustments required. As under the Minimum Tax Directive, the tax base will be determined on a per-entity basis. Once defined, the adjusted profits of in-scope entities are aggregated, defining the BEFIT tax base which would allow for cross-border set-off of losses. The base is then allocated back to the Member States, which may make adjustments and apply their own rates. In the transition period, the allocation to the Member States is based on historic profits, with the aim to limit the budgetary consequences for Member States. Proposals on risk assessment and administration are also included.

The Directive on TP aims to introduce a common framework in the EU for applying the arm’s-length principle. The TP Directive codifies the arm’s-length principle and the OECD Transfer Pricing Guidelines as a means of interpretation into EU law and introduces processes for relieving double taxation for multinational entities (MNEs). In particular, the Directive affirms key elements of the analysis under the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines (delineation of the actual transaction undertaken, comparability analysis, the five recognized OECD TP methods) and clarifies how the mechanisms to perform adjustments should be performed within the EU to ensure that double taxation is prevented and relieved as effectively and efficiently as possible.

Both draft Directives will now move to the negotiation phase among Member States with the aim of reaching unanimous agreement. The Commission proposes that the Member States transpose the BEFIT Directive into their national laws by 1 January 2028 for the rules to come into effect as of 1 July 2028. The TP Directive, instead, shall be transposed by 31 December 2025 for the rules to come into effect as of 1 January 2026.

## Argentina

Argentine Government proposes to evaluate a 15% corporate minimum tax. On 15 September 2023, the Argentine Government sent the draft Budget Law 2024 to the Congress. In the Message to the Congress, the Government recommended evaluating the possibility of enacting a 15% corporate minimum tax applicable to multinational groups in order to increase tax revenues. To date, no specific project or further details have been disclosed. The draft Budget Law 2024 is expected to be discussed in the Congress after the presidential elections to be held on 22 October 2023 (potential second round voting: 19 November 2023). A new Government will take office on 10 December 2023.

## Bangladesh

Hong Kong and Bangladesh signed a comprehensive double taxation arrangement.

## Brazil

Brazilian Government proposes the elimination of interest on net equity deduction.

Brazil modifies how investment funds will be taxed.

## Canada

Canada is moving ahead with enactment of its own digital services tax (DST). It is anticipated that Canada's DST will be enacted by 1 January 2024, with retroactive effect to 1 January 2022. The new rules may result in a

filing obligation and tax liability for any entity — Canadian or otherwise — that, as a corporate group, has global consolidated revenues of EUR 750 million or more and earns Canadian digital services revenue from providing online marketplace services, online advertising, social media services or the monetizing of user data in excess of CAD 20 million. Affected entities will need to be registered for Canada's DST by 31 January 2025 and file returns and remit DST for both 2022 and 2023 by 30 June 2025. On 4 August 2023, the Department of Finance released a revised draft of the Digital Services Tax Act (DSTA) for public consultation. The revised draft legislative proposals came shortly after Canada's decision not to further extend a multilateral freeze on the imposition of any new domestic DSTs by another year. Interested parties are invited to provide comments on the draft DSTA by 8 September 2023.

## Costa Rica

Costa Rican President partially vetoes law aimed at making reforms to achieve exclusion from EU list of non-cooperative jurisdictions in tax matters.

## France

Finance bill project for 2024 was released. It includes the following proposed changes:

- The Finance Bill for 2024 complete the article 57 of the French Tax Code (FTC) relating to the Foreign profit shifting. The bill proposes the addition of a paragraph stipulating that any difference between the result and the amount it would have reached had the transaction documentation been complied with is deemed to constitute a profit indirectly transferred abroad. The new sub-paragraph introduces a safeguard clause, giving taxpayers the option of demonstrating by any means whatsoever that there has been no transfer by way of an increase or decrease in purchase or sale prices.
- The project also covers the transfer of assets or intangible rights to a related company subject to the declaration of cross-border arrangements under article 1649 AH of the FTC: an article 238 bis-0 I Ter has been created to allow the tax authorities to make adjustments to the value of the assets or rights transferred on the basis of results subsequent to the financial year in which the transaction took place, for which the right of reversal is exercised until the end of the sixth year following the year in respect of which the tax is due. This article provides a safeguard clause to avoid rectification if:
    - The taxpayer provides the forecasts used at the time of the transfer and justifies that the significant difference between these forecasts and the actual results is due to the occurrence of unforeseeable or foreseeable events;
    - The transfer is covered by a prior bilateral or multilateral price agreement, between the jurisdictions of the transferee and the transferor;
    - The difference between the valuation resulting from the forecasts made at the time of the transaction and the valuation based on actual results is less than 20%;
    - A five-year sales period has elapsed after the year in which the asset or right first generated income from an entity unrelated to the transferee and, during this period, the difference between forecasts made at the time of the transaction and actual results is less than 20%.
- The finance bill project proposes to expand the scope of the contemporary documentation set out in article L.13 AA of the FTC, by lowering the threshold for annual sales and gross assets from EUR 400 million to EUR 150 million.
- In case of failure to present the contemporary documentation expected from the articles L.13 AA and L.13 AB of the FTC, the minimum fine provided for under article 1735 ter of the FTC is multiplied by 5, to EUR 50,000.

The Finance Bill for 2024 is currently being debated in Parliament until 22 December 2023, and in view of the parliamentary situation should be adopted via Article 49 sub-paragraph 3 of the Constitution without significant amendments before being referred to the Supreme Court. The control of the Supreme court before promulgation should not result in the censorship of these articles which are justified by the objective with constitutional value which is the fight against fraud and tax evasion (Decision n° 99-424 DC of 29 December 1999).

## Germany

The German government, on 30 August 2023, issued a revised Growth Opportunities Act, a draft bill that the German Ministry of Finance (MoF) had initially issued in mid-July. Issuance of the revised bill begins the formal legislative process, which could be completed by the end of 2023. The Growth Opportunities Act would constitute the biggest corporate tax reform in Germany since 2008. The government's revision includes several changes to the initial draft bill, including changes to the proposed expansion of tax loss utilization, revised interest deduction limitations and the proposed new interest rate-based deduction limitation.

## Hong Kong

Hong Kong introduces new patent-box tax incentive; accepting comments until 30 September.

## Ireland

Irish Government publishes roadmap for introducing dividend participation exemption to Ireland's corporation tax system.

## Israel

Israeli tax authorities issue updated guidance on Mutual Agreement Procedures, in line with BEPS principles.

## Italy

On 11 September 2023, the Italian Government released a draft Legislative Decree to implement the BEPS 2.0 Pillar Two global measures.

- The draft is based on the EU Directive n° 2022/2523 providing for the implementation of the OECD BEPS Pillar Two rules within the European Union (EU). EU Member States have until 31 December 2023 to transpose the Directive into national legislation.
- The draft is subject to a public consultation process until 1 October 2023.

## Kenya

Kenya revamps Transfer Pricing rules. New draft Transfer Pricing rules introduced in Kenya reflect recent changes in the income tax law and will eventually replace rules introduced in 2006. The new rules are generally modeled after international transfer pricing guidelines, published by the Organisation for Economic Co-operation and Development. Although the new rules will increase compliance obligations for multinational enterprises, they also provide needed clarity.

## Luxembourg

Luxembourg recently enacted legislation that significantly enhances and modernizes the existing investment fund toolbox and thus strengthens the attractiveness and competitiveness of its financial sector. The Law of 21 July 2023 (Law) brings important changes to five specific laws of the investment fund industry, namely the 2004 law on Investment Companies in Risk Capital (SICARs), the 2007 law on Specialized Investment Funds (SIFs), the 2010 law on Undertakings for Collective Investment (UCIs), the 2016 law on Reserved Alternative Investment Funds (RAIFs) and the 2013 law on Alternative Investment Fund Managers (AIFMs). In addition to amendments that lower the minimum investment threshold for "well-informed investors" and extend the time limit to reach the minimum capital requirements, the Law also modernizes the subscription tax regime. The amendments to the existing regime aim to support the emergence of new European products such as ELTIFs and PEPPs through an exemption from subscription tax and to align the subscription tax regime applicable to money market funds with the Regulation. The new provisions entered into effect on 29 July 2023.

## The Netherlands

On 19 September 2023, the Dutch Government published its budget proposals, which are subject to review and discussions by Parliament and may be subject to change.

### Alignment of legal entity and partnership classification rules with international tax standards — [Budget Day Proposal]

Effective date: 1 January 2025.

Taxpayers should carefully review their legal group structures and consider the potential consequences of the new Dutch classification of (foreign) legal entities/partnerships. The budget proposes to revise Dutch classification rules for legal entities and partnerships to align better with international tax standards, where partnerships are generally tax transparent. It is expected that this will result in a reduction of potential hybrid outcomes due to mismatches in entity classifications between the Netherlands and

foreign jurisdictions. In general, the relevant Dutch tax laws are proposed to be amended to fully codify the new classification methods of foreign legal entities/partnerships. Basis would be determined using (a) a comparison method (main rule) which applies if there is sufficient comparison with Dutch legal entities/partnerships; and (b) two alternative methods ((i) fixed classification and (ii) symmetrical classification) if there is insufficient comparison.

Furthermore, and accompanying the above, the Dutch "consent requirement" (in Dutch: toestemmingsvereiste), which was an important condition historically required to consider Dutch (and comparable foreign) partnerships as transparent from a Dutch tax perspective (i.e., transferability of legal partnership interest was only allowed with prior written consent of all (general and limited partners), will be abolished. As a result, among other things, non-transparent Dutch (incorporated or tax-resident) partnerships basically cease to exist. Only in specific situations (e.g., under fixed method — explained above) the Netherlands could consider foreign transparent legal entities/partnerships as non-transparent with regard to Dutch income.

The proposed amendments are relevant for, among other things, the application of the Anti-Tax Avoidance Directive (ATAD2), or the (conditional) withholding tax (WHT) rules that could apply on certain payments to hybrid entities — the latter being applicable to dividends as well for 2024 (2024 conditional WHT on dividends is already enacted legislation).

In particular, taxpayers with foreign partnerships in the ownership structure should consider the impact of the (conditional) WHT on dividend payments in the "gap" year between the introduction of the (conditional) WHT (as of 1 January 2024) and the alignment of the classification rules (as of 1 January 2025). The rules also include certain grandfathering methods to deal with the Dutch "deemed" (taxable) liquidation of non-transparent partnerships prior to 1 January 2025 (when the new doctrine becomes effective).

## Revision of Dutch Fiscal Investment Funds regime - [Budget Day Proposal]

Effective date: 1 January 2025.

Taxpayers should monitor details of upcoming legislative proposal.

The special regime that exists for qualifying Fiscal Investment Funds (FIF) that are — as a result of the regime — taxed against a 0% corporate income tax (CIT) rate, will be revised. Based on the announced revision, Dutch FIFs may no longer invest directly in real estate as of 1 January 2025 to keep its FIF status (and hence benefit from the 0% CIT rate). This announced measure will apply only to Dutch real estate.

Because of the expected restructuring of current real estate-FIFs, the Dutch government announced that existing FIFs can apply a one-time real estate transfer tax exemption in 2024 to transfer real estate to a non-FIF.

## Changes to Dutch Exempt Investment Institution and Fund for Joint Account regime - [Budget Day Proposal]

Effective date: 1 January 2025.

Taxpayers should monitor details of the upcoming legislative proposal. The Dutch regime for Exempt Investment Institutions (EII) will be reviewed. Under the special regime, EIIs are exempt from Dutch CIT if the requirements of the regime are met. The revision of the regime proposes that the EII regime will only be available to entities that are an investment institution or Undertakings for Collective Investment in Transferable Securities (UCITS) as referred to in the Financial Supervision Act. The aim is to only allow the regime to apply to institutional investors. For the FJA regime, a similar revision is proposed. Currently, an FJA can qualify as a taxable FJA (open FJA) or as a tax transparent FJA. The regime will be revised such that an FJA will only be considered a taxable FJA for Dutch tax purposes if the FJA is an investment institution or a UCITS, as referred to in the Financial Supervision Act, and the certificates of participation are tradable. Like the EII regime revision, this regime will only apply to institutional investors.

## Counter dividend-stripping transactions — [Budget Day Proposal]

Effective date: 1 January 2024.

The burden of proof is shifted for the dividend WHT at the source and to credit the dividend WHT levied. To further tackle anti-dividend-stripping transactions, a proposed legislative change would shift the burden of proof to the taxpayer/withholding agent, to demonstrate that the recipient is entitled to the dividend and considered the beneficial owner. Besides this, a

legal registration date will be introduced to document who the beneficial owner of the dividend is at a certain date, to determine who the beneficial owner is and what the corresponding (dividend withholding) tax considerations are. As a final item, an amendment is proposed to tackle dividend stripping within the group. The Dutch government will review whether additional measures to combat dividend stripping are required.

### WHT on dividend payments to low-taxed jurisdictions, hybrid entities and in abusive structures — [Already enacted]

Effective date: 1 January 2024 (enacted in prior years).

Taxpayers should assess the impact on dividend payments by Dutch withholding agents in the organizational structure and assess whether there is a tax haven or hybrid entity directly or indirectly in the chain of ownership. A bill enacted on 11 November 2021 introduced the WHT on dividend payments to low-taxed jurisdictions, hybrid entities and in abusive structures. This is an extension to the WHT on interest and royalty payments to low-taxed jurisdictions, hybrid entities and in abusive structures, that applies as of 1 January 2021. The WHT rate is equal to the headline CIT rate (currently 25.8%). This WHT will exist next to the "normal" dividend WHT of 15%. However, an anti-cumulation rule will apply, limiting the total dividend WHT on relevant payments to low-taxed jurisdictions, hybrid entities or in abuse structures to 25.8% (with the expectation fewer hybrid entities will exist under the new classification rules (as of 1 January 2025)). The implications of this legislation must be carefully assessed on a case-by-case basis and could impact certain taxpayers that today are not subject to (the withholding of) dividend WHT.

### Minimum Tax Act 2024 (Pillar 2) — [Legislative Proposal]

Effective date: 31 December 2023

Minimum taxation of 15% entering into force as of 31 December 2023. Legislative proposal for the Minimum Tax Act 2024, based on the EU Directive dated 14 December 2022 following the OECD Pillar Two initiative to ensure a global minimum tax of 15% for multinational enterprises (MNEs) is currently undergoing parliamentary proceedings. The rules will apply to multinational groups and domestic groups with an annual turnover of at least EUR 750 million. The Minimum Tax Act 2024 will introduce a Domestic Top-Up Tax, an Income Inclusion Rule for reporting years starting on or after 31 December 2023 and an Undertaxed Payments Rule for reporting years starting 31 December 2024. The EU Directive must be transposed into national legislation by 31 December 2023. The legislation is currently undergoing Parliamentary review and an updated proposal is expected by mid/end October 2023. Timely enactment is still expected. Note that this is structured as a separate law and therefore it is not part of the corporate income tax act and current budget day proposals.

### EU Public Country-by-Country Reporting (CbCR) — [Pending Senate approval]

Public disclosure of income taxes paid will be mandatory for MNEs with consolidated revenue exceeding EUR 750 million in the last consecutive two years.

Public disclosure of income taxes paid and other tax-related information such as a breakdown of profits, revenues and employees per country becomes required for MNEs with a consolidated revenue exceeding EUR 750 million in the last consecutive two years. This applies for both EU-based multinational enterprises (MNEs) and non-EU based MNEs doing business in the EU through a branch or subsidiary. The rules will apply for financial years starting on or after 22 June 2024.

## New Zealand

A new bill would impose a 3% digital services tax on New Zealand users of digital services. The proposed effective date of 1 January 2025 could be extended. The "go-live" date will depend on whether the Government considers sufficient progress is being made in instituting a multilateral solution at the global level.

## Nigeria

The Tax Appeal Tribunal of Nigeria (TAT) has ruled that the Income Tax Country-by-Country Reporting (CbCR) Regulations, 2018 were not made by a legally constituted and properly composed Board of the Federal Inland Revenue Service (FIRS), as required by the governing act. Therefore, to the extent of their inconsistencies, the CbCR Regulations 2018 are rendered null and void. The TAT further upheld that penalty imposed on a defaulting entity must be in tandem

with the relevant provisions of the principal legislation.

## Peru

Peruvian Supreme Court holds Peruvian branches may not offset past losses when distributing dividends to nonresident parent.

## Saudi Arabia

On 12 September 2023, Ministerial Resolution N° 25 dated 08/01/1445H (26 July 2023) was electronically published in the Official Gazette, introducing amendments to the Income Tax Bylaws (ITBL) and Zakat Regulations (ZR). This Ministerial Resolution was issued following a public consultation on the draft amendments to the ITBL and ZR.

## The United States

Bill Morgan, a financial economist at the US Treasury Department, told a panel at an International Fiscal Association's international tax conference on 12 September 2023, that Treasury would prefer the adoption of Alternative A for the transfer pricing scoping criteria in Amount B.

- "The whole idea here is that Amount B is a simplification and we don't think that can be achieved by introducing new concepts," Morgan said, according to a Daily Tax Report article.
- Amount B provides for fixed returns for in-scope in-country baseline marketing and distribution activities. While de minimis retail sales are allowed, the primary focus of Amount B is on the wholesale distribution of goods, including commissionaires and sales agents. Further, the scoping framework explicitly excludes the performance of services and distribution of commodities from scope.

Alternative A was proposed in a recent Consultation Document that was released among a series of technical documents by the Organisation for Economic Co-operation and Development (OECD) in July 2023. The Consultation Document includes two alternatives in the scoping criteria, Alternative A and Alternative B, which reflect the different positions of jurisdictions participating in the work on Pillars One and Two through the Inclusive Framework. The key differentiator between the two alternatives is whether an additional qualitative scoping criterion is required. Alternative A includes no additional qualitative scoping exclusions. Under Alternative B, the scope of Amount B would only include distributors that fit within a definition of "baseline" distributor and that do not make "non-baseline contributions" that cannot be reliably priced under the proposed pricing method. The jurisdictions supporting Alternative A believe that the additional criteria are not needed to achieve arm's-length pricing, would make Amount B far less administrable and certain, and would have the practical effect of making Amount B a "floor" on all controlled distributor returns. The jurisdictions supporting Alternative B believe that Amount B would not reliably produce outcomes aligned with the arm's-length principle and would result in opportunities for base erosion and profit shifting, absent the additional criterion.

According to the Daily Tax Report article, Morgan expressed his thoughts on the comment submissions received on the Consultation Document, noting that they generally favored Alternative A. These submissions expressed enthusiasm for the potential of Amount B to streamline transfer pricing and offer greater certainty. This enthusiasm and support, he added, comes with the caveat of Amount B potentially being a safe harbor provision.

The approach that is ultimately chosen will significantly affect the impact of Amount B. Moreover, the incorporation of Amount B into the OECD Transfer Pricing Guidelines could result in different interpretations by different jurisdictions.

Given that Amount B is not subject to a global revenue threshold, it has broad applicability. Businesses should assess the potential implications of Amount B for transactions falling within the scope and evaluate its impact on those transactions. It is also crucial to remain vigilant and monitor the progress of both Pillar One and Pillar Two in the upcoming months.

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**About Mazars**

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