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Global Tax Alert

The Latest on BEPS and Beyond

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EY Tax News Update: Global Edition

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Highlights

As announced in EY's September edition of *The Latest on BEPS and Beyond*, the key policy developments in October centered around the two Pillars of BEPS 2.0. On 13 October 2021 the G20 Finance Ministers and Central Bank Governors endorsed in a communiqué the "final political agreement" reflected in the 8 October Statement by the G20/OECD Inclusive Framework on BEPS (the Statement). The communiqué indicates that "This agreement will establish a more stable and fairer international tax system," and many political leaders supporting the deal used the words "historic" and "fair" to stress the importance of the agreements reflected in the statement. Coupled with the strong emphasis on entry into effect in 2023, the political leaders seem to have high expectations of the outcomes of the project.

For the tax community, the lack of technical details in the Statement is the first thing that catches the eye. While some very important key design features are agreed upon, some other features and all the substantiation and technical details are missing in the Statement.

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On Pillar One, for example, three key issues are not addressed in the Statement, while they are essential to establishing what the outcome of the new rules will be. Those issues are:

- To what markets the profits will be allocated (the revenue sourcing rules)
- Whether and to what extent profits will also be allocated when a relevant part of the entrepreneurial profits in the supply chain are already allocated to the market (the scope and mechanics of the marketing and distribution safe harbor)
- Which jurisdictions will be surrendering the profits to be re-allocated under Pillar One amount A (the elimination of double taxation rules)

On Pillar Two, the most important detail on the backbone of the solutions – the calculation of the effective tax rate – is missing.

Although two public consultations have already taken place, fundamental new developments happened since, such as the scope change on Pillar One, which has led to business-to-business activities also being in scope. Moreover, businesses are keenly interested in assessing whether the solutions the Inclusive Framework has developed to address the issues raised at the public consultations are fit for purpose. However, given the extreme speed of the project spurred on by the strong political push, all details need to be agreed by the end of November 2021 (Pillar Two) or early next year (Pillar One).

Country delegates working on the project will not have much time to read, digest, form their opinion and agree on all the technical details. Nevertheless, businesses will have to prepare for implementation of these upcoming proposals by 2023. Therefore, businesses should monitor the developments on these issues carefully, starting with looking at the updates in this version of *The Latest on BEPS and Beyond*.

OECD

G20 communiqué endorsing the BEPS 2.0 project

On 13 October 2021, the G20 issued a communiqué on key topics following its meeting held on 12-13 October 2021. The communiqué endorses the statement on a two-pillar solution to address the tax challenges arising from the digitalisation of the economy and the detailed implementation plan released by the Inclusive Framework on 8 October 2021. The G20 called for swift adoptions of the rules under development to ensure these new rules will come into effect in 2023.

The communiqué also welcomes the OECD report, Tax and Fiscal Policies after the COVID-19 Crisis. This report assesses the emergency tax and fiscal policy measures introduced by countries in response to the COVID-19 pandemic.

See EY Global Tax Alert, *G20 Finance Ministers endorse key components of global tax changes and call for swift implementation of the rules under development*, dated 14 October 2021.

Statement on the BEPS 2.0 project

On 8 October 2021, the OECD released a statement reflecting the agreement reached by 136 out of the 140 Inclusive Framework members on core design features of the two-pillar solution developed in the BEPS 2.0 project. The statement describes agreed components for both pillars of the project, namely:

- Pillar One on revisions to nexus and profit allocation rules (companies to pay more tax where they do business rather than where they are headquartered)
- Pillar Two on new global rules that seek to introduce a minimum tax

The statement uses as a basis the statement released in July 2021, providing further specificity on some key parameters. 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.

See EY Global Tax Alert, *OECD releases statement updating July conceptual agreement on BEPS 2.0 project*, dated 11 October 2021.

Namibia signs the MLI

On 30 September 2021, 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.

Opinions of the Conference of the Parties of the MLI

On 30 September 2021, 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. As for the second opinion, it clarifies the application of the entry into effect of Part VI (Arbitration) of the MLI in specific situations.

See EY Global Tax Alert, *OECD publishes two opinions of the Conference of the Parties of the MLI regarding MAP implementation and entry into effect of arbitration rules*, dated 7 October 2021.

Fifth annual progress report of the Inclusive Framework on BEPS

On 30 September 2021, the OECD published the fifth annual progress report of 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 the period from 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 annex 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

On 29 September and 28 September 2021, Andorra and Spain deposited their instrument of ratification of the MLI with the OECD, respectively. 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, i.e., on 1 January 2022.

European Union

Update to the EU list of non-cooperative jurisdictions

On 5 October 2021, the Council of the European Union updated the European Union (EU) list of non-cooperative jurisdictions for tax purposes. In this update, Anguilla, Dominica, and Seychelles were removed from Annex I (so-called EU Blacklist). Hence, the revised version of the EU Blacklist includes nine jurisdictions: American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu.

The update of the EU list of non-cooperative jurisdictions for tax purposes also includes Annex II (so-called EU Graylist). Australia, Eswatini and Maldives were removed from the EU Graylist as they have fulfilled all their commitments. Costa Rica, Hong Kong, Malaysia, North Macedonia, Qatar, and Uruguay have been added to the EU Graylist. In addition, Turkey remained on the EU Graylist despite failing to follow the EU's requested changes.

See EY Global Tax Alert, *EU Member States adopt revised list of non-cooperative jurisdictions for tax purposes*, dated 6 October 2021.

Adoption of the public CbCR directive by the EU Council

On 28 September 2021, the Council of the European Union (EU) 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.

See EY Global Tax Alert, *EU Member States adopt public CbCR Directive*, dated 28 September 2021.

September infringement package

On 23 September 2021, the European Commission published the September infringement package. In this package, the European Commission announced that it has sent a letter of formal notice to Cyprus on the ground 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 securitization entities, which do not qualify as 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 announces that the European Commission has sent a letter of formal notice to Czechia for failure to communicate all required national measures fully implementing ATAD I as regards hybrid mismatches with third countries. Czechia notified the relevant measures only partially and now has two months to act and take the further necessary measures. If not, the Commission may issue a reasoned opinion.

UN: Handbook on the Avoidance and Resolution of Tax Disputes

On 7 October 2021, the United Nations published the Handbook on the Avoidance and Resolution of Tax Disputes. The Handbook represents the final outcome of the work undertaken on dispute avoidance and resolution in a practical manner, on both the domestic and international level. In particular, the handbook focuses on mechanisms to avoid and resolve disputes arising at the domestic level; ways to ensure that the MAP functions as effectively and efficiently as possible; and issues associated with arbitration clauses and other means as options to supplement the MAP.

Austria: Update to Austrian transfer pricing guidelines

On 7 October 2021, the Austrian Ministry of Finance published a revised version of the Austrian transfer pricing (TP) guidelines. The main updates follow the BEPS project and focus on the actual conduct of the parties and the economic circumstances. The guidelines should be used as an interpretative basis of the arm's length principle and the application of tax treaties. As for the content of the guidelines, it includes all new elements of the 2017 OECD TP guidelines on: (i) hard to value intangibles; (ii) low value-adding intra-group services; (iii) financial transactions; (iv) group synergies; and (v) business restructuring.

In addition, the guidelines also include a section on TP documentation and reporting obligations. In particular, it addresses CbCR, master file, and local file, as well as cross-border arrangements falling under the scope of the EU Directive on the mandatory disclosure and exchange of information (DAC6).

The revised Austrian TP guidelines are effective from 7 October 2021.

Bulgaria: Consultation on implementation of reverse hybrid mismatch rules and CFC rules

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.

Cyprus: Further extension of non-application of administrative fines for DAC6

On 21 September 2021, the Cypriot Tax Department (CTD) issued an announcement to extend again the non-application of administrative fines for submissions with respect to the information on reportable cross-border arrangements under the European Union (EU) Directive on the mandatory disclosure and exchange of information (DAC6). This extension includes the following:

- Reportable arrangements that have been made between 25 June 2018 and 30 June 2018.
- Reportable arrangements that have been made between 1 July 2020 and 31 December 2020.
- Reportable arrangements made or to be made between 1 January 2021 and 31 October 2021.
- The first periodic report for marketable arrangements that had to be submitted by 30 April 2021.

This extension is applicable until 30 November 2021.

See EY Global Tax Alert, *Cyprus announces further extension of non-application of administrative fines for DAC6 submissions to 30 November 2021*, dated 21 September 2021.

Hong Kong: Response to the inclusion of Hong Kong in the EU Graylist

On 5 October 2021, the Hong Kong government issued a press release to respond to the inclusion of Hong Kong in the EU Graylist of non-cooperative jurisdictions. The government of Hong Kong agreed to cooperate with the European Union to amend its territorial tax system by the end of 2022 and implement relevant measures in 2023. According to the government, the legislative amendments will target companies with no substantial economic activity in Hong Kong that make use of passive income. Hong Kong intends to consult with stakeholders on the specific content of the legislative amendments and strive to minimize compliance burden for companies.

Israel: Proposal for an international tax reform

Recently, the Israeli Tax Authority (ITA) finalized its proposal for an international tax reform for further discussions and potential legislation. The proposal includes an amendment to CFC rules that would expand the definition of "passive

income" and lower the passive-active ratio from 50% to 30% of the company's income or profit to be regarded as a CFC for Israeli tax purposes. Further, the proposal suggests introducing anti-hybrid rules inspired by BEPS Action 2. The proposals would also introduce mandatory disclosure rules generally aligned with the EU DAC6 (Directive on mandatory automatic exchange of information in relation to reportable cross-border arrangements). The reporting would be made twice a year and it is currently suggested to exclude hallmark A (generic hallmarks linked to the Main Benefit test) since the ITA considers it to be similar to a provision already included in Israeli tax law.

These proposals are not expected in the 2021/2022 budget and there is no clarity on the timeline for the legislation of the proposals.

See EY Global Tax Alert, *Israeli Tax Authority finalizes international tax reform package for further discussion and potential legislation*, dated 21 September 2021.

Jordan: TP Executive Instructions

On 16 September 2021, 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 JOD500K (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.

See EY Global Tax Alert, *Jordan issues transfer pricing instructions*, dated 8 October 2021.

Netherlands

Proposed changes to the interest limitation rules

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 (EBITDA)-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*.

Draft legislation on reverse hybrid entities

On 21 September 2021, 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 with the exception of 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.

See EY Global Tax Alert, *The Netherlands publishes draft legislation on reverse hybrid entities as final part of ATAD II implementation*, dated 22 September 2021.

Draft legislation on the application of the arm's length principle

On 21 September 2021, 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.

See EY Global Tax Alert, *Netherlands issues proposed legislation with unilateral measures against international transfer pricing mismatches*, dated 21 September 2021.

New Zealand: Guidance on imported hybrid mismatch rule

In August 2021, the New Zealand Inland Revenue released the final Operational Statement addressing the approach that taxpayers should follow when applying the imported hybrid mismatch rule and how this rule will be administered by Inland Revenue. The expected approach for New Zealand taxpayers is the following:

- Identify payments made to nonresident control group members that are tax deductible (before applying the imported mismatch rule).
- Determine whether such payments are to a person in a jurisdiction that has not implemented equivalent hybrid mismatch provisions.
- If the answer to the second bullet point is affirmative, prior to claiming a deduction, ensure that the group head office tax function has undertaken appropriate work to identify any hybrid mismatches within the group and determine the extent to which these are funded by otherwise deductible payments from New Zealand.

Inland Revenue's suggested practice for evidencing procedures undertaken is that taxpayers in New Zealand obtain a written statement from the group's head office tax function describing the work undertaken. Although there is no specific format, the statement should contain a confirmation on whether the tax treatment of all deductible cross-border payments by members of the group has been reviewed by a suitable qualified person to determine whether they give rise to a hybrid mismatch. In case the taxpayer does not secure the statement from the group's head office tax function within three months after request, Inland Revenue may deny deductions claimed in New Zealand. The statement is not mandated as the only way for taxpayers in New Zealand to claim a deduction and there is reference to "other evidence that the imported mismatch rule has been considered" albeit without further guidance as to the form such evidence may take.

See EY Global Tax Alert, *New Zealand issues Operational Statement on Administration of imported hybrid mismatch rule*, dated 27 September 2021.

Spain: Publication of the CbCR statistics

On 4 October 2021, the Spanish tax authorities published the country-by-country (CbC) report statistics reflecting information for the year 2018. The main conclusions include the following:

- A higher number of Spanish Ultimate Parent Entities (UPE) submitted the CbC report 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.
- 46% of the UPE's subsidiaries are located outside the EU member states.

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