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Global Tax Alert

The Latest on BEPS and Beyond

March 2022

EY Tax News Update: Global Edition

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Highlights

We have made major progress on the minimum taxation directive. An agreement is within reach to end the race to the bottom. Multinational companies will have to pay a minimum of 15% of taxes worldwide.

–Bruno Le Maire, French Minister for Economic Affairs, Finance and Recovery–

Since the publication of the Model Rules and the European Union (EU) Pillar Two Directive at the end of December 2021, international tax experts and other stakeholders have been eagerly waiting for the additional guidance promised by the OECD as well as whether and when the EU Member States will be able to reach unanimous agreement. After a longer wait than was expected, on 14 March 2022, the OECD/G20 Inclusive Framework on BEPS released the Commentary, together with some illustrative examples, on the Pillar Two Model Rules. On the same day, the OECD also launched a public consultation on the Implementation Framework. The deadline for input is 11 April 2022, and a public consultation meeting will be held virtually at the end of April 2022.

And if the more than 200 pages of Commentary and many examples provided on the rules are not enough to digest, on 15 March 2022, the EU Member States held a discussion on a new compromise text of the Pillar Two Directive. The new compromise text was aimed at resolving issues previously raised by some Member States, the most important of which relate to implementation timeline, the link of Pillar Two with Pillar One and the mandatory income inclusion rule of domestic groups in scope of the Directive.

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On the implementation timeline, eight countries had previously indicated that the timeline was too ambitious. In response to that, the new compromise text extends the deadline for transposition of the rules to 31 December 2023. The Income Inclusion Rule (IIR) would then enter into effect in respect of the fiscal years beginning as of 31 December 2023, and the Undertaxed Profit Rule (UTPR) in respect of the fiscal years beginning as of 31 December 2024. In addition to this change, other changes were also proposed, including a possibility for Member States in which there are fewer than 10 parented groups in scope of Pillar Two to choose not to adopt the IIR and UTPR until 2025 and a proposal for the equivalence of IIR of third countries to be determined unanimously by the Council via an implementing act after the Commission's proposal.

Regarding the concern of some Member States on the link of Pillar Two with Pillar One, the French Council Presidency announced its plans to issue a statement, along with the agreement on the proposed directive on Pillar Two, confirming the commitment of all Member States to the ongoing process on Pillar One in the Inclusive Framework.

However, despite broad support for the adaptions which were made to the draft Directive, no unanimous agreement was reached among the EU Finance Ministers. Four countries have remaining concerns which need to be addressed (Estonia, Malta, Poland and Sweden). However, the proposed one-year delay of the implementation timeline did receive broad support, while the countries have not yet agreed to the current compromise text. With that, this delay of the implementation timeline is likely going to be part of the final text of the Directive, if and when the Directive is agreed. Whether it will be agreed will depend on negotiations to be held in the coming weeks. The French Presidency of the Council has indicated it will continue the negotiations with the Member States with the aim of reaching agreement early in April.

So what does this all mean? The discussions in the EU mark progress on the path towards agreement on the Pillar Two Directive. The coming weeks will show whether the progress continues and ends up with a final agreement between all EU Member States. Besides that, the discussions at the EU level also recognizes the need for a realistic timeline for implementation. Given the many businesses that have commented on the very short time for introduction and the uncertainties that still need to be clarified, this extra time for implementation will be very much welcomed by the businesses which are in scope of Pillar Two. And no doubt the hope will be that the example presented by the EU, will be followed by other countries with ambitions of introducing Pillar Two rules.

We will continue to monitor developments in the coming month, and hopefully will be able to provide more information on this in our next publication of our Latest on BEPS and Beyond.

OECD

Commentary and illustrative examples released on Pillar Two Model Rules and public consultation on Implementation Framework launched

On 14 March 2022, the OECD published the Commentary to the Global Anti-Base Erosion (GloBE) rules, as approved by the OECD/G20 Inclusive Framework on BEPS. The Commentary includes detailed guidance on the operations of the GloBE rules and intends to promote a consistent and common interpretation of the GloBE rules to facilitate coordinated outcomes for both tax administrations and multinational enterprises (MNEs). The document also provides that the Inclusive Framework may develop further examples on the application of the rules through Administrative Guidance.

Further, the OECD Secretariat released a separate document with a number of examples that illustrate the application of the GloBE rules. The examples are intended to be used for illustrative purposes only and do not form part of the Commentary.

On the same day, the OECD also opened a public consultation on the implementation framework of Pillar Two. This consultation focuses on putting in place mechanisms that will ensure tax administrations and MNEs can implement and apply the GloBE rules in a consistent and coordinated manner. For this, the consultation includes four questions on issues of administration, operation, compliance and rule coordination. The deadline for input is 11 April 2022, and a public consultation meeting will be held virtually at the end of April 2022.

Transfer pricing country profiles updated

On 28 February 2022, the OECD published updated transfer pricing (TP) country profiles reflecting the current TP legislation and practices of 30 jurisdictions. In this update, 6 new jurisdictions were added (Honduras, Iceland, Jamaica, Papua New Guinea, Senegal, and Ukraine) and 24 jurisdictions were updated (Brazil, Canada, Chile, China, Croatia, Dominican Republic, Estonia, Finland, Greece, Hungary, Israel, Kenya, Korea, Liechtenstein, Lithuania, Luxembourg, Malta, Panama, Poland, Portugal, Slovenia, United Kingdom, United States, and Uruguay). Similar to the previous update, the TP country profiles include two questions in relation to PEs, namely: (i) whether the jurisdiction follows the Authorized OECD Approach for the attribution of profits to a PE; and (ii) whether the jurisdiction follows another approach for the attribution of profits to a PE.

Currently, the TP country profiles cover 69 jurisdictions and the OECD expects to conduct further updates as changes in legislation or practice are submitted to the OECD Secretariat.

Bahrain and Romania deposit their instruments of ratification of the MLI with the OECD

On 23 February and 28 September 2022, Bahrain and Romania 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, Bahrain changed its preliminary positions by adding the reservation to Article 6 (purpose of a covered tax agreement) not to apply to its Covered Tax Agreements (CTAs) that already contain preamble language.

Romania removed its tax treaty with Germany from its list of CTAs and made some changes to its preliminary MLI positions, including: (i) addition of a reservation to Article 3 (transparent entities); (ii) addition of a reservation to Article 6 (purpose of a covered tax agreement); (iii) addition of a reservation to Article 7 (prevention of treaty abuse); and (iv) reserving the right not to apply any of the PE provisions of the MLI.

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 June 2022.

OECD Tax Talks, OECD Secretary-General Report and G20 communiqué

On 21 February 2022, the OECD held a Tax Talks webcast during which members of the OECD Secretariat provided an overview of the latest international tax developments, including updates on the Two-Pillar solution to address the tax challenges arising from the digitalization of the economy (so-called BEPS 2.0 project). The BEPS 2.0 project was also addressed in the OECD's Secretary-General Report to G20 Finance Ministers. This report includes other topics such as: the work on explicit and implicit carbon pricing, tax policy and gender equality, tax and development, tax transparency and the BEPS minimum standards. On carbon pricing, the report proposes the launch of an Inclusive Framework-like initiative to facilitate dialogue on implicit and explicit carbon pricing.

The BEPS 2.0 project was also addressed in the communiqué from the 17-18 February 2022 G20 Finance Ministers and Central Bank Governors meeting. In particular, it reiterates the G20's commitment to swift implementation of the two-pillar package and it calls for finalization and consistent implementation of the Pillar Two Model Rules at a global level as a common approach. It also welcomes the ongoing development of the Multilateral Convention for Pillar One.

See EY Global Tax Alert, *Updates on BEPS 2.0 project from OECD Tax Talks and G20 Finance Ministers meeting*, dated 1 March 2022.

Public consultation on tax base determinations under Amount A of Pillar One

On 18 February 2022, the Secretariat of the OECD released a public consultation document with draft rules for tax base determinations under Amount A for Pillar One of the BEPS 2.0 project. The tax base determines the total profits of a group to which the reallocation-formula will be applied under Amount A. The starting point for this determination is the consolidated group financial accounts. The draft rules provide specifics on the calculation of the tax base, including book-to-tax adjustments, treatment of restatements, carryforward of losses and taking into account changes in the group structure.

The OECD invited comments on the draft rules to be submitted in writing by 4 March 2022. All written comments have been made publicly available on the OECD website.

See EY Global Tax Alert, *OECD releases Pillar One public consultation document on draft rules for tax base determinations*, dated 21 February 2022.

European Union

Broad support of EU Finance Ministers for compromise text for Pillar Two Directive which includes a one-year delay of the implementation timeline, but no unanimous agreement yet

On 15 March 2022, the Council of the European Union (the Council) held an Economic and Financial Affairs Council (ECOFIN) meeting where Finance Ministers publicly discussed the proposal for a Directive on ensuring a global minimum level of taxation for multinational groups in the Union (the Pillar Two Directive).

In advance of the meeting, the French Council Presidency issued a new compromise text aiming at resolving the three remaining issues and reaching unanimous agreement during the ECOFIN. The three remaining issues were: (i) implementation timeline; (ii) obligation to introduce Pillar Two for countries with few Ultimate Parent Entities (UPEs); and (iii) the link between introduction of Pillar One and Pillar Two. Overall, EU Member States expressed support on the new proposal, in particular for the delay of the implementation timeline with one year, and acknowledged the progress that the Council has achieved with new compromise text for reaching agreement. However, four Member States (i.e., Estonia, Malta, Poland and Sweden) still expressed some reservations and did not agree with the adoption of the Directive at this stage.

The 27 Member States will continue negotiations on the proposal during the next weeks. The draft Directive requires a unanimous decision for adoption. The French Presidency aims at reaching final adoption in Council during the ECOFIN of 5 April 2022.

Revised list of non-cooperative jurisdictions for tax purposes

On 24 February 2022, the Council of the EU updated the EU list of non-cooperative jurisdictions for tax purposes (the List). In this update, the Annex I of the EU list (so called 'black list') remains unchanged (i.e., American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu). With regards to Annex II of the EU list (so called 'gray list'), 10 new jurisdictions were added (i.e., Bahamas, Belize, Bermuda, British Virgin Islands, Israel, Montserrat, Russia, Tunisia, Turks and Caicos, Vietnam), reaching the total number of 25 jurisdictions on the gray list (Anguilla, Bahamas, Barbados, Belize, Bermuda, Botswana, BVI, Costa Rica, Dominica, Hong Kong, Israel, Jamaica, Jordan, Malaysia, Montserrat, North Macedonia, Qatar, Russia, Seychelles, Thailand, Tunisia, Turkey, Turks and Caicos, Uruguay and Vietnam).

The Council will continue to review and update the EU List biannually, with the next update due in October 2022.

See EY Global Tax Alert, *EU Member States adopt revised list of non-cooperative jurisdictions for tax purposes*, dated 25 February 2022.

Country developments

Canada: Public consultation on interest deductibility limitation and mandatory disclosure rules

On 4 February 2022, Canada's Department of Finance released for public comment a set of draft legislative proposals to implement previously announced tax measures. Among other items, there is draft legislation introducing an earnings-stripping rule that will limit the amount of net interest expense that a company may deduct in computing its income to no more than a fixed ratio of tax Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA). Interest expense and interest income will include certain payments that are equivalent to interest, as well as certain financing-related expenses, but amounts relating to debts owing between members of the same Canadian resident group can generally be excluded. To provide for a transitional period, the new earnings-stripping rule will be phased in with a fixed ratio of 40% of tax EBITDA for taxation years beginning on or after 1 January 2023, but before 2024, and a fixed ratio of 30% for taxation years beginning on or after 1 January 2024. This new rule will apply for taxation years beginning on or after 1 January 2023.

Also included with the release was draft legislation to enhance mandatory disclosure rules (MDR), including changes to existing reportable transaction rules; a new requirement to report notifiable transactions; a requirement to report uncertain tax treatment; and related penalties and an extension of the normal assessment period in certain circumstances, in the case of a failure to report. These new

rules on mandatory disclosures are intended to be effective in 2022 (i.e., either for taxation years beginning after 2021 or for transactions entered into after 2021). Penalties will not apply to transactions that occur before Royal Assent of the enacting legislation.

See EY Global Tax Alert, *Finance Canada releases draft legislation for 2021 budget measures*, dated 10 February 2022.

Colombia and Netherlands: Tax treaty signed

On 16 February 2022, Colombia and the Netherlands signed tax treaty. The tax treaty contains a number of treaty-based recommendations from the BEPS project contained in Action 6 (preventing the granting of treaty benefits in inappropriate circumstances), Action 7 (permanent establishment) and Action 14 (making dispute resolution mechanisms more effective).

More specifically, the tax treaty also provides that in cases where a person other than an individual is resident in both Colombia and the Netherlands, both competent authorities shall endeavor to determine by mutual agreement, the Contracting State of which the person shall be deemed to be a resident. Furthermore, the tax treaty contains a principal purpose test. In the permanent establishment (PE) clause, the tax treaty contains a contract splitting rule for construction activities and service PE, an anti-fragmentation rule and the new definition of agency PE.

Moreover, the tax treaty provides a period of three years for submission of a mutual agreement procedure (MAP) request beginning on the date of the first notification of the action resulting in taxation not in accordance with the provisions of the treaty. In cases where the competent authorities are unable to reach an agreement after three years of submission, the tax treaty contains an arbitration clause to resolve the case within two years from the presentation of the case to the competent authority of the other contracting state.

The Multilateral Instrument (MLI) has no effect on this treaty since Colombia and the Netherlands have not included this tax treaty as a Covered Tax Agreement (CTA). For the MLI provisions to have effect on the tax treaty, both jurisdictions would need to include the tax treaty in their respective list of CTAs, indicating whether the tax treaty falls within the scope of any of the reservations made by that respective jurisdiction.

The treaty still needs to be ratified by both jurisdictions and will enter into force on the last day of the month following the month in which the ratification process is complete and the exchange of ratification instruments has taken place. The tax treaty will enter into effect on 1 January of the calendar year following the date of entry into force.

See EY Global Tax Alert, *Colombia and the Netherlands sign double tax treaty*, dated 10 March 2022.

Denmark and France: New tax treaty signed

On 4 February 2022, Denmark and France signed a new tax treaty. The tax treaty contains a number of treaty-based recommendations from the BEPS project contained in Action 6 (preventing the granting of treaty benefits in inappropriate circumstances) and Action 7 (permanent establishment).

More specifically, the tax treaty contains the new preamble language which clarifies that the tax treaty is intended to eliminate double taxation with respect to taxes on income and on capital gains without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance. Furthermore, the tax treaty contains a principal purpose test. In the PE clause, the tax treaty contains an anti-fragmentation rule and the new definition of agency PE.

The OECD MLI has no effect on this treaty since Denmark and France have not included this tax treaty as a CTA. For the MLI provisions to have effect on the tax treaty, both jurisdictions would need to include the tax treaty in their respective list of CTAs, indicating whether the tax treaty falls within the scope of any of the reservations made by that respective jurisdiction.

The treaty will enter into force on the first day of the month following the date on which the ratification process is complete and the exchange of ratification instruments has taken place.

Estonia: Minister of Finance announced Estonia's position on Pillar Two Directive

On 15 February 2022, the Estonian Ministry of Finance announced on its website Estonia's position regarding the Pillar Two Directive. According to the announcement, Estonia is of the opinion that the extension of the application of the Pillar Two rules on large-scale purely domestic groups under the Proposal Directive should remain voluntary instead of being mandatory for every Member tate. Estonia

aims to maintain its current distribution-based corporate tax system for such groups and implementation of two tax systems would result in a disproportionate cost. Estonia also considers that Pillar One and Pillar Two should be implemented together.

France: Update to the list of compliant jurisdictions for French CbCR purposes

On 16 February 2022, France published an update of the jurisdictions considered as "compliant" for French Country-by-Country (CbC) reporting (CbCR) purposes. As a reminder, French entities ultimately held by a foreign entity established in a compliant jurisdiction are exempted from local CbCR filing in France. The French list of compliant States includes jurisdictions (i) with similar CbCR requirements with those provided under French law and (ii) that have concluded agreements on the automatic exchange of CbC reports with France and comply with such exchange agreements. In this update, six jurisdictions (Azerbaijan, Macau, Oman, Seychelles, Turkey, and Turks and Caicos Islands) have been added to the list.

The update concerns fiscal years commencing on or after 1 January 2020.

Ghana and Luxembourg: Tax treaty signed

On 13 December 2021, Ghana and Luxembourg signed a tax treaty. The final version of the treaty generally follows the OECD Model (2014), but has also aspects of the United Nations Model (2017).

The treaty sets the maximum withholding tax rates as follows: (i) 7% on dividends; (ii) 7% on interest, with an exemption, among others, which applies for collective investment vehicles; (iii) 8% on royalties; and (iv) 10% on service fees.

The treaty contains a provision under which the treaty benefits may be denied if claiming treaty benefits was one of the principal purposes of any arrangement or transaction, i.e., principal purpose test. The tax treaty also contains the new preamble language which clarifies that the tax treaty is intended to eliminate double taxation with respect to taxes on income and on capital gains without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance. In particular, Luxembourg applies the credit and exemption with progressive method for the avoidance of double taxation while Ghana applies the credit method for the avoidance of double taxation.

The OECD MLI has no effect on this treaty since Luxembourg has not included this tax treaty as a CTA and Ghana has not signed the MLI yet. For the MLI provisions to have effect on the tax treaty, Ghana will need to become an MLI signatory first and both jurisdictions would need to include the tax treaty on their respective list of CTAs, indicating whether the tax treaty falls within the scope of any of the reservations made by that respective jurisdiction.

The treaty will enter into force on the day in which the ratification process is complete and the exchange of ratification instruments has taken place.

Hong Kong: Announcement to introduce Pillar Two rules and a domestic minimum tax

On 23 February 2022, Hong Kong announced in its 2022/2023 Budget its plan to submit a legislative proposal in the second half of 2022 to implement Pillar Two in its corporate tax system. At the same time, Hong Kong will consider the introduction of a domestic minimum top-up tax to bring the jurisdictional effective tax rates of the Hong Kong constituent entities of an in-scope multinational enterprise (MNE) group to the required minimum of 15% starting from the year of assessment 2024-2025.

See EY Global Tax Alert, *Hong Kong announces 2022/23 Budget*, dated 25 February 2022.

Concerning the timing of reporting, an exception has been made for the first reporting (for which the deadline follows the ordinary terms), and TP adjustments should be reported within 30 days from the date of approval of the parent company's financial statements making the TP adjustment.

See EY Global Tax Alert, *Italian Tax Authorities issue resolution on Mandatory Disclosure Rules*, dated 1 March 2022.

India: Circular on the non-applicability of the Most Favored Nation Clause

On 3 February 2022, the Indian Minister of Finance issued a Circular stating that the Most Favored Nation (MFN) clause included in the Indian tax treaties can be applied only if the following conditions are met:

- The date of entry into force of the tax treaty with the third state follows the signature/entry into force of the tax treaty with the second state.
- The third state is an OECD member at the time of signature of the tax treaty with India.

- Under the tax treaty, the taxing rights of India are limited in terms of scope or rate.
- A separate notification is issued under Income Tax Law to integrate the benefits of the tax treaty with the third state into the tax treaty with the second state.

If a court decision has been issued regarding the applicability of the MFN clause prior to the date of the Circular, the Circular does not apply.

See EY Global Tax Alert, *Indian Government releases restrictive interpretation of Most Favored Nation clause*, dated 8 February 2022.

Ireland: Updated guidance on Controlled Foreign Companies rules

On 21 February 2022, the Irish Revenue Commissioners updated its Controlled Foreign Company (CFC) guidance. Finance Act 2020 introduced changes which meant that certain exemptions (e.g., effective tax rate exemption, low-profit margin exemption, and the low accounting profit exemption) should not be available where the CFC in question is resident in a non-cooperative jurisdiction, as per the European Union's (EU) list on same. As the non-cooperative jurisdiction lists are subject to updates from time to time, the updated guidance reflects the most recent EU list for accounting periods beginning on or after 1 January 2021.

Italy: Transfer pricing adjustments under the scope of MDR

On 31 December 2021, the Italian Tax Authorities published a Resolution on the correct interpretation of transfer pricing (TP) adjustments between associated entities for MDR.

The Resolution provides that the TP policy followed by a group of companies may qualify as a cross-border arrangement and, as such, be reportable under MDR. In that respect, TP adjustments made in favor of subsidiaries resident in jurisdictions meeting the characteristics indicated in the hallmarks C.1 bi) (no corporate income tax or at a rate equal to or close to zero) and C.1 bii) (non-cooperative jurisdictions) should be reported for MDR purposes upon the occurrence of the additional conditions of reduction of taxes and the Main Benefit Test (where relevant).

Jordan: Release of guide on country-by-country reporting filing

On 25 January 2022, Jordan issued guidance to clarify CbCR requirements. The guidance addresses topics such as definitions and related regulations, applicability and deadlines, and the CbCR form and its content. In addition, the guidance confirms that 2021 is the first reporting financial year, and the submission of the respective CbC report should be by 31 December 2022 at the latest.

Jordan: Release of new Transfer Pricing templates

On 2 January 2022, the Jordan Income and Sales Tax Department (JIST) released TP templates for Local File, Master File, and CbCR. Previously, these templates were provided in the Executive Instructions No. 3 from September 2021 but the new published forms are editable versions.

Lithuania: Rules for reportable cross-border arrangements under MDR amended

On 17 January 2022, the *Official Gazette* of Lithuania released amendments regarding the rules on the use of reportable cross-border arrangements. The notification's deadline regarding this type of arrangement is 15 June of the following calendar year, and such notification must be completed by filling in the form PRC914. The rules applying in that respect concern reporting periods for 2021 and onwards, and the use of cross-border arrangements as of 2018 should be included in the notification of 2021.

Singapore: Announcement to study a domestic minimum top-up tax in response to BEPS 2.0 Pillar Two

On 18 February 2022, Singapore announced in its Budget 2022 that it is exploring a Minimum Effective Tax Rate (METR) regime that will top-up an MNEs group's effective tax rate in Singapore to 15%. The METR will apply to MNE groups operating in Singapore that have annual revenues of at least €750 million, as reflected in the consolidated financial statements of the ultimate parent entity. The METR, if introduced eventually, is expected to be closely aligned with the Pillar Two GloBE (global anti-base erosion) rules. rules. Singapore will consult industry stakeholders on the design of the METR and continue to monitor international developments before making any decisions on the METR.

South Africa: Commitment to BEPS 2.0 implementation announced

On 23 February 2022, the National Treasury of South Africa published the Budget Review 2022. Among other items, South Africa announced that it will introduce legislative changes to its tax regime once the OECD/G20 Inclusive Framework completes the framework on BEPS 2.0 and rules are ready to be implemented domestically.

Turkey: Ratification of the Bilateral Competent Authority Arrangement with the US on exchange of Country-by-Country reports

On 14 February 2022, Turkey published in the *Official Gazette* Presidential Decision No.5191 ratifying the bilateral competent authority agreement on the exchange of CbC reports with the United States. The agreement's purpose is to exchange CbC reports for fiscal years starting from 1 January 2019.

Uruguay: Update to the list of low or no tax jurisdictions

On 21 February 2022, Uruguay published resolution No. 223/022 updating the domestic list of low or no tax jurisdictions. Transactions with any entity located in the list are deemed to be controlled transactions for transfer pricing purposes or subject to increased withholding tax. In this update, the list removes Antigua and Barbuda, Brunei, and Dominica. The updated list includes the following:

Angola, Ascension Island, Christmas Island, Cocos (Keeling) Islands, Djibouti, Eswatini, Falkland Islands, Fiji, French Polynesia, Guam, Guyana, Honduras, Jamaica, Jordan, Kiribati, Labuan, Liberia, Maldives, Niue, Norfolk Island, Oman, Pacific Islands, Palau, Pitcairn Island, Puerto Rico, Saint Helena, Saint Pierre and Miquelon, Sint Maarten (former member of Netherlands Antilles), Solomon Islands, Svalbard, Tokelau, Tonga, Tristan da Cunha, Tuvalu, US Virgin Islands, and Yemen.

The resolution is effective from 21 February 2022.

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