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Global Tax Alert

The Latest on BEPS and Beyond

November 2021

EY Tax News Update: Global Edition

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Highlights

With the year-end approaching, one of the key questions that comes up in tax policy every year is whether there will be time to relax with family and friends. Often the year-end holidays are interrupted as policy makers work to publish or finalize legislation and materials by the end of the year. Specifically, for international organizations like the OECD and the European Commission, the end of the year is the time to issue public consultations and proposals, leaving it to those concerned with the business implementation to digest the content over the holidays. And this coming holiday season does not appear to be any different.

In the Annex to the 8 October Statement by the Inclusive Framework on BEPS, a one and a half page "detailed" implementation plan is included. In this plan it is announced that by the end of November 2021, the OECD will publish the model rules which give effect to the core of the global minimum tax rules, the GloBE rules. The GloBE rules consist of the Income Inclusion Rule (IIR) and the Undertaxed Payment Rule (UTPR). These model rules will be accompanied by commentary. In addition, a model treaty provision giving effect to the Subject to Tax Rule (STTR) will be published by the end of November, along with the relevant commentary. Following these publications, a Multilateral Instrument for the introduction of the STTR in bilateral tax treaties will be published mid-2022, and by the end of 2022 the Implementation Framework for coordinated implementation of the rules will be ready, right before the anticipated 2023 entry into force date of part of the global minimum tax rules.

As reported in the October issue of Latest on BEPS and Beyond, the agreement reflected in the 8 October Statement on Pillar Two is limited to some key design features and does not contain any technical details. Getting all that is announced ready by the end of November is an immense job, leaving no time for soliciting coordinated and organized input from businesses. Accordingly, businesses will only see what has been decided at the Inclusive Framework level by the end of November. And after that, there will be little time to read, digest and react, as the European Commission (the Commission) has announced it will pick up the global agreement immediately to translate it into a Pillar Two Directive to be released on 22 December 2021. This will not be the only proposal to be released by the Commission on that date. The Commission also announced the publication of a Directive on shell companies (Anti-Tax Avoidance Directive (ATAD) III). Finally, this will also be the date where the own resource package will be decided upon by the commissioners, including answering the question of what to do with the budget deficit that will exist if the digital levy is not introduced. The introduction of a digital levy seems difficult if not impossible given the standstill on introduction of Digital Services Taxes which was agreed in the 8 October Statement.

Right after the holiday break, the new and ambitious French Presidency of the Council of the European Union (EU) will take up its role of leading the Member States. In this role, it will pick up the Commission proposal on Pillar Two and ATAD III with the aim to develop a text agreed by all the Member States by the end of June, when the French Presidency ends. Given the endorsement of all EU Member States of the 8 October Statement, the first steps towards such an agreement have already been set.

All in all, the holiday season remains "the most wonderful time of the year," but in addition to celebrating with family and friends, many of us impacted by tax policy developments will likely have to consider these developments every now and then.

OECD

Mauritania becomes member of the Inclusive Framework on BEPS and also joins the agreement on BEPS 2.0

On 4 November 2021, Mauritania joined the Inclusive Framework on BEPS, bringing the total number of members to 141. As a new Inclusive Framework member, Mauritania has committed to comply with the BEPS minimum standards, which are contained in the final reports on Action 5 (Countering Harmful Tax Practices), Action 6 (Preventing Treaty Abuse), Action 13 (Transfer Pricing Documentation) and Action 14 (Enhancing Dispute Resolution). Mauritania will also participate on an equal footing with the members of the Inclusive Framework in the remaining standard setting activities, as well as the review and monitoring of the implementation of the BEPS package.

Further, Mauritania also joined the statement to address the tax challenges arising from the digitalization of the economy, bringing to 137 the total number of jurisdictions participating in the agreement.

G20 leaders confirm commitment under BEPS 2.0 project

On 30-31 October 2021, the leaders of the G-20 met in Rome for the G20 summit. After the meeting, the G20 leaders issued a declaration endorsing the global tax changes in connection with the BEPS 2.0 project. The declaration calls for swift action with the aim of ensuring that the new rules come into effect globally in 2023.

See EY Global Tax Alert, *G20 leaders confirm commitment to global tax changes under BEPS 2.0*, dated 1 November 2021.

Statement from the United States and five European countries on transitional approach to existing Digital Services Taxes (DST)

On 21 October 2021, Austria, France, Italy, Spain, the United Kingdom (UK) and the United States (US) released a joint statement on a transitional approach to the treatment of existing digital services taxes (DSTs) and other relevant similar measures during the interim period before new Pillar One rules come into effect. According to the statement, the European countries will not withdraw their DSTs but have agreed to allow a portion of the DSTs or any other unilateral measure accrued by a multinational enterprise (MNE) to be credited against Amount A when Pillar One rules are in effect. In return, the US has agreed to terminate all trade actions against the European countries with respect to their existing DSTs and also commits not to impose further trade actions during the interim period before Pillar One takes effect.

See EY Global Tax Alert, *Six country Joint Statement on transitional approach to existing unilateral measures during period before Pillar One is in effect*, dated 25 October 2021.

Indonesia and Russia made notification of the MLI to the OECD

On 21 October 2021, both Indonesia and Russia made a notification confirming the completion of their internal procedures for the entry into effect of the provisions of the Multilateral Instrument (MLI) with respect to five and seven of their covered tax agreements (CTAs), respectively. Indonesia and Russia had reserved the right to delay the entry into effect of the provisions of the MLI in accordance with Article 35(7)(a) until they completed their internal procedures for this purpose. Now that Indonesia and Russia have notified the completion of their internal procedures with respect to the notified CTAs, the rule on entry into effect set out in Article 35(1) and (5) of the MLI would apply as from the date that is 30 days after the Depositary has received the notification from Indonesia and Russia that they have completed their internal procedures, i.e., as from 21 November 2021.

Fourth phase of peer reviews on BEPS Action 13 released

On 18 October 2021, the OECD released the compilation of the outcomes of the fourth phase of peer reviews (the Compilation) of the minimum standard on Action 13 (Transfer Pricing Documentation and Country-by-Country Reporting) of the BEPS project.

According to the executive summary accompanying the Compilation, over 100 jurisdictions have already introduced legislation to impose a filing obligation for Country-by-Country (CbC) Reporting (CbCR) on MNE groups, covering almost all MNE groups with consolidated group revenue equal to or exceeding €750 million. Where legislation is in place, the implementation of CbCR has been found to be largely consistent with the Action 13 minimum standard. However, 33 jurisdictions have received a general recommendation to either put in place or finalize their domestic legal or administrative framework. Of the jurisdictions that have already introduced the legislation, 43 jurisdictions received one or more recommendations to make improvements to specific areas of their framework. Moreover, 83 jurisdictions have multilateral or bilateral competent authority agreements in place, which results in more than 3,000 exchange relationships. In addition, 84 jurisdictions have provided detailed information about the appropriate use of CbC reports, enabling the Inclusive Framework to obtain sufficient assurance that measures are in place to ensure the appropriate use.

Further work will continue to monitor the implementation and operation of CbCR and to highlight progress made by jurisdictions to address the recommendations that have been made.

See EY Global Tax Alert, *OECD releases outcomes of fourth phase of peer reviews on BEPS Action 13*, dated 25 October 2021.

Seventh batch of Stage 2 peer review reports on BEPS Action 14 released

On 18 October 2021, the OECD released the seventh batch of Stage 2 peer review reports on BEPS Action 14 (dispute resolution). The report covers Brazil, Bulgaria, China, Hong Kong, Indonesia, Russia, and Saudi Arabia. As for the outcome of the peer review process, overall positive changes were found in all of the assessed jurisdictions. However, Brazil and Hong Kong have addressed none of the deficiencies identified in the Stage 1 review. Further, new issues were identified in Stage 2 for Indonesia. In addition, China and Russia addressed some of the identified deficiencies. The assessed jurisdictions have committed to continue working to resolve the remaining deficiencies identified during the peer review process.

See EY Global Tax Alert, *OECD releases seventh batch of Stage 2 peer review reports on dispute resolution*, dated 25 October 2021.

EU: European Parliament approves public CbCR Directive

On 11 November 2021, the European Parliament formally approved the proposed public CbCR directive (the Directive). This follows a provisional agreement reached by representatives of European Union (EU) institutions on 1 June 2021 and a formal adoption of the proposal by the Council of the EU, i.e., the EU Member States on 28 September 2021. The Directive will be signed shortly and subsequently be published in the Official Journal of the EU. It will enter into force on the 20th day following that publication. After entry into force, Member States will have 18 months to transpose the Directive into national legislation.

See EY Global Tax Alert, *European Parliament provides final approval needed for formal adoption of public CbCR Directive*, dated 11 November 2021.

Cyprus: MDR guidance issued

On 29 October 2021, the Cypriot Ministry of Finance issued guidelines (Decree N. 438/2021) on the Cypriot Mandatory Disclosure Rules (MDR). The guidelines are broadly aligned to the requirements of the EU Directive on the mandatory disclosure and exchange of cross-border tax arrangements (DAC6). Among other items, the guidelines include the scope of taxes covered and further guidance on hallmarks A-E. As for the main benefit test, the guidelines provide that it is an objective test, implying that there is no need to examine the specific motives or intentions of a person which enters into an arrangement. Further, to determine whether an arrangement results in a tax advantage, one needs to make a comparison between the amount of tax due (after the arrangement) with the amount of tax that would be due under the same circumstances in the absence of the arrangement.

Penalties for non-compliance may range from €1,000 up to a maximum of €20,000.

See EY Global Tax Alert, *Cyprus issues Ministerial Decree on DAC6 Guidelines*, dated 4 November 2021.

Estonia: FAQs on BEPS 2.0 published

On 18 October 2021, the Ministry of Finance published a frequently asked questions (FAQ) document related to its decision to join the OECD global tax agreement (of the so-called BEPS 2.0 project).

The Ministry clarifies in the FAQ document that Estonian companies could have been in a worse position if Estonia did not join the global tax agreement due to the income inclusion rule, which imposes a top-up tax on a parent entity in respect of the Estonian subsidiary if the income of the subsidiary is not taxed at an effective tax rate of 15%.

By joining the global tax agreement, Estonia contributed to achieve certain favorable exceptions, e.g., (i) a de minimis exclusion for jurisdiction where revenues are less than €10 million and profits less than €1 million; and (ii) in respect of existing distribution tax systems (like Estonia) there will be no top-up tax provided the earnings are distributed within four years and taxed at or above the minimum tax rate.

Finland: Proposal to introduce reverse hybrid mismatches rules

On 28 October 2021, the Finnish Government presented to the Parliament a law proposal (HE 204/2021) introducing reverse hybrid mismatches rules under Anti-tax Avoidance Directive (ATAD) 2. The reverse hybrid mismatches rules would not apply to certain alternative investment funds.

According to the proposal, a nonresident partner will be taxable in Finland for the income received from a reverse hybrid if the following conditions are met:

- The partner is a legal entity or an arrangement.
- The partner alone or together with its related parties directly or indirectly holds at least 50% of the voting rights, capital interests or rights to a share of profit.
- The residence state of the partner does not tax the income due to the fact that it regards the entity as a separate taxable entity.

If adopted, the law proposal is intended to take effect from 1 January 2022 onwards.

Germany: Draft decree on the list of non-cooperative jurisdictions

On 25 October 2021, the German Ministry of Finance published a draft decree containing a list of states and territories considered to be non-cooperative for the purpose of the application of the new law to prevent tax avoidance and unfair tax competition which will be effective as of 1 January 2022. The defensive measures are designed to restrict transactions with non-cooperative jurisdictions, including restrictions on the deduction of expenses, additional Controlled Foreign Company (CFC) rules, and others. The draft decree lists the following jurisdictions: American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu.

Ireland

Increase of corporate tax rate

On 7 October 2021, the Irish Government announced it is supporting the G20/OECD International Tax Proposals – the two-pillar solution commonly referred to as "BEPS 2.0." The consensus provides that the minimum tax rate for those companies in the scope of the agreement will be 15% following deletion of the words "at least" in the earlier draft which raised concerns of a materially higher minimum rate. Important assurances were also obtained from the Commission that the proposed implementing Directive will not go beyond the global consensus and that there will be consistent and timely implementation to provide the required certainty and stability in the international tax framework to support future investment decisions. The Agreement will allow for retention of the 12.5% rate for businesses with annual revenue less than €750 million.

See EY Global Tax Alert, *Ireland joining consensus on G20/ OECD International Tax Proposals,* dated 7 October 2021.

Finance Bill 2021 published

On 21 October 2021, the Irish Government published the Finance Bill 2021 which contains a number of tax measures. Among other items, the Bill implements interest limitation rules (ILR) which are broadly aligned with the EU ATAD. The ILR limits the maximum tax deduction for net borrowing costs to 30% of earnings before tax and before deductions for net interest expense, depreciation and amortization (EBITDA). Of note, the ILR applies to all interest and interest equivalents and companies may operate the interest restriction on a single entity or local group basis. Furthermore, where the Irish taxpayer is part of a consolidated worldwide group for accounting purposes, the indebtedness of the overall group at worldwide level may be considered for the purposes of providing additional relief.

The Bill also introduces anti-reverse hybrid rules in line with ATAD II and makes some technical amendments to the existing hybrid provisions. The purpose of the anti-reverse hybrid rule is to tax income in Ireland that would otherwise go untaxed because an Irish entity is regarded as tax transparent in Ireland but tax opaque in a jurisdiction of a relevant participator (e.g., shareholder).

While the Finance Bill may be amended as the Bill passes through the Houses of Parliament, both the ILR and anti-reverse hybrid rules are expected to apply for accounting periods commencing on or after 1 January 2022.

Public consultation on new rules for outbound payments

On 5 November 2021, the Irish Department of Finance launched a public consultation seeking input on the potential introduction of new taxation measures to apply to outbound payments. The purpose of the consultation is to obtain the views of stakeholders on the potential introduction of measures to prevent double non-taxation in relation to payments of royalties, interest and dividends. The consultation seeks input on potential measures under consideration including denial of deduction of costs or the imposition of withholding taxes. It is anticipated that any new measures would be largely preventative in nature and only applicable to no-tax, zero-tax jurisdictions, or jurisdictions included on Annex I of the EU list of non-cooperative jurisdictions.

The consultation period is open from 5 November 2021 to 20 December 2021.

Italy: Public consultation on hybrid mismatches

On 18 October 2021, the Italian Tax Authorities launched a public consultation on the draft circular of hybrid mismatch rules governed by the Decree 142/2018 which implements ATAD in domestic law. The draft circular provides guidance on the subjective and objective factors in applying the hybrid mismatch rules as well as the different results of applying the rules, including several examples.

The consultation period runs until 19 November 2021.

Romania: Lower house approves MLI

On 18 October 2021, the Romanian lower house approved Bill No. 343/2021 to ratify the MLI. The Bill has now been submitted to the Senate for further approval. Once the ratification process is completed, Romania will need to deposit its instrument of ratification of the MLI with the OECD. The MLI will enter into force for Romania 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 such instrument with the OECD.

Singapore: Update to tax treaty guidelines

On 23 October 2021, the Inland Revenue Authority of Singapore released an update to the e-Tax guide on the Avoidance of Double Taxation Agreements (DTAs). In this update, the guide outlines the application process and rules relating to the arbitration provision found in Singapore's DTAs. Further, the guide provides the criteria for when a case can be submitted for arbitration. According to the guide, Singapore adopts the "final offer" arbitration process under the MLI. In this type of arbitration process, each competent authority submits to the arbitration panel a proposed resolution for the arbitration panel to select one of the proposed resolutions as its final decision.

Spain: Minimum tax proposal published

On 13 October 2021, the Spanish Government presented the draft Budget Bill for 2022 to the Congress. The Bill includes an amendment to the Corporate Income Tax Law to introduce a minimum tax, applicable from 1 January 2022 and generally set at 15% of the taxable base for taxpayers with turnover in excess of €20 million during the prior fiscal year or which are taxed in a tax unity regardless of their turnover.

The proposed budget must be discussed and approved by Congress and subsequently ratified by the Senate.

Thailand: Introduction of CbCR requirements

On 30 September 2021, the Thai Revenue Department published notification No. 408 outlining the requirements for the submission of CbCR reports for fiscal years starting on or after 1 January 2021. According to the decision, all Thai tax resident constituent entities that are Ultimate Parent Entities (UPEs) of MNE groups with annual consolidated group revenue of not less than THB28,000 million (US$840 million) have to prepare a CbC report.

Any other entity of the group that is carrying on business in Thailand will have to prepare and submit the CbC report if the UPE is not resident in Thailand and any of the following conditions are met: (i) it is not obliged to file a CbC report in its country of tax residence; (ii) there is an international agreement which permits automatic exchange of information between the jurisdiction where the UPE is resident and Thailand, but there is no Qualified Competent Authority Agreement in effect between these jurisdictions by the time for filing the CbC Report; or (iii) the jurisdiction has been notified regarding a systematic failure to exchange the information.

Notwithstanding the above, local filing will not be required if the MNE group appoints a surrogate parent entity and other requirements are met. The CbC report should be submitted within 150 days after the fiscal year end. The penalty for failure to submit a CbC report by the due date should be a fine not exceeding THB2,000 (US$60).

See EY Global Tax Alert, *Thailand publishes mandatory requirements for submission of Thai transfer pricing Country-by-Country reports*, dated 4 November 2021.

UK: Budget 2021 delivered

On 27 October 2021, the UK Chancellor delivered the second UK Budget of 2021. Among other items, it was confirmed that legislation will be introduced in Finance Bill 2021-22 related to the treatment of fiscally transparent entities which are payees under the UK hybrid mismatch rules to ensure that any counteraction is proportionate to the overall hybrid effect. This follows from prior draft legislation included in the prior Finance Bill which was withdrawn following stakeholder feedback, as it would not have operated as intended.

With respect to the new requirements for large businesses to notify Her Majesty's Revenue & Customs (HMRC) of uncertain tax treatments (UTT), it was confirmed that this will be legislated in Finance Bill 2021-22, and that currently only two triggers will apply when the UTT regime comes into force (from 1 April 2022 onwards), i.e., if an accounting provision is required under Generally Accepted Accounting Principles (GAAP) in respect of the treatment or if the treatment is contrary to HMRC's "known" position. The third trigger (substantial possibility that the treatment would be found to be incorrect if it were considered by a court or tribunal) has been removed but the Government confirmed it will continue to evaluate whether this trigger should be included in the rules at a later stage.

Furthermore, HMRC published a policy paper on Mutual Agreement Procedure (MAP) decisions relating to the Diverted Profits Tax (DPT). To ensure that the UK meets its commitments under its double tax treaties, domestic legislation will be introduced through Finance Bill 2021-22 to include DPT as one of the covered taxes in respect of which a MAP outcome can potentially be implemented, subject to the terms of the relevant double tax treaty. The measure will have effect for any MAP decisions involving DPT which are reached after 27 October 2021.

The UK Chancellor also confirmed that a consultation will be published soon related to an online sales tax.

See EY Global Tax Alert, *UK Chancellor delivers second Budget of 2021*, dated 28 October 2021.

US: Latest Build Back Better proposal includes 15% corporate minimum tax on book income

On 26 October 2021, the US Senate Finance Committee unveiled a proposal for a 15% corporate alternative minimum tax. The minimum tax would apply to any corporation (other than an S corporation, regulated investment company, or real estate investment trust) whose average annual adjusted financial statement income exceeds US$1 billion over any consecutive three-tax-year period preceding the tax year. For a corporation that is a member of an international financial reporting group with a foreign parent, two thresholds must be met: (i) average annual adjusted financial statement income must be greater than the US$1 billion threshold (for this purpose, it appears that it is intended that all income of all foreign members of the financial reporting group is included); and (ii) average annual adjusted financial statement income (including only income of the US corporation(s), income of controlled foreign corporations under Internal Revenue Code Section 56A(c)(3) and effectively connected US income) is US$100 million or more.

See EY Global Tax Alert, *US: Latest Build Back Better proposal includes 15% corporate minimum tax on book income*, dated 2 November 2021.

Vietnam: Circular on digital tax released

On 29 September 2021, the Ministry of Finance in Vietnam released Circular 80/2021/TT-BTC which provides detailed guidelines on the implementation of a number of tax rules. Among other items, the Circular includes a section on digital tax. The rules are applicable to nonresident companies that do not have a Permanent Establishment in Vietnam and that carry on e-commerce activities, digital platform-based business, and/or other related services.

The nonresident company needs to file a tax return for the digital tax and can register in Vietnam or authorize a Vietnamese party to do so on its behalf. The authorized party is defined to include an organization or a tax agent operating under the laws of Vietnam.

The Circular provides that the tax payable is calculated on revenue earned by the nonresident company and different value added tax/corporate income tax rates will be applied depending on the nature of the activities conducted. It may be also possible to apply for a corporate income tax exemption if the nonresident company is resident of a jurisdiction for which Vietnam has a tax treaty.

Furthermore, the Circular addresses the responsibilities of Vietnamese parties in withholding, declaring and paying taxes on behalf of overseas suppliers should the overseas suppliers fail to do so.

The Circular is effective as of 1 January 2022.

See EY Global Tax Alert, *Vietnam releases a Circular on digital tax*, dated 29 October 2021.

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