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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

The international tax community concluded 2022 with the realization that the global minimum tax is now a reality. Specifically, just before year-end, the European Union (EU) reached agreement on the introduction of a Minimum Tax Directive as of 31 December 2023. Also, the OECD's publication of the first Safe Harbour guidance provided more clarity on the first minimum tax obligations of in-scope companies. However, the developments were not limited to the action by the EU as a "first mover." On 31 December, the Korean legislature enacted minimum tax rules to implement Pillar Two. For governments and businesses, this means that as we write, only 348 days remain before the minimum tax rules enter into effect.

As we mentioned at the conclusion of 2022, issues other than Pillar Two also deserve attention, especially at the EU level. For example, the EU is expected to formalize groundbreaking political agreements relating to the EU Green Deal. As informal agreements were reached on the Carbon Border Adjustment Mechanism and important adaptions to the Emission Trading System, the final steps needed to formalize these agreements will take place in the near future. This will give companies inside and outside the EU more clarity for investing in a green transition. Partly in response to the ongoing energy crisis, EU policy makers wish to accelerate the green transition. In this light, Europeans are also carefully analyzing the United States' (US) *Inflation Reduction Act*. While stimulus for a green transition is generally appreciated, the tax incentives favoring US production have raised concerns.

Building a better working world

In early February, EU leaders may decide on a European response to the US rules. Will this involve expanding State aid rules and introducing new EU subsidies? Or will neutralizing measures be taken, for example, on the basis of the Foreign Subsidies Regulation that enters into force on 12 July 2023? The Foreign Subsidies Regulation expands the State aid rules beyond EU borders and allows the European Commission to intervene in mergers, acquisitions, and government procurements when one or more of the parties involved have benefited from significant amounts of government grants, including tax incentives. Whatever Brussels compromise is reached, the impact on taxation could be significant.

And finally, a hearing in the European Parliament on 9 January 2023 made it clear that personal income taxes have not been forgotten. Parliamentarians were particularly concerned about the treatment of remote workers and tax competition in income tax. Although the EU looks primarily to the OECD for solutions for these issues, 2023 may become the year that policy makers start looking into more issues beyond BEPS.

BEPS 2.0

OECD

OECD releases document on safe harbors and penalty relief under Pillar Two GloBE rules

On 20 December 2022, the OECD released guidance on safe harbors and penalty relief under the BEPS 2.0 Pillar Two Global Anti-Base Erosion (GloBE) rules. This guidance includes the agreed terms of a "Transitional CbCR Safe Harbour" that temporarily removes the obligation of calculating the GloBE effective tax rate for a multinational enterprise's (MNE) operations in lower-risk jurisdictions in the first three years. This is intended to provide relief to MNEs in respect of their GloBE compliance obligations as they start with the implementation of the rules.

Furthermore, the document mentions that the Inclusive Framework is planning to examine the possibility of creating additional permanent safe harbors and simplifications in the future, with a particular focus on developing a qualified domestic minimum top-up tax (QDMTT) safe harbor. This safe harbor would simplify compliance for MNEs operating in jurisdictions that have implemented a QDMTT.

The guidance also includes a common understanding among the Inclusive Framework member jurisdictions as to a transitional penalty relief regime for the initial years of application of the GloBE rules (i.e., for any fiscal year beginning on or before 31 December 2026 but not including a fiscal year that ends after 30 June 2028). Under the common understanding on penalty relief, no penalties or sanctions should apply where a tax administration considers that an MNE has taken "reasonable measures" to ensure the correct application of the GloBE rules. The term "reasonable measure" is not defined in the document, and it should be understood in light of each jurisdiction's existing rules and practice.

See EY Global Tax Alert, *OECD/G20 Inclusive Framework releases document on safe harbors and penalty relief under Pillar Two GloBE rules*, dated 21 December 2022.

OECD releases consultation document on Pillar Two GloBE Information Return

On 20 December 2022, the OECD released a consultation document on the development of a standardized GloBE information return as part of the Implementation Framework of Pillar Two. The development of a standardized GloBE information return is aimed at facilitating compliance with and administration of the GloBE rules.

The document is an initial draft that does not include all elements of what is expected to be part of a GloBE information return. For example, the document, for now, does not address how available safe harbors will impact the information which will be required. The document, in particular, provides a template with the data points that MNEs need to include for a full computation of their tax liability for Pillar Two purposes according to the GloBE Model Rules as published in December 2021, as well as explanatory guidance.

Stakeholders are invited to submit written comments by 3 February 2023.

See EY Global Tax Alert, *OECD releases consultation document on Pillar Two GloBE Information Return*, dated 21 December 2022.

OECD releases consultation document on tax certainty for Pillar Two

On 20 December 2022, the OECD released a consultation document seeking input from stakeholders on mechanisms to ensure tax certainty under the GloBE rules. The consultation document covers mechanisms to ensure tax certainty can be divided into two groups: (i) dispute prevention mechanisms; and (ii) dispute resolution mechanisms.

Dispute prevention mechanisms aim to ensure a common interpretation or application of rules among tax administrations and taxpayers and include the use of model rules, commentary, and a multilateral review process with respect to the qualified status of the rules implemented by jurisdictions. These mechanisms are already set in motion by the OECD and considered a priority. Other options include the use of common risk assessment and coordinated compliance processes, as well as the use of binding certainty mechanisms such as Advance Pricing Arrangements (APAs).

Dispute resolution mechanisms are aimed at resolving differences in the interpretation or application of the GloBE rules that may arise between two or more jurisdictions. Options discussed in the consultation document include the development of a multilateral convention, the use of competent authority agreements under the Convention on Mutual Administrative Assistance in Tax Matters (MAAC), the reliance on existing tax treaties, and the creation of a dispute resolution provision in domestic law.

Stakeholders are invited to submit written comments by 3 February 2023.

See EY Global Tax Alert, *OECD releases consultation document on tax certainty for the Pillar Two GloBE rules*, dated 22 December 2022.

OECD releases public consultation on Pillar One Amount A and Digital Services Taxes

On 20 December 2022, the OECD released a consultation document on the Multilateral Convention (MLC) provisions on digital services taxes (DSTs) and other relevant similar measures as part of the BEPS 2.0 project. The consultation document is intended to illustrate the structure and operation of the provisions on the standstill and withdrawal commitment for DSTs and other measures but does not reflect the final views of the Inclusive Framework on the subject.

The consultation document covers: (i) draft MLC provisions on DSTs and similar measures; (ii) withdrawal of certain existing DSTs and other measures that are to be listed in the MLC; and (iii) a mechanism to eliminate Amount A allocations if the commitment is breached.

With the standstill agreement in place until the end of 2023 and some countries, regardless of this agreement introducing certain forms of digital levies, the delineation of DSTs and similar measures will determine what types of measures will have to be withdrawn and cannot be introduced going forward if an agreement on Pillar One is reached. Besides that, it will also provide guidance to governments wishing to introduce digital measures not captured by the Pillar One standstill and withdrawal measures.

Written comments on the document are requested by 20 January 2023.

See EY Global Tax Alert, *OECD releases public consultation document on Pillar One Amount A and Digital Services Taxes*, dated 23 December 2022.

ATAF

ATAF releases draft legislation on Domestic Minimum Top-up Tax

In December 2022, the African Tax Administration Forum (ATAF) released a draft legislation model for a Domestic Minimum Top-up Tax (DMTT). The draft legislation is generally aligned with the GloBE Rules. However, the proposed DMTT rules do not consider controlled foreign company (CFC) taxes as Covered Taxes. Alternatively, the document indicates that countries may consider CFC taxes as Covered Taxes but if they wish to do so, they should contact the ATAF Secretariat for advice, as it requires a number of rule changes and additional definitions.

IASB

IASB releases exposure draft on amendments to IAS 12 due to upcoming Pillar Two legislation

On 9 January 2023, the International Accounting Standards Board (IASB) issued an Exposure Draft for proposed amendments to IAS 12 (Income Taxes) to take account of the Pillar Two Model Rules. The proposed amendments would introduce:

a. A temporary exception to the accounting for deferred taxes arising from the implementation of the Pillar Two model rules in domestic legislation

b. Targeted disclosure requirements

Based on this document, the disclosures would include:

1. In periods in which Pillar Two legislation is enacted or substantively enacted and in effect:
   a. A disclosure that the exception for accounting for deferred taxes has been applied.
   b. The amount of current tax expense (income) that is related to Pillar Two income taxes.
2. In periods in which Pillar Two legislation is enacted or substantively enacted, but not yet in effect (pre-effective period):
   a. Information about legislation enacted or substantively enacted in jurisdictions in which the entity operates.
   b. The jurisdictions in which the average effective tax rate (ETR) for the current period, calculated in accordance with the IAS 12 principles, is below 15%. The entity shall also disclose the tax expense (income) and accounting profit for these jurisdictions in aggregate, as well as the resulting weighted average effective tax rate.
   c. Whether assessments made in preparing to comply with Pillar Two legislation and the application of proposed requirement (b) above indicates that there are jurisdictions with an ETR below 15% that might not be exposed to Pillar Two income taxes and/or jurisdictions with an ETR in excess of 15% that might be exposed to Pillar Two income taxes.

The proposals are open for consultation until 10 March 2023 and the IASB expects to finalize any amendments in the second quarter of 2023. When the IASB adopts the amendments, these amendments apply immediately and retrospectively in accordance with IAS 8 and the pre-effective period disclosure requirements apply for annual reporting periods beginning on or after 1 January 2023.

Country developments

Indonesia announces implementation of Pillar One and Pillar Two

On 20 December 2022, Indonesia released regulation PP 55/2022 governing several tax provisions. Among other items, this regulation expresses Indonesia's intention to implement Pillar One and/or Pillar Two. The supporting materials of the regulation indicate the implementation of these rules in 2023. However, neither the regulation nor the materials indicate whether both rules are going to be implemented as a package.

According to the regulation, more details will be released by way of a Ministerial Regulation in the following months.

Japan announces implementation of Pillar Two

On 16 December 2022, Japan released the 2023 tax reform. Among other items, the tax reform includes a proposal to introduce the Income Inclusion Rule (IIR) for fiscal years beginning on 1 April 2024 or after. The Under-taxed Profits Rule (UTPR) and the QDMTT, are being considered for legislation in the 2024 tax reform at the earliest.

According to Japan, opinions, and feedback from the international community on Pillar Two will play a major role in any future deliberations.

South Korea implements Pillar Two into domestic law

On 31 December 2022, Korea enacted new global minimum tax rules to align with the OECD BEPS 2.0 Pillar Two after it was passed by Korea's National Assembly on 23 December 2022. The legislation includes an IIR as well as UTPR. The proposed legislation was passed without change from the proposal in July 2023. Transitional Safe Harbors, as described in the OECD document released in December 2022 are not part of this legislation. In the following months, it is expected further legislation will provide more details and possibly add safe harbors.

Both rules are effective from 1 January 2024.

See EY Global Tax Alert, *Korea enacts new global minimum tax rules to align with OECD BEPS 2.0 Pillar Two*, dated 11 January 2023.

BEPS and other developments

OECD

New peer review results under BEPS Action 5

On 5 January 2023, the OECD released an update on the results of the peer reviews of jurisdictions' domestic laws under Action 5 (harmful tax practices) of the OECD/G20 BEPS Project. The updated results cover new decisions on nine tax regimes. According to the press release, the total number of tax regimes that have been reviewed, or are under review, is close to 320. The reviews were undertaken by the Forum on Harmful Tax Practices (FHTP).

The results show that two regimes were found to be not harmful (Cabo Verde and Hong Kong (China)), two regimes of Armenia are now in the process of being amended, and two regimes have been amended to be in line with the standard and are now not harmful (amended) (Jamaica and North Macedonia). Furthermore, two regimes were abolished (Honduras and Pakistan), and one regime of Albania is potentially harmful, for which the FHTP will assess at its next meeting if this regime is actually harmful.

Additionally, the Inclusive Framework concluded its second annual monitoring process for the effectiveness of the substantial activities requirements in previously identified no or only nominal tax jurisdictions. Recommendations for substantial improvement were made for four jurisdictions (Anguilla, the Bahamas, Barbados and the Turks and Caicos Islands), and areas for focused monitoring were identified for another four jurisdictions (Bahrain, Bermuda, the British Virgin Islands, and the Cayman Islands). No issues were identified for Guernsey, the Isle of Man, Jersey, and the United Arab Emirates.

OECD updates list of Multilateral Competent Authority Agreement on the exchange of Country-by-Country reports

On 23 December 2022, the OECD updated the list of signatories of the Multilateral Competent Authority Agreement on the exchange of Country-by-Country reports (CbC MCAA). According to this latest update, Thailand signed the CbC MCAA on 9 December 2022. The total number of jurisdictions that have signed the CbC MCAA is now 95.

Switzerland makes a notification to the OECD for purposes of the MLI

On 16 December 2022, Switzerland made a notification to the OECD in relation to the Multilateral Instrument (MLI). This notification relates to the completion of internal procedures for purposes of the entry into effect of the Covered Tax Agreement (CTA) with Iceland. This notification is required due to the MLI position of Switzerland which links the entry into effect of the MLI Provisions for a CTA to the notification of completion of internal procedures with respect to the relevant CTA.

Country developments

Argentina introduces new mandatory disclosure regime

On 27 December 2022, the Argentine Tax Authority (AFIP) has established a new informative regime, known as RICOI (in Spanish "Régimen de Información Complementario de Operaciones Internacionales"), for certain international transactions. The RICOI replaces the previously mandatory reporting regime for domestic and international arrangements and applies to transactions with related parties or parties in non-cooperating or low/no-tax jurisdictions.

Micro-, Small-, or Medium-sized companies as classified on AFIP's website are exempt from this requirement. International transactions that must be reported under the RICOI include those involving permanent establishments, cross-border non-taxation, transfer of benefits to other jurisdictions, exclusion from Common Reporting Standard or Foreign Account Tax Compliance Act reporting, business restructurings, and international leasing treated as financial loans. The RICOI must be filed up to the due date for filing the Income Tax return for the fiscal year to which the reportable transaction corresponds.

See EY Global Tax Alert, *Argentina implements new mandatory disclosure regime for international transactions*, dated 4 January 2023.

Brazil adopts the arm's-length principle

On 29 December 2022, Brazil published Provisional Measure (PM) 1152 whereby it substantially revises Brazil's transfer pricing (TP) rules for transactions between related parties, bringing them in line with the OECD Guidelines. The main changes include the adoption of the arm's-length principle, the introduction of several new methods for determining the most suitable method for an operation, and the introduction of corresponding adjustments and secondary adjustments. The PM also covers specific rules for commodities, intangibles, intragroup services, cost contribution arrangements, business restructurings, financial transactions, and APAs.

The PM will take effect on 1 January 2024, but taxpayers can choose to apply it starting on 1 January 2023. The PM awaits to be regulated by the Brazilian Federal Revenue Service and must be voted on by the National Congress and signed by the President to become valid.

See EY Global Tax Alert, *Brazilian Government publishes Provisional Measure adopting arm's-length principle*, dated 30 December 2022.

French Minister of Finance issues Decree providing details on procedural rules under DAC7

On 28 December 2022, France's Minister of Finance issued a Decree (No. 2022-1661) in the *Official Journal*, which provides specifics on the procedures outlined in DAC7 (reporting obligation for digital platforms).

As part of the Decree, a new section is added to the General Tax Code, stating that platform operators or designated third parties must file electronically the declaration as outlined in the General Tax Code. Additionally, if a platform operator chooses to meet their reporting obligations in France, they must notify the relevant authorities of any other European Union (EU) Member States where they will also be reporting.

The declaration in question should include information on the platform operator, such as their corporate name, registered office, tax identification number, and trade name, as well as information on the seller or service provider, such as their name, date of birth, place of residence, tax identification number, and Value Added Tax number.

The Decree went into effect on 1 January 2023.

Latvia updates list of low-tax jurisdictions

On 23 December 2022, Latvia published in the *Official Gazette* an updated list of non-cooperative states and territories in response to the latest update (October 2022) of the EU list of non-cooperative jurisdiction for tax purposes. In this update, Latvia added to the list Anguilla, Bahamas and Turks and Caicos Islands. Hence, the updated list includes the following jurisdictions: American Samoa, Anguilla, Bahamas, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands and Vanuatu.

The updated list will enter into force on 1 January 2023.

Malaysia releases guidelines on tax treatment related to income received from abroad

On 29 December 2022, the Inland Revenue Board (IRB) in Malaysia issued amended guidelines on the tax treatment of foreign-sourced income received in Malaysia.

Consistent with requirements set out under the previous guidelines, foreign-sourced dividend income received by companies in Malaysia, limited liability partnerships (LLPs) and individuals of a partnership in Malaysia are tax-exempt if it had been subject to foreign tax and the headline tax rate in the source country was at least 15%. In addition, the amended guidelines introduce retrospective economic substance requirements from 1 January 2022 for resident companies, LLPs, and individuals of a partnership in Malaysia to qualify for the dividend tax exemption.

To meet these requirements, a resident company, LLP, or individual of a partnership in Malaysia must have an adequate number of qualified employees and incur an adequate amount of operating expenses in Malaysia for the relevant economic activities. When determining whether a company meets the economic substance requirement, the IRB will consider various factors, including the nature of the relevant activities, the type of employees and the adequacy of office premises.

The Netherlands updates list of low-tax jurisdictions

On 27 December 2022, the Netherlands published in the *Official Gazette* Decree No. 33377 to implement a number of tax measures. Among other items, the Decree updated the list of low-tax jurisdictions for purposes of the application of the conditional withholding tax on interest and royalty payments to a related party located in such a listed jurisdiction. The updated list includes jurisdictions that have a corporate income tax rate lower than 9% (i.e., Anguilla, Bahamas, Bahrain, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man, Jersey, Turkmenistan, Turks and Caicos Islands, Vanuatu, and the United Arab Emirates). Also, the list contains the jurisdictions that are included on the EU list for non-cooperative jurisdictions (i.e., American Samoa, Anguilla, Bahamas, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands and Vanuatu).

The Decree became effective on 1 January 2023.

Slovak Republic introduces amendments implementing interest limitation deduction of Article 4 ATAD

On 6 December 2022, the national council of the Slovak Republic issued a bill introducing amendments in the *Income Tax Act*. The changes are introduced with the aim to implement the interest limitation deduction provided under Article 4 of the EU Anti-Tax Avoidance Directive (ATAD) following BEPS Action 4.

In line with Article 4 of the ATAD, the bill uses taxable profit before interest, tax, depreciation, and amortization (tax EBITDA) instead of the specific EBITDA used by currently applicable interest limitation rules. It also states that the limitation applies to net interest tax expense exceeding 30% of the tax EBITDA applicable to both internal and external debt. The exceeding amount can be carried forward for five tax periods. In addition, the bill forecasts a de-minimis rule of €3 million and an exception for banks and financial institutions and entities with individual related persons. Finally, the tested interest in contrast to currently applicable limitation should also include that on bonds, or capitalized interest, and the concept of interest is expanded including interest equivalent payments as well.

The new legislation will not result in the abolition of the current interest limitation rules (set at 25% of the specific EBITDA testing gross related party interest expense with no carryover), but the applicability of the "new" limitation rules based on Article 4 of the ATAD is examined as a matter of priority in determining the tax base.

The amendments will enter into force on 1 January 2024.

Spain implements EU Country-by-Country Reporting (CbCR) Directive applicable as of 22 June 2024

On 22 December 2022, the Spanish Government published in its *Official Gazette* legislation to implement the EU Public CbCR Directive.

In general, the Spanish Law has adhered to the general rules in the Directive. The Spanish legislation makes use of the option granted by the Directive to the EU Member States to allow the deferral of sensitive information where their public disclosure would be seriously prejudicial to the commercial position of the MNE group to which the information relates, providing for a deferral period of five years. Any omission shall be clearly indicated and duly explained in the report.

In addition, the provision in the Spanish legislation for the publication of the report is stricter in terms of deadlines than what is outlined in the EU Directive. The time frame for publication is shortened from a 12-month period to a 6-month period after the close of the fiscal year. The rules will enter into force for the year starting on or after 22 June 2024.

See EY Global Tax Alert, *Spain implements EU Country-by-Country Reporting Directive applicable as of 22 June 2024*, dated 22 December 2022.

United Kingdom releases draft secondary legislation published for consultation on transfer pricing record-keeping

On 21 December 2022, His Majesty's Revenue and Customs (HMRC), released the draft Transfer Pricing Records Regulations 2023, The regulations require MNEs to keep and preserve specified transfer pricing (TP) records, including a master file and local file, and outline the form and manner in which these records must be kept. These regulations will apply to MNEs operating in the United Kingdom with turnover of more than €750 million for accounting periods beginning on or after 1 April 2023.

HMRC also has the power to introduce a requirement for MNEs to produce a summary audit trail covering the steps taken in completing the local file, but this will be the subject of a separate consultation and will not come into force on 1 April 2023. The draft Transfer Pricing Records Regulations 2023 is currently open for consultation until 31 January 2023.

This secondary legislation cannot come into effect until the primary legislation that provides the powers of these Regulations to be enacted, has itself been enacted. The draft primary legislation was published back in November and will form part of this year's Finance Act, which likely won't receive Royal Assent until sometime in the summer (albeit the changes to the TP legislation will be effective for accounting periods beginning on or after 1 April 2023).

Uruguay updates list of low- or no-tax jurisdictions

On 28 December 2022, Uruguay published resolution No. 2,470/022 updating the domestic list of low- or no-tax jurisdictions. Transactions with any entity on the list are deemed to be controlled transactions for TP purposes or subject to increased withholding tax. In this update, the list removes Jamaica, Maldives, and Oman. The updated list comprises the following jurisdictions:

> Angola, Ascension Island, Christmas Island, Cocos Island (Keeling Island), Djibouti, Falkland Islands, Fiji Islands, French Polynesia, Guam, Guyana, Honduras, Jordan, Kiribati, Labuan, Liberia, Niue, Norfolk Island, Pacific Islands, Palau Islands, Pitcairn Island, Puerto Rico, Saint Helena Island, Saint Martin, Saint Pierre and Miquelon, Solomon Islands, Svalbard, Swaziland, Tokelau, Tonga, Tristan da Cunha, Tuvalu, US Virgin Islands, and Yemen.

The resolution is effective from 1 January 2023.

See EY Global Tax Alert, *Uruguay updates list of countries or jurisdictions deemed low or no taxation*, dated 4 January 2023.

US releases interim guidance on the 15% corporate alternative minimum tax

On 27 December 2022, the US Treasury Department and Internal Revenue Service (IRS) released (Notice 2023-07) providing interim guidance on the application of the corporate alternative minimum tax (CAMT). Taxpayers may rely on the interim guidance pending the release of proposed regulations. An "applicable corporation" is liable for the CAMT to the extent that its "tentative minimum tax" exceeds its regular US federal income tax liability plus its liability for the base erosion anti-abuse tax (BEAT). An applicable corporation's tentative minimum tax is a 15% minimum tax on its "adjusted financial statement income" (AFSI) to the extent it exceeds the CAMT foreign tax credit for the tax year. The CAMT is effective for tax years beginning after 31 December 2022.

The Notice provides taxpayers certain guidance they may follow in determining their AFSI for purposes of determining applicable corporation status and calculating the CAMT before the issuance of proposed regulations.

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