Fiscal Countdown

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Edito

The Fiscal Countdown, a monthly summary of international tax news, provides you with regular insights into the introduction of the OECD's BEPS initiative and the ongoing international tax reforms.

This fifty-seventh edition deals with the new measures published in January 2021 by the OECD, the EU and in 23 countries: Argentina, Australia, Belgium, Czech Republic, Denmark, France, Germany, Hungary, Ireland, Italy, Jordania, Kenya, Korea, Luxembourg, Netherlands, Oman, Peru, Philippines, Poland, Spain, UK, USA, Zambia.

Frédéric Barat, Avocat Associé

Frédéric Lubczinski, Avocat Senior Manager

OECD

On 14-15 January 2021, the OECD organized a public consultation meeting to provide stakeholders the opportunity to discuss the feedback on the OECD Pillar One and Pillar Two Blueprints that the OECD/G20 Inclusive Framework on BEPS published on 12 October 2020. While that meeting was ongoing, the European Commission (the Commission) presented its roadmap for the development of a European Union (EU) digital levy and initiated public consultations. Both consultation processes have their own dynamics. The public consultation meeting hosted by the OECD followed a written consultation that attracted thousands of pages of comments. The public consultation meeting brought out the main concerns that were shared by a broad audience. One major concern relates to the connecting of two different systems: the existing international tax rules and the new overlay of the OECD's Pillar One of the Unified Approach. This approach is designed to result in a partial reallocation of taxing rights to the benefit of market jurisdictions. However, the issue to address is how can this be ensured without creating double taxation. Another concern was related to the complexity of the proposed rules where commentators called for a simple system. Again, the issue to address is can simplicity be ensured while taking account of the diversity in business models in the industries that will affected by these new rules.

Barbados deposited its instrument of ratification of the Multilateral Convention (MLI) with the OECD. Barbados removed the tax treaty with the Caribbean Community (CARICOM) and Ghana from its list of Covered Tax Agreements (CTAs) and added a reservation on Article 16(5)(c) (Mutual Agreement Procedure). The MLI will enter into force for Barbados on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by Barbados of its instrument of ratification, i.e., 1 April 2021.

Germany and Pakistan deposited their respective instrument of ratification of the MLI with the OECD. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, Germany removed 22 tax treaties from its list of CTAs and added the tax treaty with Greece. Pakistan added three tax treaties (Brunei Darussalam, Bulgaria and Hong Kong) to its list of CTAs and changed its preliminary positions by removing the reservations on:

• Article 4 (dual resident entities)

• Article 5 (elimination of double taxation)

• The specific anti- abuse rules of Articles 8-11

• Articles 12-15 regarding permanent establishment

• Article 35 (entry into effect)

Further, Pakistan chose to apply a simplified limitation on benefits (LOB) provision pursuant to paragraph 6 of Article 7 (prevention of treaty abuse). 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 by their instrument of ratification, i.e., 1 April 2021.

Switzerland notified that it has completed its internal procedures for the entry into effect of the MLI provisions with respect to the CTAs with Lithuania and the Czech Republic, which is required when a signatory

has made the reservation in Article 35(7)(b) of the MLI. The MLI will have effect on the notified CTAs with respect to taxes withheld at source on 1 January 2022 and with respect to all other taxes on 17 July 2021.

Cameroon ratified the OECD MLI by way of Presidential Decree No. 2020/798. Cameroon submitted its provisional MLI positions at the time of signature, listing its reservations and notifications as well as the five CTAs it wishes to be covered by the MLI. The instrument of ratification still needs to be deposited with the OECD before the MLI will enter into force with respect to its CTAs. A definitive list of reservations and notifications will also need to be provided upon the depositing the instrument of ratification. The Platform for Collaboration on Tax (PCT)—a joint initiative of IMF, OECD, UN and the World Bank—has released the final version of the Practical Toolkit to Support the Successful Implementation by Developing Countries of Effective Transfer Pricing Documentation Requirements.

The PCT's new toolkit serves as a sourcebook of guidance on implementing transfer pricing documentation requirements for developing countries. The toolkit compiles essential information on transfer pricing documentation and analyses policy choices and legislative options. Readers can find sample legislation as well as examples and practices from over 30 countries and additional approaches to transfer pricing documentation in the toolkit.

European union

The Commission published a roadmap including a public consultation for the introduction of a digital levy on 14 January 2021. In July 2020, EU leaders requested the Commission to propose such levy as a new EU-own resource to support the EU's borrowing and repayment capacity in the context of the EU's recovery package, the Next Generation EU. The roadmap informs citizens and stakeholders about the Commission's plans and invites feedback on the intended initiative. The first feedback period for the initiative ends on 11 February 2021. The roadmap highlights that the EU is still committed to reaching a global agreement, and that the roadmap and consultation should be seen as supplementing ongoing work at the G20 and OECD level on a reform of the international corporate tax framework.

On 18 January 2021, the Commission also launched the more extensive public consultation process on the introduction of a digital levy. This consultation runs until 12 April and allows the public to provide more extensive feedback through a questionnaire. The Commission expects to put forth a proposal for a Directive during the first half of 2021.

As of 1 January 2021, Portugal assumed the rotating six-month Presidency of the Council of the EU following the German Presidency. Portugal will hold the Presidency of the Council of the EU until 30 July 2021. Recently, the Portuguese Presidency of the Council of the EU published its Programme of Work (the program), including the focus areas for the six-month period of its Presidency. In the tax area, the program indicates that the main priorities of the Portuguese Presidency during its term will be among others:

- Addressing the challenges of European taxation, including the model for taxation of the digital economy, under the principles of fairness and tax efficiency
- Strengthening of good governance mechanisms and global tax transparency
- Stepping up the fight against tax fraud, evasion and avoidance through non-cooperative jurisdiction

- Aligning tax policy with the objective of decarbonization.

In addition, the Portuguese Presidency expects progress on the discussion on tax reporting as the program states that "the Presidency will seek to create the conditions for reaching a political agreement on the revision of the rules on disclosure of information concerning tax on revenues for certain companies and branches."

Argentina

The Argentinian Tax Authorities (AFIP) launched on their website a new regime (Regimen IPF) to ensure compliance with the new Mandatory Disclosure Regime (MDR).

Argentina's Executive Power published, in the Official Gazette, Decree 1034/2020 (Decree 1034) to implement the provisions of the promotional tax system applicable to the knowledge-based economy.

Australia

The Australian Taxation Office (ATO) released the final version of Schedule 3 to its Practical Compliance Guideline PCG 2017/4 in relation to outbound interest-free loans between related parties.

Belgium

Belgium published in the Official Gazette a law containing urgent tax and anti-fraud measures. In particular, the law introduces:

- technical changes in the wording of the applicable provisions of the tax code related to the Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA)-based interest deduction limitation rule that may have given rise to interpretation issues; and
- some defensive measures against jurisdictions listed on the EU list of non-cooperative jurisdictions.

With respect to the latter, changes are made to the so-called "Cayman tax" (look-through tax), the controlled foreign company (CFC) regulation, the dividends received deduction and the reporting requirements for payments to "tax havens." The Law entered into force on 31 December 2020 and is applicable to taxable periods closing on 31 December 2020 and onwards.

Czech Republic

The Czech General Financial Directorate published a document providing answers to selected questions on interpretation and application of the MDR as implemented into the Czech law.

Denmark

the Danish Parliament enacted Bill L 69 C to amend Denmark's application of the MLI regarding the reservation on arbitration panels under Part VI of the MLI, to which Australia and Canada objected in October 2020. The Bill amends the reservation Denmark made under paragraph 2(a) of Article 28 (reservations) of the MLI by deleting paragraph 2 of Denmark's reservation, which states that arbitration will apply to a tax case only insofar as the parties agree that the chair of the arbitration panel will be the judge and that Denmark is allowed to publish the abstracts from the decision made by the arbitration panel.

France

The French Tax Authorities published guidelines on the MLI. The guidelines present the general principles of application of the MLI (presentation, articulation with tax treaties and rules regarding entry into force), as well as the options chosen by France and their effects on CTAs. The guidelines are available in French here.

The French Tax Authorities also published the French specifications for the reporting of cross-border schemes under DAC6 and the

MDR. The specifications describe the information to be collected and the specific XML forma to be used for the creation and filing of reports relating to the reportable arrangements, with a view to their submission to the tax authorities. The filing procedure is also described, establishing a transitional filing procedure between January 2021 and the end of April 2021, until the platform is finalized in May 20201 and the established procedures are available.

The 2021 French Social Security Finance and Income Tax Bills have recently been passed into law by the end of December 2020 and introduce some changes to the income tax and social security provisions in France. The changes will be effective from January 1, 2021.

The French Administrative Supreme Court (Supreme Court) ruled in case N° 420174 (pdf) that an Irish resident entity performing digital marketing activities has a PE in France, overturning the decision from a lower court. In the case at hand, a French subsidiary of the Irish entity habitually had authority to decide on client transactions that were automatically confirmed by the Irish entity. According to the French tax authorities, the French employees acted as employees of the Irish entity and clients did not distinguish between the employees from the French or Irish entity. Hence, although the French entity did not formally have the authority to sign contracts on behalf of the Irish entity, the decision to conclude a contract with a client, as well as all related tasks, were actually made and performed by the employees of the French entity. In addition, as consideration for the services, the French entity was remunerated on a cost plus 8% basis. According to the French tax authorities, the Irish entity had a fixed place of business within the meaning of the Irish-French Double Tax Treaty (the DTT) in the premises of its French subsidiary. The Supreme Court ruled that the French entity is a dependent agent PE (DAPE) of the Irish entity since the French entity habitually makes all preparations and decisions to enter into contracts with clients on behalf of the Irish entity. Also, the Supreme Court concluded the Irish entity has a fixed establishment for value added tax (VAT) purposes in France. The wording of the DAPE provisions in the tax treaty between Ireland and France which dates back to 1968 is in fact similar to the one in the OECD Model Tax Convention (OECD MTC) 2010. Therefore, the outcome of this case is a very important development in the interpretation and application of tax treaties that do not follow the language from the MLI or the OECD MTC 2017.

Germany

German Government issues draft law on modernization of withholding tax relief and various additional topics.

Hungary

Hungary published the Decree 19/2020 (XII.30.) in the Official Journal providing a list of non-cooperative jurisdictions for tax purposes. The list contains the following jurisdictions: American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands and Vanuatu. The list is applicable from 1 January 2021 and is based on the EU's list. Further, from 1 January 2021 onwards, certain exemptions cannot be applied under the CFC rules if the concerned entity/permanent establishment is resident in a listed non-cooperative jurisdiction.

Ireland

Ireland publishes updated Corporation Tax Roadmap. The Irish Revenue Commissioners published eBrief 235/2020 and eBrief 238/2020, which focus on EU

MDR. The Department of Finance published its Feedback Statement on the implementation of the EU Anti-Tax Avoidance Directive's (ATAD) Interest Limitation Rules (ILR). The Feedback Statement builds on the November 2018 public consultation on the implementation of the ATAD's ILR.

Italy

Italian Tax Authorities issue final guidelines on Digital Services Tax.

Jordania

Jordan tightens corporate income tax filing process as of 2021.

Kenya

The Kenyan President assented to the Tax Law Amendment Act (No. 2) of 2020 (the Act). The Act amends the Income Tax Act and the Value Added Tax (VAT) Act of Kenya. The key amendments made through the Act include the reinstatement of: (i) the resident corporate income tax rate to 30% from 25%; and (ii) the highest individual income tax band to 30% from the 25%. Additionally, the VAT rate was reinstated to 16% from 14% through a legal notice in accordance with the law. These rate changes became effective on 1 January 2021.

Korea

Korea enacts 2021 tax reform bill. It includes the following changes:

- Extension of the relief period for net operating losses (NOLs): The 2021 Tax Reform extends the NOL carryforward period from 10 years to 15 years. This rule applies to NOLs reported on or after 1 January 2021.
- Changes in foreign tax credit regime : The 2021 Tax Reform repeals the deduction method in the foreign tax credit regime. However, foreign tax payments may still be claimed as a tax deduction (the deduction method) if a foreign tax credit is not claimed.2 In addition, the carryforward period for excess foreign tax credits is extended from 5 years to 10 years.
- Reduction of securities transaction tax (STT): Reduced STT rates apply to securities transactions occurring on or after 1 January 2021.

Luxembourg

The Luxembourg Tax Authorities (LTA) published a Circular clarifying certain technical aspects of the interest limitation rules applicable since 1st January 2019 in Luxembourg further to the implementation of the EU ATAD into Luxembourg domestic legislation at the end of 2018.

Netherlands

The Netherlands published in the Official Gazette the document no. 64029 providing an updated list of low-tax jurisdictions for 2021. The list includes the following: (i) countries that have a statutory corporate income tax rate of less than 9%, i.e., Anguilla, the 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; and (ii) countries that are on the EU's list of non-cooperative jurisdictions. The Dutch list of low-tax jurisdictions is relevant for the Dutch CFC rules, the conditional withholding tax on interest and royalty payments, and eligibility for obtaining advance certainty with the Dutch tax authorities.

The Netherlands also published in the Official Gazette regulation no. 63397 to implement regulations that provide additional guidance for the application of the conditional withholding tax on interest and royalties from 2021 onwards. From 1 January 2021 onwards, a conditional

withholding tax on interest and royalty payments is applicable to related companies established in jurisdictions that are included on the Dutch list of low-tax jurisdictions and in abusive situations. This new withholding tax was already enacted late 2019.The new rules are applicable from 1 January 2021.

Dutch Government releases decree on fixed establishments for VAT purposes.

Oman

The Oman Tax Authorities, in light of the circumstances related to the pandemic, extended the deadline to submit the County-by-Country (CbC) reporting notification for entities whose financial years end on 31 December 2020. The new deadline has been extended up to 30 April 2021.

Peru

Peru-Japan income tax treaty will apply beginning 1 January 2022.

In Law 31110 (published 31 December 2020, in the Official Gazette), Peru enacted a new preferential tax regime for agribusiness. The regime, which is effective as of 1 January 2021, replaces the prior preferential tax regime for agribusiness (Law 27360 and Urgency Decree 043-2019) repealed on 6 December 2020.

Philippines

The Bureau of Internal Revenue of Philippines published Revenue Regulation 34-2020(the regulation) to streamline the guidelines and procedures for the submission of BIR Form No. 1709 (RPT Form), TP Documentation and other supporting documents by providing safe harbors and materiality thresholds. The regulations provide a list of taxpayers which are required to submit a ‘’Related Party transaction’’ (RPT) form along with their annual tax returns to verify that taxpayers are reporting their transactions at arm’s length. Further, the regulations provide that taxpayers required to submit the RPT form, are also required to prepare TP documentation and submit the same within 30-calendar days upon receipt of a request by the BIR if any of the following thresholds are met:

- the annual gross revenue is greater than PHP150 million (approximately US$3.1 million) and the total amount of related party transactions is greater than PHP90 million (approximately US$1.8 million); or
- the related party transactions involving sale of tangible goods exceeds PHP60 million (approximately US$1.2 million) and/or other related party transactions other than tangible goods is greater than PHP15 million (approximately US$300,000); or
- if TP documentation is required to be prepared during the immediately preceding taxable period for exceeding either (i) or (ii) above.

Poland

Poland introduces new obligation to publish reports on tax strategy.

Spain

Spain delays first reporting of Digital Services Tax and Financial Transaction Tax.

The Spanish Parliament approved final legislation to implement the EU Council Directive 2018/822 (DAC6).

UK

UK Government announces approach to UK MDR post UK-EU Brexit Agreement.

USA

On 6 January 2021, the United States (US) Trade Representative (USTR) released the findings in its investigations of the Digital

Services Tax (DST) regimes adopted by India, Italy, and Turkey, initiated under Section 301 of the Trade Act of 1974 (Section 301). The USTR determined each DST to be discriminatory against US companies, inconsistent with prevailing principles of international taxation, and burdensome or restrictive to US commerce.1 While the USTR is authorized to take action under Section 301 as a result of the findings, the USTR noted in the announcement that no specific actions in connection with the findings would be taken at this time.

On 7 January 2021, the USTR announced the suspension of punitive tariffs on certain French origin goods in relation to the Section 301 investigation of France's DST that were set to take effect on 6 January 2021.

Zambia

Zambian Government issues 2021 Tax Amendment Acts and Regulations.

Contacts

Frédéric Barat, Partner,
Mazars Société d'Avocats
frederic.barat@avocats-mazars.com

Frédéric Lubczinski, Senior Manager,
Mazars Société d'Avocats
frederic.lubczinski@avocats-mazars.com

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