



Fiscal Countdown

Newsletter n°65 – September 2021

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 sixty fifth edition deals with the new measures published in September 2021 by the OECD, the EU, and in 33 countries: Belgium, Brazil, China, Cyprus, Colombia, Dominican Republic, Finland, Germany, Greece, Guernsey, India, Ireland, Isle of Man, Israel, Italy, Jersey, Kenya, Korea, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Poland, Romania, Singapore, Spain, Switzerland, Thailand, UAE, and UK.

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OECD

Togo becomes member of the Inclusive Framework OECD/G20 on BEPS (Inclusive Framework) and joins the agreement on BEPS 2.0.

Barbados joins the agreement on BEPS 2.0.

Singapore updates its Multilateral instrument positions.

The OECD published updated transfer pricing (TP) country profiles reflecting the current TP legislation and practices of 20 jurisdictions. In this update, 3 new jurisdictions were added (Angola, Romania, Tunisia) and 17 jurisdictions were updated (Argentina, Australia, Colombia, Costa Rica, Czech Republic, Denmark, India, Japan, Netherlands, New Zealand, Nigeria, Norway, Russia, Slovak Republic, Spain, Switzerland, Turkey). The TP country profiles include information on the TP treatment of financial transactions and the application of the Authorized OECD Approach (AOA) to attribute profits to permanent establishments (PEs). Currently, the TP country profiles cover 60 jurisdictions and the OECD expects to conduct updates in batches during the second half of 2021 and the first half of 2022.

The OECD released the third edition of its annual Corporate Tax Statistics publication together with an updated database. This third edition compile new data items and statistics in various existing data sets held by the OECD, such as: corporate tax revenues, corporate effective tax rates, BEPS Action 13 implementation, and anonymized and aggregated statistics collected via CbC reports, among others. According to the OECD, evidence of continuing BEPS behaviors and a persistent downward trend in statutory corporate income tax rates reinforce the need to finalize agreement on the BEPS 2.0 project

and begin implementation of the new Pillar One and Pillar Two rules.

The OECD released the sixth batch of Stage 2 peer review reports relating to the outcome of the peer monitoring of the implementation of BEPS Action 14 (dispute resolution). The report covers Argentina, Chile, Colombia, Croatia, India, Latvia, Lithuania, and South Africa. As for the outcome of the peer review process, overall positive changes were found in all the assessed jurisdictions. However, several new issues were identified for India, in particular in relation to the implementation of Mutual Agreement Procedure (MAP) agreements. Chile addressed some of the identified deficiencies, whereas, Argentina and Croatia have addressed none of the identified deficiencies.

EU

On 10-11 September 2021, the Slovenian Presidency of the Council organized an informal meeting of Ministers for Economic and Financial Affairs. Part of the meeting was devoted to a discussion on the future of taxation and the fine print underneath July's agreement on BEPS 2.0 in advance of the forthcoming G20 meeting in October.

On September 9, 2021 (C-294-20) the Court of Justice of the European Union (CJEU) ruled that the Tax Authorities may reject the VAT refund of a taxable person not established in the territory of the country if the taxable person does not submit the documents justifying the request during the administrative proceeding, even if they are subsequently provided during the economic-administrative claim or court appeal proceedings. The case concerns a German entity, AUTO SERVICE LEASING GMBH, who filed requests in Spain for the refund of input VAT paid as a taxable person not established in Spain. The Spanish Tax Authorities rejected the request based on

grounds that they had issued two formal information requests to the company asking them to provide evidence concerning the right to obtain the refund. These requests were not answered by the taxpayer. The company appealed this rejection to the Central Economic-Administrative Court and the National Court, providing all the information requested by the Spanish Tax Authorities. However, both the Administrative Court and the National Court dismissed the case, stating that the relevant evidence had to be submitted to the competent administrative body. This statement suggests that the administrative claim procedure is not appropriate to review such evidence. The case was appealed to the Supreme Court who upheld the case and ordered the National Court to issue a resolution on the basis of the evidence provided in the economic-administrative claim. The National Court decided to raise a question to the CJEU to interpret the Eighth Council Directive 79/1072/EEC of 6 December 1979 regarding the refund procedure for taxable persons established in another EU Member State and on the determination of whether a court must examine documents submitted after the stipulated deadlines granted by the Tax Authorities in the administrative procedure by a non-established person in order to substantiate their right to a VAT refund. The ruling of the CJEU states it is not contrary to the VAT directive and principles of EU law to reject a request of a VAT refund of a taxable person who is not established in the territory of the country if all the documents and information required to evidence the person's entitlement to the VAT refund have not been submitted to the Tax Authorities in due term. This stands even if the taxable person submits such documents and information during the course of the economic-administrative claim or judicial appeal proceedings.

However, the European Court also states that it does not constitute an "abuse" of law for a taxable person who applies for a VAT refund to not provide the documents requested by the Tax Authorities during the administrative procedure, but to provide those during the appeal phase.

This is a significant judgement for Spanish case law which has traditionally accepted to analyze evidence not provided in the administrative procedure. As such, this ruling will have a considerable impact on the ongoing litigations on this topic.

On 16 September 2021, the CJEU issued its judgement on whether the Belgian excess profit rulings could qualify as State aid scheme or not. The Court of Justice sets aside the General Court's judgement of 14 February 2019 that had dismissed the "scheme" qualification and accordingly had annulled the European Commission's State aid decision of 11 January 2016. The case is now referred back to the General Court for a second review of the substance of the case, i.e., whether these rulings provided an unlawful selective (tax) advantage to their beneficiaries.

The General Court of the CJUE confirms that the aid granted by Austria to Austrian Airlines (Austrian Airlines) is compatible with the internal market (T-677/20). Such aid was granted in order to compensate for the damage resulting from the cancellation or rescheduling of its flights due to the covid-19 pandemic.

Belgium

In a recently published decision dd. 8 June 2021 of the Court of Appeal of Ghent relating to transfer pricing (nr. 2016/AR/455), the Court decided in favor of the taxpayer. The case originated from an audit initiated by the Special Investigation Squad (BBI/ISI) in 2009.

Considering transfer pricing cases in Belgium are scarce, it is interesting to see the Court's point of view on certain transfer pricing matters, in particular as judges in Belgium are not specialized in this area. Furthermore, the number of transfer pricing audits in Belgium has only increased in recent years, a trend that may be reflected in court cases going forward. On an international level, an increase in the number of court cases relating to transfer pricing can also be observed.

An important element from this decision concerns the legal discussion on the application of the appropriate version of the OECD Transfer Pricing Guidelines ("OECD TPG"). In the case at hand, the tax administration based certain argumentation on the 2017 OECD TPG. However, this version of the guidelines was not yet available in the relevant tax years under audit. Therefore, the Court correctly states that the 1995 OECD TPG should have been considered, and later versions of the OECD TPG should only be used to the extent that they relate to clarifications of these guidelines, and do not impact in any way, even implicitly, whatsoever the content thereof. It was decided by the Court that the tax administration should not have based its argumentation on newly introduced elements in the 2017 OECD TPG, in case DEMPE (Development, Enhancement, Maintenance, Protection and Exploitation relating to intangible assets) and ex-post price adjustments for hard-to-value intangibles. Reference is also made by the Court to the Transfer Pricing Circular Letter 2020/C/35 (25 February 2020) in which it is explicitly stated by the tax administration that the content is only applicable for transactions occurring as of 1 January 2018.

Furthermore, the decision of the Court highlights some other interesting elements.

- **Burden of proof:** As the tax administration based its argumentation on Article 26 of the 92 Income Tax Code (ITC), it must demonstrate the existence and the extent of an abnormal or benevolent advantage granted and it should do so based on a functional analysis and a comparability analysis to support its standpoint of what would be the arm's length pricing in comparable circumstances. In the case at hand, the Court decided that the tax administration did not provide sufficient proof to justify its position. The tax administration did not prove that the main functions were performed, or key risks were incurred by the Belgian entity, and no results have been presented of a comparability analysis of an arm's length pricing for the case at hand.
- **Importance of internal documents:** The lack of proof that was presented by the tax administration was countered by various documents of the taxpayer, such as intercompany agreements, intercompany invoicing, contracting of sub-contractors and board of directors' meetings. The Court ruled that the content of certain documents demonstrated that relevant functions were performed by the foreign entity. Therefore, the value of written documents should not be underestimated.
- **Rejection of tax losses:** The tax administration rejected the deduction of carried forward tax losses, by arguing that losses must have originated from the Belgian company being under-remunerated in view of its functionality. In the case at hand, the losses originated from a financial year after the period challenged by the tax administration as demonstrated by the taxpayer. In addition, the tax administration cannot

reject carried forward tax losses on the grounds of additional income that would have been earned at arm's length in previous tax years, as it must be assessed on a year-by-year basis, and therefore the Court rejected the position of the tax administration and labelled it as being arbitrary.

Brazil

Brazil increases tax on financial transactions.

Brazilian House of Deputies approved bill modifying the corporate income tax system as part of comprehensive tax reform. In particular, the CIT rate will plummet from 15% to 5% for FY 2022 and 2,5% for FY 2023. This decrease will be compensated with a rise of withholding taxes on dividends.

China

To further alleviate tax administrative burdens of enterprises engaging in cross-border business activities in Mainland China, on 26 July 2021, China's State Tax Administration (STA) issued STA PN [2021] No. 24 (STA PN 24) providing simplified application procedures for unilateral advance pricing arrangements (APA). STA PN 24 is effective from 1 September 2021. It is anticipated that the simplified procedures will enhance the efficiency of unilateral APA negotiations for qualifying enterprises and will likely reduce administrative costs of both taxpayers and the tax authorities.

Cyprus

Cyprus announces further extension of non-application of administrative fines for DAC6 submissions to 30 November 2021.

Colombia

On 14 September 2021, Colombia enacted Law 2155 (the Social Investment Act), which includes the 2021 tax reform, as well as rules to increase social expenditures, reduce

public expenditures and adjust the 2021 budget.

Dominican Republic

The tax authorities from the Dominican Republic requested public comments on the draft rules for CbCR. The rules would apply to multinational enterprises with consolidated annual revenue of DOP38.8 billion minimum (approximately US\$683 million). Ultimate parent entities should submit the report within 12 months following the end of the reporting fiscal year. The draft rules also include filing instructions and penalties for non-compliance. The consultation period ran until 7 September 2021.

Finland

The Finnish Ministry of Finance launched a public consultation to revise the TP adjustment provision in Finland's domestic tax law. The proposed rules intend to bring the TP adjustment provision in line with the OECD TP Guidelines as well as Article 9 of the OECD Model Tax Convention. The proposed rules would also allow tax authorities to delineate the actual underlying transaction and ignore the legal form in order to characterize intra-group transactions based on their economic substance. In addition, the new rules would allow tax authorities to disregard irrational transactions. The consultation period ran until 17 September 2021. The proposed regulations would apply from 1 January 2022.

Germany

The German Ministry of Finance (MoF) published a letter commenting on dispute settlement procedures under tax treaties, the EU Arbitration convention, and the EU Directive on Tax Dispute Resolution with respect to income or capital. The letter first describes procedural aspects that are

generally the same for all three dispute resolution procedures, however, existing regulations and long-standing procedural practice are now more restrictive to a certain extent (e.g., with regard to language, submission date, content, etc.). The letter further contains clarification on the relationship between the various dispute resolution procedures and domestic appeal proceedings as well as comments on the relationship between MAP and withholding tax refund procedures.

The German MoF published a joint statement by the competent authorities of Germany and the United States on the implementation of the spontaneous exchange of CbC reports for financial years starting in 2020.

The German MoF published a technical interpretation note on CbCR.

The MoF issued the Administrative Principles Transfer Pricing (AP TP). Administrative principles – although not binding for taxpayers and courts – serve as important guidance for the interpretation and illustration of tax laws and executive orders. The AP TP replaces several previously issued administrative principles and is the central reference for all administrative TP matters.

Greece

The Greek Ministry of Finance issued a statement about Greece being among the 130 countries and jurisdictions that joined the new Two-Pillar plan of the Inclusive Framework to reform international taxation rules (BEPS 2.0).

It is precised that Greece embraces is committed to make every effort to safeguard its taxing rights under the new tax architecture and strengthen the competitiveness of the Greek tax system and economy.

Guernsey

Guernsey introduces new compliance measures for the OECD's common reporting standard (CRS) and the US' Foreign Account Taxes Compliance Act (FATCA) reporting.

India

India published Circular No.16/2021 extending the timelines for electronic filing of various forms. Among other items, the CbC report notification (i.e., Form 3CEAC) may be filed on or before 31 December 2021 instead of 30 November 2021.

Ireland

The Irish Department of Finance released a public consultation on the new Two-Pillar plan of the Inclusive Framework to reform international taxation rules ("BEPS 2.0"). The consultation invited interested parties to make submissions on the BEPS 2.0 and US tax measures being proposed to ensure that Ireland's tax policy can continue to support economic growth and prosperity. In the consultation document, Ireland reiterated that it believes that it is in the interest of all countries to achieve an equitable, ambitious and sustainable agreement on the international tax architecture and noted that Ireland is committed to playing its part in reaching any agreement. The consultation concisely summarizes Ireland's position with regard to Pillar One and Pillar Two. Although fully supportive of the Pillar One proposal, with respect to Pillar Two, Ireland has expressed its broad support but not with regards the proposed global minimum effective tax rate of at least 15%.

Isle of Man

Isle of Man issued Practice Note 217/21 explaining the new tax registration requirement applicable for all Partnerships and Limited Liability Companies.

Israel

Israeli Tax Authority finalizes international tax reform package for further discussion and potential legislation.

Italy

In accordance with art. 1 (Section 1103) of the 2021 Budget Law (Law no. 178 dated 30 December 2020) and the Provvedimento no. 183994 dated 8 July 2021, new VAT rules on e-invoicing of cross-border transactions and pre-populated VAT ledgers and return will apply starting from 1 January 2022.

Jersey

The States Assembly of Jersey adopted the extension of the economic substance requirements to partnerships.

Kenya

High Court of Kenya declares that minimum tax is unconstitutional.

Korea

Korea's Ministry of Economy and Finance announced the 2021 tax reform proposals. Among other items, the proposals include a revision of the interest limitation rule. Currently, the interest limitation rules apply on the 30% of the tax-adjusted EBITDA with an ordering rule for the calculation of the non-deductible interest. If there are different interest rates, the interest deduction denial applies starting with the highest interest rate. The proposals introduce an additional ordering rule for the non-deductible interest:

- i) if the same interest rate is applied, the most recent borrowing date takes precedence; and
- ii) if the interest and borrowing date are the same, the non-deductible portion is split based on the ratio of the borrowed amounts.

Furthermore, the proposals introduce a new rule for interest deduction limitation. If the amount of tax-adjusted EBITDA is negative,

the deductible amount of interest is deemed to be nil. This rule will be effective for fiscal years beginning on or after 1 January 2022.

Luxembourg

The Luxembourg Tax Authorities published updated FAQs to clarify the interpretation of certain terms and definitions on CbCR.

The first judgement analyzing the compliance of the variable interest of a profit participating loan (PPL) with the arm's length principle was rendered, following an appeal for the reversal of a decision issued by the Luxembourg tax administration (case n°43264 dated 13 July 2021).

The Administrative Tribunal of Luxembourg confirmed that the interest rate of a PPL may be justified by a comparison with the arm's length interest accrued during the same period on a similar fixed interest loan. It also acknowledges that any value in the interest rate range determined by the economic analysis satisfies the arm's length principle.

Malaysia

The Malaysian Ministry of Finance issued its maiden Pre-Budget Statement (Statement) on 31 August 2021, ahead of the Government's 2022 federal budget announcement to take place on 29 October 2021.

Mexico

Mexico's 2022 economic Proposal focuses on increasing tax collection eliminating loopholes.

Morocco

A tax audit of Nestlé Morocco was carried out by the team of the National Audit Division (NAD), which reports directly to the head of the Moroccan General Tax Directorate. As a result, the NAD claims a billion dirhams (\$110 million) from the Swiss agribusiness group's subsidiary based on the rejection of its transfer pricing policies.

The transfer prices of transactions concluded between Nestlé Morocco with foreign subsidiaries and with the parent company have been both challenged.

Unsurprisingly, transfer pricing issues remain the main focus of tax inspectors when auditing MNE's subsidiaries in Morocco.

The 1 billion tax amount requested from Nestlé Morocco is significant considering the total amount of tax collection deriving from tax audits in 2020 was 2.17 billion dirhams (source: LesEco). However, the NAD may rule for a lesser amount, after Nestlé Morocco reached them to find a mutual agreement and in passing obtaining a discount on this huge tax reassessment.

Whatsoever, based on our experience, MNEs should not neglect the possibilities of concluding an advance pricing agreement (APA) with the Moroccan tax authorities to prevent any difficulties, especially as they happen to be free of charge in Morocco.

Netherlands

The Netherlands publishes 2022 budget proposals.

One of the draft legislations concerns specific reverse hybrid entity provisions as mandated by the European Union Directive ATAD II. These provisions counteract hybrid mismatches resulting from reverse hybrid entities, i.e., entities that are considered transparent from a Dutch tax perspective and if at least 50% of the voting rights, capital interests or profit rights in the entity are directly or indirectly held by related participants that are resident in a jurisdiction that qualifies the entity as non-transparent. In such case and as mandated by ATAD II, the so-called "reverse hybrid entity" would become subject to Dutch corporate income tax, dividend withholding tax or conditional withholding tax unless an exemption applies.

The proposed legislation will apply to fiscal years starting on or after 1 January 2022 and is still subject to parliamentary discussions.

Another draft legislation is intended to avoid double non-taxation resulting from the unilateral application of the arm's-length principle in the Netherlands. This draft legislation is generally in line with the Consultation Document issued on 4 March 2021.

The Ministry of finance publishes research paper on a more equal tax treatment of debt and equity.

New Zealand

New Zealand proposes changes to Goods and Services Tax.

Norway

The Norwegian Ministry of issued a public consultation paper proposing amendments to the conditions for a tax neutral cross-border restructuring. The current rules provide for the possibility of carrying out a cross-border restructuring, including mergers, demergers and certain exchanges of shares, without triggering Norwegian taxation on a company or shareholder level, subject to certain conditions. One of the general conditions is the transaction is carried out in accordance with the principle of tax continuity in the countries involved and that all tax positions are unchanged for the shareholders and the companies that are part of the restructuring. The application of the tax continuity condition abroad may be challenging and burdensome for both taxpayers and tax authorities. Due to this the Ministry has already established exceptions to this condition, not requiring tax continuity in the foreign country in certain cases. Through this consultation paper the Ministry is evaluating this condition again and proposing to abolish it for some types of

cross-border restructurings. It is proposed that the rules shall be effective from 1 January 2022. Comments to the proposal must be submitted by 22 December 2021.

Poland

The representatives of the Polish Government submitted draft legislation to the Polish Parliament on the major tax reform referred to as the "Polish Order." The changes would affect several areas of taxation including Corporate Income Tax, Personal Income Tax, and Value Added Tax. Among other items, the draft legislation introduces a minimum tax, an undertaxed payment rule (so-called "shifting profit tax"), and also include changes to the controlled foreign company (CFC) rules and TP regulations. A majority of the provisions are expected to come into force as of 1 January 2022. The draft legislation will now be discussed in Parliament. Their potential impact should be assessed by businesses in order to prepare for change and undertake necessary action.

Romania

The Romanian Government approved a draft bill for the ratification of the MLI.

Romania published in the Official Gazette No. 808/2021 an updated list of the jurisdictions exchanging information under the Multilateral Competent Authority Agreement to add 10 new jurisdictions (Albania, Aruba, Lebanon, Nigeria, Oman, Peru, Qatar, Samoa, United Kingdom, and Vanuatu).

Singapore

The Inland Revenue Authority of Singapore (IRAS) released the sixth edition of its TP guidelines.

Spain

Spain published Law 11/2021 in the Official Gazette approving, among other measures,

certain amendments to the existing Spanish exit tax and CFC rules to align them with the EU Directive ATAD I.

Switzerland

Swiss Parliament acts to eliminate import customs duties on industrial goods as soon as 1 January 2022.

Thailand

Nonresident electronic service providers are subject to VAT from 1 September 2021.

The Thai Cabinet approved the extension of the reduced Value Added Tax (VAT) rate of 7% for another two years to sustain the economic stability of the country. This 7% rate will, therefore, continue to be applied for sales of goods, provisions of services and imports of goods from 1 October 2021 until 30 September 2023.

UAE

The Ministry of Finance of the United Arab Emirates (UAE) published a statement related to the OECD Inclusive Framework on BEPS statement agreed on 1 July 2021.

UK

The UK Government published draft legislation intended for Finance Bill 2022. Among other items, the draft Finance Bill legislation contains proposed changes to the rules for hybrid and other mismatches to prevent disproportionate outcomes where payments are made to a fiscally transparent entity such as a US LLC. It was originally intended that a change would be made in Finance Act 2021 to achieve the same policy outcome, however following engagement with stakeholders, the UK Government decided to withdraw the change from the Finance Bill due to possible unintended consequences.

Under the latest proposal, certain fiscally transparent entities would be treated as partnerships specifically for the "hybrid

payee” rules, which may prevent counteraction of amounts attributable to members who regard the payee as fiscally transparent.

If enacted, these changes will have retroactive effect to 1 January 2017 without it being required to submit for an election to Her Majesty Revenue and Customs (HMRC).

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