



# Fiscal Countdown

## Newsletter n°71 – March 2022

### 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 seventy first edition deals with the new measures published in March 2022 by the OECD, the EU and in 19 countries: Canada, Colombia, Costa Rica, Ecuador, France, Germany, Ireland, Italy, Korea, Luxembourg, Mexico, New Zealand, Peru, Russia, Switzerland, Turkey, UK, Ukraine and USA.

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## OECD

The OECD released the Commentary to the Pillar Two Model Rules of the so-called BEPS 2.0 project, as agreed by the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS). The Pillar Two Model Rules, released on 20 December 2021, define the scope and key mechanics for the Pillar Two system of global minimum tax rules, which includes the Income Inclusion Rule (IIR) and the Under Taxed Payments Rule (UTPR), referred to collectively as the “GloBE rules”. The Commentary references the role of the Model Rules and the Commentary in the context of the GloBE rules’ status as a Common Approach, noting the need for consistency in the implementation and administration of the rules to avoid the risk of double or over-taxation. The Commentary provides detailed technical guidance on the operation and intended outcomes of the Model Rules and clarifies the meaning of certain terms. It also illustrates the application of the rules to various fact patterns. Together with the Commentary, the OECD also published a separate document with illustrative examples of the application of the Model Rules. In addition, the Commentary identifies various matters throughout the Model Rules where consideration is being given to developing further guidance that would become part of the GloBE Implementation Framework. The OECD also announced a public consultation in connection with the work to be done next to develop the GloBE Implementation Framework addressing administration, compliance and coordination matters related to Pillar Two. The Inclusive Framework members are seeking public input on the issues that should be addressed as part of this work.

The Secretariat of the OECD released a public consultation document with draft rules

for tax base determinations under Amount A for Pillar One of the BEPS 2.0 project. The tax base determines the total profits of a group to which the reallocation-formula will be applied under Amount A. The starting point for this determination is the consolidated group financial accounts. The draft rules provide specifics on the calculation of the tax base, including book-to-tax adjustments, treatment of restatements, carryforward of losses and taking into account changes in the group structure. The OECD invited comments on the draft rules to be submitted in writing by 4 March 2022. All written comments have been made publicly available on the OECD website.

The OECD held a Tax Talks webcast during which members of the OECD Secretariat provided an overview of the latest international tax developments, including updates on the Two-Pillar solution (BEPS 2.0 project). The BEPS 2.0 project was also addressed in the OECD’s Secretary-General Report to G20 Finance Ministers. This report includes other topics such as: the work on explicit and implicit carbon pricing, tax policy and gender equality, tax and development, tax transparency and the BEPS minimum standards. On carbon pricing, the report proposes the launch of an Inclusive Framework-like initiative to facilitate dialogue on implicit and explicit carbon pricing. The BEPS 2.0 project was also addressed in the communiqué from the 17-18 February 2022 G20 Finance Ministers and Central Bank Governors meeting. In particular, it reiterates the G20’s commitment to swift implementation of the two pillars package and it calls for finalization and consistent implementation of the Pillar Two Model Rules at a global level as a common approach. It also welcomes the ongoing development of the Multilateral Convention for Pillar One.

The OECD published updated transfer pricing (TP) country profiles reflecting the current TP legislation and practices of 30 jurisdictions. In this update, 6 new jurisdictions were added (Honduras, Iceland, Jamaica, Papua New Guinea, Senegal, and Ukraine) and 24 jurisdictions were updated (Brazil, Canada, Chile, China, Croatia, Dominican Republic, Estonia, Finland, Greece, Hungary, Israel, Kenya, Korea, Liechtenstein, Lithuania, Luxembourg, Malta, Panama, Poland, Portugal, Slovenia, United Kingdom, United States, and Uruguay). Similar to the previous update, the TP country profiles include two questions in relation to PEs, namely: (i) whether the jurisdiction follows the Authorized OECD Approach for the attribution of profits to a PE; and (ii) whether the jurisdiction follows another approach for the attribution of profits to a PE. Currently, the TP country profiles cover 69 jurisdictions and the OECD expects to conduct further updates as changes in legislation or practice are submitted to the OECD Secretariat.

Bahrain and Romania deposited their instrument of ratification of the MLI with the OECD, on 23 February 2022 and 28 February 2022, respectively. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, Bahrain changed its preliminary positions by adding the reservation to Article 6 (purpose of a covered tax agreement) not to apply to its Covered Tax Agreements (CTAs) that already contain preamble language. Romania removed its tax treaty with Germany from its list of CTAs and made some changes to its preliminary MLI positions, including: (i) addition of a reservation to Article 3 (transparent entities); (ii) addition of a reservation to Article 6 (purpose of a covered tax agreement); (iii) addition of a reservation to Article 7

(prevention of treaty abuse); and (iv) reserving the right not to apply any of the PE provisions of the MLI. The MLI will enter into force for these jurisdictions on the first day of the month following a three calendar month period starting on the date of the deposit of their instrument of ratification, i.e., on 1 June 2022.

## **EU**

The Council of the European Union (the Council) held an Economic and Financial Affairs Council (ECOFIN) meeting where Finance Ministers publicly discussed the proposal for a Directive on ensuring a global minimum level of taxation for multinational groups in the Union (the Pillar Two Directive). The meeting took place one day following the release by the OECD of the long-awaited Commentary on the Pillar Two Model Rules and the launching of a public consultation on the Implementation Framework of the global minimum tax with a deadline for input by 11 April 2022. In advance of the meeting, the French Council Presidency issued a new compromise text aimed at resolving the three remaining issues and reaching unanimous agreement during the ECOFIN meeting. Those three issues were: (i) the implementation timeline; (ii) the obligation to introduce Pillar Two for countries with few Ultimate Parent Entities ; and (iii) the link between the introduction of Pillar One and Pillar Two. Overall, EU Member States expressed support on the new proposal, in particular for the delay of the implementation timeline for one year and acknowledged the progress that the Council achieved with the new compromise text for reaching agreement. However, four Member States (i.e., Estonia, Malta, Poland and Sweden) still expressed some reservations and did not agree with the adoption of the Directive at this stage. The 27 Member States will continue negotiations on the proposal during the next weeks. The draft

Directive requires a unanimous decision for adoption. The French Presidency aims at reaching final adoption by the Council during the ECOFIN meeting of 5 April 2022.

EU Finance Ministers reach agreement on EU Carbon Border Adjustment Mechanism.

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

The Members of the European Parliament (MEPs) adopted two reports on March 10<sup>th</sup>, 2022, containing recommendations on reforming withholding taxes and simplifying tax systems to help the recovery. The withholding tax recommendations report, spearheaded by Pedro Marques (S&D, PT), was adopted by 625 votes in favor, 38 against and 28 abstentions. In this report, MEPs adopted recommendations to prevent withholding tax regimes from facilitating tax avoidance, while also reducing barriers for companies and investors who operate cross-border. The simplification of tax systems report, led by Luděk Niedermayer (EPP,

CZ), was adopted by 478 votes in favor, 78 against and 129 abstentions. In this report, MEPs have called for legislation to modernize tax systems to reduce tax evasion and avoidance and help SMEs, thereby making tax policy fit for the 21st Century.

## **Canada**

Canada’s Department of Finance released for public comment a set of draft legislative proposals to implement previously announced tax measures. Among other items, there is draft legislation introducing an earnings-stripping rule that will limit the amount of net interest expense that a company may deduct in computing its income to no more than a fixed ratio of tax Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA). Interest expense and interest income will include certain payments that are equivalent to interest, as well as certain financing-related expenses, but amounts relating to debts owing between members of the same Canadian resident group can generally be excluded. This new rule will apply for taxation years beginning on or after 1 January 2023. To provide for a transitional period, the new earnings-stripping rule will be phased in with a fixed ratio of 40% of tax EBITDA for taxation years beginning on or after 1 January 2023, but before 2024, and a fixed ratio of 30% for taxation years beginning on or after 1 January 2024. Also included with the release was draft legislation to enhance mandatory disclosure rules (MDR), including changes to existing reportable transaction rules; a new requirement to report notifiable transactions; a requirement to report uncertain tax treatment; and related penalties and an extension of the normal assessment period in certain circumstances, in the case of a failure to report. These new rules on mandatory disclosures are intended to be

effective in 2022 (i.e., either for taxation years beginning after 2021 or for transactions entered into after 2021).

Penalties will not apply to transactions that occur before Royal Assent of the enacting legislation.

### **Colombia**

Colombia and the Netherlands have signed a double tax treaty.

### **Costa Rica**

Costa Rica enacted a law simplifying tax obligations for inactive entities and granting them a three-month extension for filing the simplified income tax return, which was due 15 March 2022. The law establishes that inactive entities must only provide the tax authority with a high-level of detail on assets, liabilities and capital, through a summarized and simplified tax return that minimizes compliance costs. If the information does not change in following years, taxpayers must only confirm the information provided in the previous tax return. The law also allows non-domiciled entities assigned legal ID 3-012 to request the removal of that legal ID, which would eliminate certain compliance obligations they must currently satisfy.

### **Ecuador**

Ecuadorian President proposes bill to attract new investments.

### **France**

In a recent case law (February 2nd, 2022 n°443018), The French Public Supreme Court (*Conseil d'Etat*) gave important precisions on the notion of tax residence for companies. It stated that a Tunisian service provider company which is temporarily exempted from tax on its non-Tunisian profits, must be regarded as subject to tax according to the French-Tunisian Double Tax Treaty (DTT), although it did not actually

taxes pay as no profits were made locally. Therefore, the company should be considered a Tunisian tax resident and the payment made by the French company beneficiary of provided services, of the Tunisian service provider company could benefit from the exemption of French withholding tax, by application of the DTT's provisions.

In two decisions of February 11<sup>th</sup>, 2022 (n°442061, n°442062), The *Conseil d'Etat* recalled that, to decide whether a foreign tax regime applying to a company must be regarded as "favorable" (which enables the French Tax Authorities to apply anti-tax avoidance rules), it should be compared with the corresponding tax regime applicable to companies in France in the same situation. In particular, for comparison purposes, the application of the French favorable participation-exemption regime must be taken into account.

### **Germany**

German federal ministry of finance requires disclosure in cases of licensing of IP registered in Germany.

### **Ireland**

Updates to Revenue guidance on Irish VAT groups.

### **Italy**

The Italian Tax Authorities issued implementing instructions in February 2022 (protocol n. 48243/2022) on the new patent box regime that was introduced by Law Decree n. 146 on 21 October 2021 (as modified by 2022 Budget Law). Under the new patent box regime, the amount of qualifying research and development (R&D) expenses incurred in relation to qualifying intellectual property (IP) may be recognized for tax purposes for an amount equal to 210% of the relevant expenditure for both corporate income tax (IRES) and regional

tax (IRAP). The Instructions include clarifications on qualifying R&D activities, eligible R&D expenses, specific requirements to qualify for the available penalty protection regime and procedures for electing the new incentive.

Italy's Law Decree n. 17, referred to as the "Energy Decree," was published in the Official Gazette and entered into force on the same day. While immediately in effect, the Decree will have to be converted (with potential changes) into Law within 60 days from its publication to remain in force. Among others, the Energy Decree revamps a one-off opportunity to elect a tax step-up of participations in unlisted Italian companies and land (both buildable and agricultural). Individuals and nonresident entities may elect the tax step-up of participations and land held as of 1 January 2022 by paying a 14% substitute tax. The base of the substitute tax equals the tax value of the participation or land as of 1 January 2022 and needs to be certified by a sworn appraisal prepared by 15 June 2022. The substitute tax may either be paid in full by 15 June 2022 or in three annual installments paid respectively by 15 June 2022, 15 June 2023 and 15 June 2024. An annual rate of 3% interest applies to the second and third installments. This measure may represent an opportunity for nonresident companies who might derive Italian capital gains (generally taxable at 26%) on the disposal of Italian participations without tax treaty protection (e.g., US, Australian, Canadian, Israeli, and Mexican parents of Italian land-rich companies, French parents of Italian companies, and other non-treaty parents like the Cayman Islands and Bermuda).

The Supreme Court confirms reduced withholding tax on dividends distributed to EU Funds.

## **Korea**

Supreme Court Rules that royalties paid to US entities for foreign know-how, unlike foreign patent rights, are taxable in Korea.

## **Luxembourg**

The Luxembourg Tax Authorities (LTA) announced an update to the Mandatory Disclosure Rules (MDR) XSD schema and User Guide on submitting MDR reports. Such reports are required under implementation of the EU Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6). Going forward, the new XSD schema allows for the filing of a corrective MDR report as well as an arrangement chart.

On 9 March 2022, the Luxembourg government released a new draft law amending the interest deduction limitation rules of article 168bis of the Luxembourg income tax law.

## **Mexico**

Mexico approves changes to thin capitalization rules as part of 2022 Mexican tax reform. For taxpayers electing to consider tax attributes instead of stockholders' book equity average of a given tax year, the net operating losses carry forward balance should now be included as part of the calculation of the thin capitalization ratio and subtracted from CUFIN (after tax earnings) and CUCA (updated capital contributed) balances. This basically reduces the base value for the three times equity threshold. Furthermore, the election would not be available when the result exceeds 20% of the stockholder's book equity, unless such difference derives from a proven business reason and the relevant supporting documentation on those tax attributes is available, upon the tax authority's request. These reforms may

impact MNEs whose Mexican subsidiaries are leveraged via loans, specifically, those taxpayers that historically elected the tax attribute alternative instead of stockholders' book equity for purposes of the limitation, as well as Mexican groups with SOFOMs within their structures. This is because their interest deduction could be negatively impacted from these changes. The new limitations and changes may lead taxpayers to revisit current and forecast calculations and debt finance structures within the group. The reform also included amendments to the applicable exemption for debts incurred in connection with construction, operation, or maintenance of productive infrastructure for strategic areas or electric energy generation. The exception now applies only to those taxpayers that hold the permits or authorizations, proving that they directly perform those activities. Finally, the exception to determine the thin capitalization rules for Mexican non-regulated non-bank banks ('SOFOM ENR') will no longer be available for those SOFOMs carrying out activities mainly with their domestic or foreign related parties.

### **New Zealand**

New Zealand delays introduction of proposed changes to GST invoicing requirements.

### **Peru**

Peru issues rules for reporting ultimate beneficial owners for 2022 and 2023.

In Resolution 03052-5-2020, the Tax Court determined that proceeds from an interest-free loan are a payment for services because there was no intention to repay the loan and the parties agreed that the funds could be used to pay for services rendered in 2013 and services to be rendered in 2014.,

Peruvian Tax Court addresses how to determine if payments to foreign entities qualify as payments for digital services.

Peru's President amends the Tax Code.

### **Russia**

Russia announces new tax support measures for IT companies.

Russian Federal Tax Service comments on applicability of IT incentives in case of split of business.

### **Switzerland**

The Swiss electorate decided, against the legislative proposal of the parliament and federal council, and with a majority of 62.67%, that the issuance stamp duty should not be abolished.

### **Turkey**

The Turkish government imposes transfer pricing (TP) obligations on taxpayers that must be met at the time of corporate tax filings. The due date for filing the Turkish annual corporation tax return for fiscal year 2021 is 30 April 2022. All taxpayers must fill out a form in regard to transfer pricing, controlled foreign corporations and thin capitalization to be sent to their relevant tax offices together with the corporation tax return. All corporate taxpayers that have cross-border related party transactions are also obliged to prepare their local annual TP report (Local File). The Local File is not required to be attached to the corporation tax return. However, it must be prepared by the due date of the corporation tax return and submitted to the related tax office and/or tax inspectors upon an official request.

### **UK**

In the last few weeks, since the Russian invasion of Ukraine, a number of sanctions have been introduced to put pressure on Russia. One of the major issues which is left unresolved is that the Common Reporting

Standard exchange of information regimes remained intact. CRS is a web of relationships called "activated exchange relationships", each country exchanges with other countries and not all countries have the same web of relationships. In effect financial institutions in one jurisdiction gather tax relevant information and that information gets sent to the other jurisdiction. On the 17th March 2021, in response to the Russian invasion of Ukraine, the UK suspended its information exchange arrangements with the Russian Federation. This means that banks and other financial institutions in the UK will no longer be obliged to help Russia collect tax.

HMRC has issued guidance on plastic packaging tax that has the force of law under the primary legislation (Sch 9, Finance Act 2021) or secondary legislation (The Plastic Packaging Tax (General) Regulations 2022, SI 2022/117) for the tax. The guidance covers a range of administrative and technical issues.

HMRC increased late payment interest rates. As HMRC interest rates are linked to the Bank of England base rate, the increase in the base rate from 0.5% to 0.75% on 17 March 2022 has triggered an increase in rates for late payments. The rate is increased from 1.5% to 1.75% from 28 March 2022 for quarterly instalment payments. Late payment interest for other payments is increased from 3.00% to 3.25% from 5 April 2022. The rate of interest paid by HMRC on repayments remains unchanged at 0.5% as this rate is calculated as the higher of:

- 0.5%; and
- the Bank of England base rate minus one.

The Upper Tribunal has imposed a penalty of £150,000 for a company's failure to supply information in relation to checking the

company's tax position concerning certain tax avoidance schemes utilised by UK contractors and sub-contractors. This tax-related penalty is in addition to fixed and daily penalties.

## **Ukraine**

Tax relief measures for businesses introduced for the duration of martial law.

## **USA**

President Joe Biden will propose a minimum 20% tax rate that would hit both the income and unrealized capital gains of U.S. households worth more than \$100 million as part of his budget proposal. The plan -- called the "Billionaire Minimum Income Tax" by the White House -- represents the most aggressive proposal by the administration yet in Biden's efforts to increase taxation on the wealthiest Americans.

A Treasury official confirmed that the Government is committed to releasing long-awaited proposed previously-taxed earnings and profits (PTEP) regulations in 2022 that will address multiple areas, but that taxpayers should not expect their release until the latter half of the year. An Internal Revenue Service (IRS) official was also quoted this week as saying, however, that the coming PTEP regulations would not include rules on capital accounts "especially as [they] relate to GILTI."

An IRS official provided some insight this week into the December 2021 final foreign tax credit regulations. The government official was quoted as saying that in a situation where a foreign jurisdiction divides a royalty into two parts based on payor location and the location of the use of the intellectual property, withholding tax on the portion based on the payor location may not be eligible for a US foreign tax credit. The IRS official said in this situation, no foreign tax credit would be available because the

payor jurisdiction designation is not reasonably similar to US rules and does not meet the final regulations' attribution requirement.

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