Fiscal Countdown

Newsletter n°73 –May 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 third edition deals with the new measures published in May 2022 by the OECD, the EU and in 17 countries: Brazil, Canada, Cayman, Czech Republic, Denmark, Finland, France, Germany, Hong Kong, Luxembourg, New Zealand, Norway, Sultanate of Oman, Switzerland, Turkey, UAE and UK.

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OECD

The OECD released a public consultation document regarding the Regulated Financial Services Exclusion under Amount A for Pillar One. The Regulated Financial Services Exclusion will exclude the revenues and profits of a Regulated Financial Institution from the scope of Amount A. The consultation document states that the term Regulated Financial Services means services carried out by a Regulated Financial Institution. This means that the exclusion is operated on an Entity-by-Entity basis. The consultation document provides that Regulated Financial Institution means a: (i) Depositary Institution; (ii) Mortgage Institution; (iii) Investment Institution; (iv) Insurance Institution; (v) Asset Manager; (vi) Mixed Financial Institution; and (vii) service entity that exclusively performs functions for a Regulated Financial Institution. To qualify as a Regulated Financial Institution under categories (i) through (vi), an institution needs to satisfy three elements: a licensing requirement; a regulatory capital requirement; and an activities requirement. The public consultation will run until 20 May 2022.

The OECD held a public consultation meeting on the Implementation Framework for the Pillar Two GloBE Rules (the Implementation Framework). This meeting discussed the input received from the public consultation launched on 14 March 2022. The meeting focused on the mechanisms necessary to ensure that tax administrations and MNEs can implement and apply the GloBE Rules in a consistent and coordinated manner.

On 14 April 2022, the Secretariat of the OECD released a public consultation document regarding the Extractives Exclusion under Amount A for Pillar One. The Extractives Exclusion will exclude the profits from Extractive Activities from the scope of Amount A. The term Extractive Activities means that the Group derives revenue from the sale of an Extractive Product and conducts Exploration, Development or Extraction. This exclusion contains two elements: (i) a product test; and (ii) an activities test. Both of these tests must be met for the revenues and profits to be excluded from the Amount A scope determination. According to the consultation document, an MNE Group covered by the Extractives Exclusion should follow seven steps to assess the application of Amount A. Step 2 (Identify Extractives Activities and apply the Revenue Threshold to in-scope revenue) and Step 3 (Identifying excluded and in-scope profits) are specific to the Extractives Exclusion, and public comments were invited on these two steps. The OECD invited comments on the draft rules to be submitted in writing by 29 April 2022.

Senegal deposited its instrument of ratification of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) with the OECD. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, Senegal confirmed its preliminary MLI positions but removed its agreement with Mauritius from the list of its Covered Tax Agreements. The MLI will enter into force for Senegal on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit of their instrument of ratification, i.e., on 1 September 2022.

European Union

The European Commission (the Commission) published a legislative proposal on the Debt-equity bias reduction allowance (DEBRA) initiative. The proposal sets forth rules to address the tax-related asymmetry in treatment of debt and equity, with the aim to encourage companies to finance their investment through equity contributions rather than through debt financing. This initiative was announced by the Commission in its Communication on Business Taxation for the 21st century published in May 2021. The draft Directive applies to all taxpayers that are subject to corporate income tax in one or more European Union (EU) Member States, with the exception of financial undertakings. It includes two separate measures that apply independently:

(i) a notional interest allowance on changes in equity levels; and

(ii) a limitation on interest deduction to 85% of the exceeding borrowing costs (i.e., interest paid minus interest received).

The proposal requires Member States to provide specific data to the Commission on an annual basis in order to allow monitoring of the implementation and effects of the new rules. The proposal also includes anti-abuse provisions to prevent tax-driven changes in equity levels. The draft Directive will now move to the negotiation phase among Member States with the aim of reaching a final agreement. In the EU, adoption of tax legislation requires unanimity between all 27 Member States. The Commission proposes that the Member States shall transpose the Directive into their national laws by 31 December 2023 for the rules to come into effect as of 1 January 2024.

The European Parliament's Committee on Environment, Public Health and Food Safety (ENVI) voted and adopted five reports of the "Fit for 55" legislative package. The package aims to align the EU climate, energy, land use, transport and taxation policies with the goal of reducing net greenhouse gas (GHG) emissions by at least 55% from 1990 levels by 2030 with the overarching goal to achieve climate neutrality in Europe by 2050. The ENVI is the committee responsible for the Carbon Border Adjustment Mechanism (CBAM). Following their earlier recommendations and the ECOFIN's agreement on CBAM, they have now voted for CBAM to have a broader scope, more ambitious targets and at an accelerated pace of implementation. In addition, free allowances under the EU Emissions Trading System (ETS) will be phased out sooner than originally planned, a new EU carbon sinks goal will increase EU 2030 reduction target to 57%, and the Effort Sharing Regulation, which governs GHG emissions in sectors not covered by the EU ETS, will be tightened. With expanded scopes and tighter timelines, a greater number of businesses will be impacted. It will be critical for businesses to keep a close eye on developments as the legislative process for CBAM in particular unfolds at pace, with a vote in early June 2022 followed by negotiations by the EU Member States.

The Committee on Economic and Monetary Affairs (ECON) of the European Parliament approved its opinion on the proposed Pillar Two Directive. According to the opinion, ECON members support the minimum tax proposals and only propose minor changes to the Commission's initial draft, such as the introduction of an anti-abuse provision. In addition, the opinion introduces a clause inviting the Commission to review the application of the Directive five years after its entry into force and, if needed, present a legislative proposal. The Members of the European Parliament supported the 5% penalty for non-compliant companies, withdrawn in the compromise text approved on 5 April, and the original implementation date (i.e., 31 December 2022) included in the Commission's initial proposal. At the same time, they have backtracked on earlier proposals to make Pillar Two stricter in order to not deviate from the international consensus.

The European Parliament's FISC tax committee held a debate on the regulation of the tax profession in the EU, confirming the Commission's intention to regulate tax advisers by creating an EU-wide framework and enforcement mechanism. The main objective of this initiative is not to completely regulate the tax profession but rather to set a threshold on the acceptable behavior of tax intermediaries. Furthermore, the procedures to be followed in that respect and monitoring and enforcement measures ensuring compliance with such threshold are also expected to be included in the said proposal.

Brazil

The Brazilian Office of the General Counsel for the National Treasury published, on 3 May 2022, Public Notice 9/2022, which allows taxpayers to settle debts arising from the amortization of goodwill under the tax regime preceding Law No. 12,973/2014. According to the Public Notice, taxpayers may settle debts (regardless of whether they are registered as overdue federal tax liabilities, including suspended liabilities) that are pending in administrative adjudication or judicial litigation as of 3 May 2022. The Public Notice also applies to cases involving the addition of goodwill amortization expenses to the calculation of the social contribution on net profit. The settlement agreement must cover all the debts that the taxpayer has outstanding as a result of the amortization of goodwill. Taxpayers have until 29 July 2022, to enter into a settlement agreement. As part of the settlement, the taxpayers agree to have their cases withdrawn from administrative or judicial proceedings. Under the settlement agreement, taxpayers may choose one of the three methods to pay off their tax liability:

- 50% reduction of the principal, fines, interest and other charges - Pay 5% of the total debt or amount eligible for settlement, without reductions, divided into five successive monthly installments, with the remainder paid over seven months;
- 40% reduction of the principal, fines, interest and other charges - Pay 5% of the total debt or amount eligible for settlement, without reductions, divided into five successive monthly installments, with the remainder paid over 31 months;
- 30% reduction of the principal, fines, interest and other charges – Pay 5% of the total debt amount or amount eligible for settlement, without reductions, divided into five successive monthly installments, with the remainder paid over 55 months

When determining whether to enter into a tax settlement, taxpayers must take tax, accounting and financial aspects into consideration.

Canada

The Canadian Government released draft legislative proposals and accompanying explanatory notes (referred to herein as the hybrid mismatch rules) to address certain hybrid mismatch arrangements. As per the explanatory notes, these rules are intended to implement the recommendations in, and be generally consistent with, the Final Report under Action 2 of the OECD/G20's Base Erosion and Profit Shifting (BEPS) Project. The hybrid mismatch rules will apply in respect of payments arising on or after 1 July 2022, with no grandfathering for existing arrangements. Interested parties are invited to send comments on these draft proposals to Consultation-Legislation@fin.gc.ca by 30 June 2022.

Cayman

Cayman Islands' new enforcement guidelines detail circumstances under which financial institutions could face penalties for failing to comply with Common Reporting Standard.

Czech Republic

The Czech Government approved an amendment to the Act on International Cooperation in Tax Administration implementing the Directive on Administrative Cooperation (the so-called "DAC7") to expand reporting obligations and exchange of information to cover sales through digital platforms. The amendment provides closer international cooperation and the possibility of carrying out joint tax audits with the participation of several EU Member States. Companies will be required to report to the Czech tax authorities every year, by the end of January, specific information, such as the seller's identification and the income realized from the usage of the platform for the previous calendar year. The law now needs to be approved by the Parliament and the President and should become effective as of 1 January 2023, while the part on joint tax audits should become effective first as of 1 January 2024.

Denmark

For financial years starting on or after 1 January 2021, new legislation requires transfer pricing documentation (TPD) to be submitted annually. The deadline for submitting compliant documentation is 60 days after the due date for the filing of the annual corporate income tax return. Therefore, for financial years ended on 31 December 2021, the deadline for submission of FY21 TPD will be 29 August 2022. Under the new rules, taxpayers subject to TPD requirements are obliged to submit both the entity specific local file and group-wide master file (including appendices as applicable) annually. However, it is recognized that in certain situations multinational groups are not able to finalize the master file in time to meet the deadline. Therefore, it is possible to request an extension of the master file submission deadline and/or to use the master file prepared for the previous financial year as a temporary document if certain requirements are met. The TPD requirement applies to all Danish entities and permanent establishments of Groups which (measured on a global Group consolidated level) meet one of the following two thresholds:

- Have more than 250 employees; or
- Have more than DKK125 million in assets and more than DKK250 million in revenue

If one of the above criteria is met when measured on a Group consolidated basis, then the Danish entity (or permanent establishment) falls within scope of these rules.

The penalty for non-compliance is DKK250,000 (approx. €33,500) per legal entity, per year. It is anticipated that this penalty will be imposed automatically on the entities that do not meet the deadline for the pro-active submission of the TPD. Additionally, a penalty of 10% may be imposed on a potential income adjustment.

Finland

The Finnish Tax Authority published updated Guidance No. VH/5004/00.01.00/2021 (Guidance 1) and Guidance No. VH/3437/00.01.00/2021 (Guidance 2) to clarify certain aspects related to interest, royalty and dividend payments to nonresident legal and natural persons. Guidance 1 addresses the general rules applicable to nonresident legal and natural persons (persons with limited tax liability in Finland) upon receipt of interests, royalties or dividends from Finnish taxpayers, while Guidance 2 covers the procedural and administrative issues connected to such payments. The latter covers, among others, comments on the obligation of the Finnish payer to levy withholding tax, guidance on how the payer should determine the applicable withholding tax rate, and the formalities to be completed by the payer with respect to e.g., reporting withholding taxes upon payment of interests, royalties or dividends.

France

The French Administrative Supreme Court ruled on April 25th, 2022, by a decision n°439859, that CFC rules (Article 209 B of the French tax code) are compliant with the free movement of capital (Article 63 of the Treaty on the Functioning of the European Union). Indeed, the Judges recalled that legislation which applies to situations irrespective of whether a parent company exercises decisive influence over its subsidiary must be consistent with the free movement of capital. However, as the CFC rules are anti-avoidance rules that only concern parent companies having a decisive influence on their foreign subsidiaries' decisions, such rules are not incompatible with the free movement of capital.

The European Union Court of Justice brought light to the application of the ne bis in idem principle in France, by a judgment C-570/20 dated May 5th, 2022. It ruled that the ne bis in idem principle guaranteed by Article 50 of the Charter of Fundamental Rights of the European Union:

- does not preclude a situation whereby the limitation of the duplication of proceedings and penalties of a criminal nature in the event of fraudulent concealment or omissions from a return relating to VAT provided for by national legislation to the most serious cases is based only on settled case-law interpreting restrictively the legal provisions laying down the conditions for the application of that duplication, provided that it is reasonably foreseeable, at the time when the offence is committed, that that offence is liable to be the subject of a duplication of proceedings and penalties of a criminal nature; and
- precludes national legislation which does not ensure, in cases of the combination of a financial penalty and a custodial sentence, by means of clear and precise rules, where necessary as interpreted by the national courts, that all the penalties imposed do not exceed the seriousness of the offence identified.

Germany

Germany's Ministry for the Environment circulated proposal on implementation of Extended Producer Responsibility regime for single-use plastic items.

Hong Kong

In its 2021 annual meeting with tax practitioners, the Hong Kong Tax Authority clarified the following issues related to the profits tax:

- When a Hong Kong resident enterprise has a "server permanent establishment (PE)" located outside Hong Kong which forms an essential and significant part of its e-commerce business, the Tax Authority has indicated that a part or all of its profits could be regarded as non-taxable offshore Hong Kong profits. The Tax Authority reconfirmed that the location of the server PE alone would not determine the locality of the profits, instead the core operations for the e-commerce transaction and the place where those operations had been carried out should be focused on.
- Genuine businesses established in Hong Kong with a view to enjoy the tax concessions under the preferential tax regimes or the tax treaty network of Hong Kong would not fall under the anti-

avoidance provisions of the “main purpose test.”

- Transfer of trading stock between two related Hong Kong taxpayers at below market value would not be subject to tax adjustments under the arm’s-length transfer pricing rules if the transfer was: (i) in the course of trade; or (ii) made upon cessation of business, given certain conditions are satisfied.
- Currently taxpayers can make an irrevocable election so that fair value changes from a financial instrument held for trading purposes could be taxed as reflected in the accounts rather than on realization basis. While taxation based on fair value accounting would not affect the general onshore-versus-offshore nature of the profits under the source principles, taxpayers should assess whether there is a reasonable prospect that the profits eventually realized could be regarded as being offshore sourced and non-taxable. It’s critical to note that even if the subsequent sales activities warrant an offshore claim of the profits, in practice, it may be difficult for taxpayers to re-open prior year tax assessments regarding the fair value changes which have already been taxed.

Hong Kong’s Court of First Instance (CFI) recently handed down a favorable decision which clarified that profits tax liabilities are imposed on what a taxpayer has done to earn the profits in question, as opposed to what its role or purpose in Hong Kong is, notwithstanding that its role in Hong Kong is to mitigate the overseas tax liabilities of its group. The taxpayer was a private limited company incorporated in Hong Kong engaged in the trading of electronic products. It purchased the products from two independent Hong Kong suppliers and sold to its group company in the Netherlands. All business operations of the taxpayer were conducted by affiliates outside Hong Kong, while its only connection with Hong Kong was limited to having a bank account in Hong Kong. The CFI held that the taxpayer’s booked profits are not subject to Hong Kong profits tax, on the basis that: (i) it did not carry on a trade or business in Hong Kong; and (ii) all the commercial operations relevant to the production of the trading profits were performed outside Hong Kong. The CFI held that a Hong Kong incorporated company with limited activities carried out in Hong Kong, such as operating a bank account from outside Hong Kong and maintaining a registered office in Hong Kong, would not normally be regarded as carrying on a business in Hong Kong. The locality of the Hong Kong suppliers’ business was irrelevant. In the context of a trading business, the CFI considered that operating a bank account to settle payments due to suppliers and receive payments from customers would not by itself amount to profit-producing activities. They were incidental acts done after the formation of the profit-generating contracts of purchase and sale and would not generally be relevant for determining the source of trading profits. While the tax planning arrangement undertaken by the group prevented a portion of the profits from being charged to tax anywhere, it was not relevant in determining the source of profits

Luxembourg

The Luxembourg tax authorities updated the clarifications regarding the interpretation of certain aspects related to the law implementing the Directive on Administrative Cooperation (the so-called “DAC6”) in Luxembourg. DAC6 requires EU Intermediaries/Relevant Taxpayers to report cross-border arrangements which meet at least one of the hallmarks listed in the Directive. The clarifications are now presented in the form of FAQs. The document is divided into 12 sections and includes newly added questions with answers, and completions and amendments to previously provided clarifications. The additions concern, among others, the scope of persons covered and arrangements subject to reporting, clarifications on the intermediaries obliged to report, the reporting and the notification obligations, the different categories of hallmarks and the definition of the main benefit test.

New Zealand

The New Zealand Government released a consultation paper on New Zealand's adoption of the OECD Pillar Two rules. The paper outlines officials' thinking as to whether New Zealand should adopt the Pillar Two proposals and, if so, when the proposals should apply. Officials are seeking feedback on how implementing the proposals would impact New Zealand, and what design considerations need to be made ahead of implementation. Officials have sought specific feedback on six key areas, detailed in chapters 10 through 15 of the paper. Outside of the timing and design of implementation, these areas include challenges with tax compliance processes, the New Zealand imputation credit regime, and the viability of a domestic minimum tax. Submissions are due by 1 July 2022.

Norway

The Norwegian Ministry of Finance has proposed to extend the scope of services subject to Norwegian value-added tax (VAT) supplied by foreign service providers to cover the supply of intangible and remotely delivered services to Norwegian consumers (VAT on e-commerce or VOEC). In the Ministry of Finance's whitepaper, "consumers" will include not only private persons, but also all types of customers who are not considered as businesses or entrepreneurs (i.e., companies and organizations not considered as conducting business activities, such as pure or passive holding companies). The proposed regulations are likely to mean that a foreign service provider supplying remotely delivered advisory services (e.g., suppliers of transaction support services or legal services) to a Norwegian passive holding company will have to register for Norwegian VAT (using the simplified VAT registration scheme for e-commerce, VOEC) and charge 25 % Norwegian VAT. Thus, after the potential introduction of the new regulations, foreign suppliers will be required to keep track of the customers classification as business and consumer. The proposal is currently subject to public consultation, ending in July 2022. It is expected that introduction of the proposed regulations will be in connection with the Government budget for 2023, with potential implementation from 1 January 2023

Sultanate of Oman

The Sultanate of Oman Tax Authority published on its website the Guidelines on the Country-by-Country Reporting (CbCR) (the Guide) developed in March 2022. The Guide makes reference to the reporting obligations contemplated under BEPS Action 13 and the purpose and uses of CbCR. At the same time, it identifies the MNE Groups that fall within the scope of CbCR. The Guidance is divided into three main sections. The first section, "General CbCR report guidance" includes guidelines on the data sources, currency and years of data to be used when reporting under the CbCR. The second section, "Specific Guidance on the preparation of the CbCR report" provides clarifications on the data points to be reported, such as revenues, profits, and employees count, among others. The third section, ''Submission of CbC Reports,'' clarifies the process to be followed when filing and submitting a CbC report. Oman also published a list of jurisdictions for which Oman has an automatic exchange for

CbCR purposes. The list includes 45 jurisdictions.

Switzerland

In order to promote the maritime sector and to set an equal playing field for Swiss-based companies internationally, the Federal Council published its dispatch and draft legislation to introduce a tonnage tax in Switzerland. The tonnage tax will allow maritime companies (subject to certain conditions) to determine the taxable profit at a flat rate based on tonnage, i.e., the loading capacity, instead of the profits determined based on the otherwise applicable standard Swiss tax laws, which may allow Swiss maritime companies to reduce their corporate tax burden.

The Swiss Federal Parliament has adopted the bill to unilaterally abolish import duties on almost all industrial goods and simplify the Swiss customs tariff to reduce costs for consumers and companies. This legislative change will enter into force on 1 January 2024.

Turkey

Turkey publishes Communiqué regarding one-point corporation tax rate reduction on certain income generated from manufacturing and exportation.

Turkey publishes Communiqué on inflation adjustment for revaluation purposes.

UAE

The UAE Ministry of Finance published a public consultation to obtain comments on the draft legislation regarding the introduction of a corporate tax regime in the UAE for financial years starting on or after 1 June 2023. Among other items, the consultation document covers taxable persons, the basis for taxation, the calculation of taxable income and corporate income tax liability, and the treatment of groups. The consultation document also includes a reference on how the UAE would reflect its commitment to implement Pillar Two. Accordingly, the UAE is working with other members of the Inclusive Framework to implement the Pillar Two rules. Further announcements on how the Pillar Two rules will be incorporated in the UAE corporate tax regime will be made in due course. In addition, the regime is expected to include transfer pricing provisions regulating transactions between related parties and connected persons, making use of the arm's-length principle. With respect to transfer pricing documentation, it is indicated that businesses engaged in transactions exceeding a specific threshold will be obliged to submit a local and a master file in line with the requirements provided under BEPS Action 13. Finally, the corporate tax regime includes the concept of permanent establishment (PE), indicating that such concept has been designed on the basis of Article 5 of the OECD Model Tax Convention and the internationally recognized principles set thereof. It is also expected that legal entities will be able to make use of the Commentaries of the OECD Model Tax Convention to establish the existence of a PE in the UAE. The due date for providing comments was 19 May 2022.

UK

UK Tax Authority updates Plastic Packaging Tax Guidance.

UK delays import checks on EU products.

The United Kingdom (UK) Tax Authority, Her Majesty's Revenue and Customs (HMRC) has issued an Update on the UK's reporting rules for digital platforms. Following a recent consultation on the implementation of the OECD's Model 'Reporting rules for digital platforms', the UK Government has decided that the new rules will start from 1 January 2024. This new date is intended to give platforms and their advisors time to prepare for the implementation of the new rules, with collection of information starting from 1 January 2024 and submission of the first reports due by the end of January 2025. Further, HMRC has said that it is currently considering the many comments and issues that have been raised by the consultation respondents. HMRC is aiming to publish the Government's response to the consultation, draft regulations giving details of the new rules, and an update on interactions with European Union (EU) rules in this area (referred to as DAC7) this summer. HMRC has said that it will also be engaging with platforms and their advisors before the new rules come into effect.

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