



# Fiscal Countdown

## Newsletter n°81 – January 2023

### 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 eighty-first edition deals with the new measures published in January 2023 by the OECD the ATAF, the IASB, the EU and in 15 countries: Algeria, Argentina, Brazil, Bulgaria, Canada France, Guatemala, Honduras, Indonesia, Japan, Latvia, Mauritius, Norway, South Korea and The United Kingdom.

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**OECD**

The OECD released guidance on safe harbors and penalty relief under the BEPS 2.0 Pillar Two Global Anti-Base Erosion (GloBE) rules. This guidance includes the agreed terms of a “Transitional CbCR Safe Harbour” that temporarily removes the obligation of calculating the GloBE effective tax rate for a multinational enterprise’s (MNE) operations in lower-risk jurisdictions in the first three years. This is intended to provide relief to MNEs in respect of their GloBE compliance obligations as they start with the implementation of the rules. Furthermore, the document mentions that the Inclusive Framework is planning to examine the possibility of creating additional permanent safe harbors and Simplifications in the future, with a particular focus on developing a qualified domestic minimum top-up tax (QDMTT) safe harbor. This safe harbor would simplify compliance for MNEs operating in jurisdictions that have implemented a QDMTT. The guidance also includes a common understanding among the Inclusive Framework member jurisdictions as to a transitional penalty relief regime for the initial years of application of the GloBE rules (i.e., for any fiscal year beginning on or before 31 December 2026 but not including a fiscal year that ends after 30 June 2028). Under the common understanding on penalty relief, no penalties or sanctions should apply where a tax administration considers that an MNE has taken “reasonable measures” to ensure the correct application of the GloBE rules. The term “reasonable measure” is not defined in the document, and it should be understood in light of each jurisdiction’s existing rules and practice.

The OECD released a consultation document on the development of a standardized GloBE information return as part of the Implementation Framework of Pillar Two. The development of a standardized GloBE

information return is aimed at facilitating compliance with and administration of the GloBE rules. The document is an initial draft that does not include all elements of what is expected to be part of a GloBE information return. For example, the document, for now, does not address how available safe harbors will impact the information which will be required. The document, in particular, provides a template with the data points that MNEs need to include for a full computation of their tax liability for Pillar Two purposes according to the GloBE Model Rules as published in December 2021, as well as explanatory guidance. Stakeholders are invited to submit written comments by 3 February 2023.

The OECD released a consultation document seeking input from stakeholders on mechanisms to ensure tax certainty under the GloBE rules. The consultation document covers mechanisms to ensure tax certainty can be divided into two groups: (i) dispute prevention mechanisms; and (ii) dispute resolution mechanisms. Dispute prevention mechanisms aim to ensure a common interpretation or application of rules among tax administrations and taxpayers and include the use of model rules, commentary, and a multilateral review process with respect to the qualified status of the rules implemented by jurisdictions. These mechanisms are already set in motion by the OECD and considered a priority. Other options include the use of common risk assessment and coordinated compliance processes, as well as the use of binding certainty mechanisms such as Advance Pricing Arrangements (APAs). Dispute resolution mechanisms are aimed at resolving differences in the interpretation or application of the GloBE rules that may arise between two or more jurisdictions. Options discussed in the consultation document include the development of a multilateral

convention, the use of competent authority agreements under the Convention on Mutual Administrative Assistance in Tax Matters (MAAC), the reliance on existing tax treaties, and the creation of a dispute resolution provision in domestic law. Stakeholders are invited to submit written comments by 3 February 2023.

The OECD released a consultation document on the Multilateral Convention (MLC) provisions on digital services taxes (DSTs) and other relevant similar measures as part of the BEPS 2.0 project. The consultation document is intended to illustrate the structure and operation of the provisions on the standstill and withdrawal commitment for DSTs and other measures but does not reflect the final views of the Inclusive Framework on the subject. The consultation document covers: (i) draft MLC provisions on DSTs and similar measures; (ii) withdrawal of certain existing DSTs and other measures that are to be listed in the MLC; and (iii) a mechanism to eliminate Amount A allocations if the commitment is breached. With the standstill agreement in place until the end of 2023 and some countries, regardless of this agreement introducing certain forms of digital levies, the delineation of DSTs and similar measures will determine what types of measures will have to be withdrawn and cannot be introduced going forward if an agreement on Pillar One is reached. Besides that, it will also provide guidance to governments wishing to introduce digital measures not captured by the Pillar One standstill and withdrawal measures. Written comments on the document are requested by 20 January 2023.

On 5 January 2023, the OECD released an update on the results of the peer reviews of jurisdictions' domestic laws under Action 5 (harmful tax practices) of the OECD/G20 BEPS Project. The updated results cover new decisions on nine tax regimes. According to

the press release, the total number of tax regimes that have been reviewed, or are under review, is close to 320. The reviews were undertaken by the Forum on Harmful Tax Practices (FHTP). The results show that two regimes were found to be not harmful (Cabo Verde and Hong Kong (China)), two regimes of Armenia are now in the process of being amended, and two regimes have been amended to be in line with the standard and are now not harmful (amended) (Jamaica and North Macedonia). Furthermore, two regimes were abolished (Honduras and Pakistan), and one regime of Albania is potentially harmful, for which the FHTP will assess at its next meeting if this regime is actually harmful. Additionally, the Inclusive Framework concluded its second annual monitoring process for the effectiveness of the substantial activities requirements in previously no identified jurisdictions or only nominal tax jurisdictions. Recommendations for substantial improvement were made for four jurisdictions (Anguilla, the Bahamas, Barbados and the Turks and Caicos Islands), and areas for focused monitoring were identified for another four jurisdictions (Bahrain, Bermuda, the British Virgin Islands, and the Cayman Islands). No issues were identified for Guernsey, the Isle of Man, Jersey, and the United Arab Emirates.

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

Switzerland made a notification to the OECD in relation to the Multilateral Instrument (MLI). This notification relates to the completion of internal procedures for purposes of the entry into effect of the Covered Tax Agreement (CTA) with Iceland. This notification is

required due to the MLI position of Switzerland which links the entry into effect of the MLI Provisions for a CTA to the notification of completion of internal procedures with respect to the relevant CTA.

## **ATAF**

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

## **IASB**

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

- A temporary exception to the accounting for deferred taxes arising from the implementation of the Pillar Two model rules in domestic legislation;
- Targeted disclosure requirements based on this document, the disclosures would include:
  1. In periods in which Pillar Two legislation is enacted or substantively enacted and in effect:
    - a. A disclosure that the exception for accounting for deferred taxes has been applied.
    - b. The amount of current tax expense (income) that is related to Pillar Two income taxes.

2. In periods in which Pillar Two legislation is enacted or substantively enacted, but not yet in effect (pre-effective period):

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

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

## **European Union**

On 17 January 2023, the European Parliament (EP) approved almost by

unanimity the proposal for a Council directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU (the ATAD III Proposal) with certain amendments proposed by its Committee on Economic and Monetary Affairs (ECON Committee) on 9 December 2022. Generally speaking, the ECON Committee has (i) lowered gateways' threshold (i.e., cumulative conditions to be met by entity to be considered as "at risk" and subject to reporting obligations) (ii) reduced the number of exclusions (entities outside the scope of ATAD III Proposal) and (iii) relaxed, in some cases clarified/specified, the minimum substance indicators to be reported by an "at risk" entity. In relation to the rebuttal and exemption for absence of tax motives procedures, it has been specified that the competent authority will have nine months as from the date of receipt of the request to analyze it. A failure to provide an answer after the expiry of the period will be considered as an approval. Finally, it is worth noting that the implementation deadline remains unchanged (i.e., 1 January 2024) meaning that the lookback period has started already on 1 January 2022.

The CJEU has ruled that lawyers' legal professional privilege prevails over their obligation to report to the authorities various activities carried out by their clients which are considered to be suspicious. The CJEU had to determine what prevails: lawyers' legal professional privilege (an essential element in a democratic society) or the need to combat aggressive tax planning and prevent the risk of tax evasion and fraud (of essential general EU interest). Legal professional privilege won! According to the CJEU, the obligation for lawyers to notify intermediaries involved in such planning of their reporting obligations infringes lawyers' legal professional privilege. The Court holds that such interference with lawyers' legal

professional privilege is not necessary to achieve the objectives of combating aggressive tax-planning and preventing the risk of tax avoidance and evasion. The novelty of this case is that the CJEU has recognized that lawyers' legal professional privilege prevails over tax objectives and obligations. The Court held that, save in exceptional circumstances, clients must be able to have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her.

### **Algeria**

Algeria introduces Finance Law 2023.

### **Argentina**

Argentina implements new mandatory disclosure regime for international transactions.

### **Brazil**

Brazilian Federal Revenue Service issues new PIS and COFINS Regulation.

Brazil published Provisional Measure (PM) 1152 whereby it substantially revises Brazil's transfer pricing (TP) rules for transactions between related parties, bringing them in line with the OECD Guidelines. The main changes include the adoption of the arm's-length principle, the introduction of several new methods for determining the most suitable method for an operation, and the introduction of corresponding adjustments and secondary adjustments. The PM also covers specific rules for commodities, intangibles, intragroup services, cost contribution arrangements, business restructurings, financial transactions, and APAs. The PM will take effect on 1 January 2024, but taxpayers can choose to apply it starting on 1 January 2023. The PM awaits to be regulated by the Brazilian Federal Revenue Service and must be voted on by



the National Congress and signed by the President to become valid

Brazil announces tax recovery measures.

### **Bulgaria**

Bulgaria amends VAT legislation.

### **Canada**

Canada is evolving its transfer pricing doctrine. On 17 January 2023 is published Interpretation Note 127 headed Determination of the Taxable Income of Certain Persons from International Transactions: Intra-Group Loans ("IN 127"), providing official guidance as the manner in which the SARS will apply the provisions of transfer pricing and thin capitalization. IN 127 provides guidance on the application of the arm's length principle in the context of the pricing of intra group loans.

### **France**

France's Minister of Finance issued a Decree (No. 2022-1661) in the Official Journal, which provides specifics on the procedures outlined in DAC7 (reporting obligation for digital platforms). As part of the Decree, a new section is added to the General Tax Code, stating that platform operators or designated third parties must file electronically the declaration as outlined in the General Tax Code. Additionally, if a platform operator chooses to meet their reporting obligations in France, they must notify the relevant authorities of any other European Union (EU) Member States where they will also be reporting. The declaration in question should include information on the platform operator, such as their corporate name, registered office, tax identification number, and trade name, as well as information on the seller or service provider, such as their name, date of birth, place of residence, tax identification number, and Value Added Tax number. The Decree went into effect on 1 January 2023.

### **Guatemala**

Guatemala's Ministry of Public Finance amends Value Added Tax Regulations.

### **Honduras**

Honduras' ZEDE regime is recognized as abolished following review by OECD Forum on Harmful Tax Practices.

### **Indonesia**

Indonesia announces implementation of Pillar One and Pillar Two.

### **Japan**

Japan announces implementation of Pillar Two.

### **Latvia**

Latvia updated its list of low-tax jurisdictions.

### **Mauritius**

Mauritius has taken the necessary steps to implement the Protocol amending the Double Taxation Avoidance Agreement (DTA) with Germany.

### **Norway**

Expert committee propose changes to Norwegian tax system.

### **Slovenia**

Slovenian Government submits Bill implementing DAC7 Directive into national law to the Parliament.

### **South Korea**

South Korea enacts new global minimum tax rules to align with OECD BEPS 2.0 Pillar Two.

### **The United Kingdom**

HMRC released the draft Transfer Pricing Records Regulations 2023, The regulations require MNEs to keep and preserve specified transfer pricing (TP) records, including a master file and local file, and outline the form and manner in which these records must be

kept. These regulations will apply to MNEs operating in the United Kingdom with turnover of more than €750 million for accounting periods beginning on or after 1 April 2023. HMRC also has the power to introduce a requirement for MNEs to produce a summary audit trail covering the steps taken in completing the local file, but this will be the subject of a separate consultation and will not come into force on 1 April 2023. The draft Transfer Pricing Records Regulations 2023 is currently open for consultation until 31 January 2023. This secondary legislation cannot come into effect until the primary legislation that provides the powers of these Regulations to be enacted, has itself been enacted. The draft primary legislation was published back in November and will form part of this year's Finance Act, which likely won't receive Royal Assent until sometime in the summer (albeit the changes to the TP legislation will be effective for accounting periods beginning on or after 1 April 2023).

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