Fiscal Countdown

Newsletter n°84 – April 2023

Editor

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-fourth edition deals with the new measures published in April 2023 by the OECD, the EU, and the UN in 20 countries: Australia, Bahamas, Canada, El Salvador, Ireland, Estonia, Italia, Kenya, Luxembourg, Netherlands, Nicaragua, Nigeria, Russia, Rwanda, Saudi Arabia, Spain, Sweden, Uganda, United Kingdom, and USA.

Frédéric Barat, Partner

OECD

On April 11, 2023, the IASB announced amendments to IAS 12 Income Taxes in light of the implementation of the OECD GloBE rules. The amendments take into account the feedback received during a consultation on an exposure draft that ran until March 10, 2023 to deferred tax accounting where the GloBE rules have been enacted or substantively enacted in an area in which a group operates. In addition, the revised IAS 12 will introduce targeted disclosure requirements for affected companies to help public stakeholders better understand a group's exposure to local Pillar Two legislation, particularly before its effective date. In this context, a company would also be required to disclose known or reasonably estimable qualitative and quantitative information about its exposure at the end of the reporting period. The final amendments to IAS 12 are expected to be issued by the end of May 2023.

European Union

European Parliament approves EU Emission Trading System reform and new EU Carbon Border Adjustment Mechanism

On April 13, 2023, the European Commission adopted an implementing regulation to establish the criteria for determining whether the information exchanged under an agreement between the tax authorities of Member States and a non-EU country is equivalent to that specified in Council Directive (EU) 2021/514 (DAC7).

Where the European Commission has determined that Member States receive equivalent information from non-EU countries that apply similar reporting regimes (e.g., under the OECD's multilateral competent authority agreement (MCAA), DAC7 provides relief from the reporting obligations for non-EU platform operators in the EU to eliminate double reporting. The adopted regulation mirrors the previous draft that was submitted in January for consultation. Notably, the Commission clarified in the recitals that relevant information needs to be automatically exchanged between non-EU countries and EU Member States.

The Court of Justice of the European Union (the CJEU or the Court) removed from its Registry the case of National Bar Council and Others, C-398/21. The case concerned the compatibility with EU law of the requirement for intermediaries, who are subject to legal professional privilege, to notify other intermediaries of their reporting obligation under the EU mandatory disclosure rules (DAC6). The removal follows the CJEU's decision in a Belgian referral dealing with the same topic, i.e., case Orde van Vlaamse Balies and Others (the Flemish Bar Council), C-694/20. The CJEU held that the notification obligation is invalid in light of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union – specifically the right to respect for communications between a lawyer and his or her client (Article 7). In light of the invalidation mentioned above, the Registry of the Court asked the referring French court whether they wished to maintain their request for a preliminary ruling.

Following a confirmation received from the French court that they do not intend to continue the proceedings, the case was removed from the Registry.

The European Commission (EC) today published updated State aid guiding templates to assist Member States in designing measures that will be included in their national recovery and resilience plans in line with EU State aid rules. As explained in the related EC release:

- The updated technical documents will help Member States design measures that further contribute to the implementation of the European Green Deal, while helping to end the dependence on Russian fossil fuels and fast forward the green transition as set out in the REPowerEU Plan.
- All investments and reforms entailing State aid included in the national recovery plans must be notified to the EC for prior approval, unless covered by one of the State aid block-exemption rules.
- The EC assesses measures entailing State aid contained in the national recovery plans to confirm that the applicable State aid rules are complied with and thereby preserve the level playing field in the single market.

United Nation

The United Nations Committee of Experts on International Cooperation in Tax Matters (UN Tax Committee) held its twenty-six meeting. During the conference, a revised draft proposal for a subject-to-tax rule (STTR), as well as accompanying draft commentary was approved. The proposed STTR would be included in Article 1 of the UN Model Convention and would provide that the Convention does not affect the taxation of income by a Contracting State if that income is subject to a low level of taxation in the other Contracting State. Income is considered subject to a low level of taxation if:

- it is subject to a statutory tax rate of a certain percentage or less (the percentage is to be established through bilateral negotiations); or
- it is subject to a higher statutory tax rate, but the beneficial owner of the income is entitled to a special exemption, exclusion, or reduction that results in a lower amount of tax paid compared to the rate agreed as above.

It was noted that further work on the STTR provision is required in order to address concerns raised by some members.

- Other key topics on the agenda of the UN Tax Committee's meeting included:
- Taxation of the digitalized and globalized economy;
- Transfer pricing;
- United Nations Model Double Taxation Convention;
- Environmental taxation,
- Dispute avoidance and resolution;
- Digitalization and improvement of tax administration;
- Tax transparency;
- Indirect taxes;
- Wealth and solidarity taxes;
- Crypto assets; and
- Update of the Manual for the Negotiation of Bilateral Tax Treaties.

Australia

Australian Treasury releases Exposure Draft Bill — Multinational tax transparency public country-by-country reporting.

Australian Treasury releases Exposure Draft Bill to deny deductions for payments by significant global entities to low-tax jurisdictions relating to intangible assets.

Bahamas

The Bahamas introduced economic substance legislation and guidance notes, applicable to certain geographically mobile income sectors such as:

- Banking, insurance and fund management;
- Shipping, distribution and service center businesses;
- Finance and leasing; and
- “Headquartering” entities, holding companies and intellectual property (IP) entities.

Under the new rules, businesses need, on an annual basis, to:

- Determine whether they are in scope of the economic substance requirements;
- Undertake classification exercises to determine whether they perform any “relevant activities” in a given financial period;
- For those entities that perform one or more relevant activities, undertake gap analyses on how they comply with the economic substance test and take action to fill any gaps identified;
- Confirm that an appropriate economic substance risk operating model exists within the organization, e.g., policies and procedures, documentation, and training;
- Collate information/data internally and from outsourcing providers;
- Report to the relevant authorities; and
- Retain documentation.

Canada

Legislation is expected in Canada that may affect the deduction of interest and financing expenses (IFE) for Canadian corporations and trusts. The excessive interest and financing expenses limitation (EIFEL) rules would restrict the amount of IFE that corporations and trusts can deduct for Canadian income tax purposes. The rules are complex and are expected to apply to tax years on or after 1 October 2023. Businesses may need to begin their assessments and tax planning to prepare for potential effects and compliance, particularly with respect to the pre-regime years.

Ireland

On 31 March 2023, the Irish Department of Finance released a FBS1 on the transposition of the Directive . Building on the May 2022 public consultation, this FBS launches the next phase of Ireland's consultation process on the implementation of the Organization for Economic Co-operation and Development's (OECD) Pillar Two framework under BEPS 2.0. Minister for Finance Michael McGrath confirmed that Ireland will bring forward implementing legislation later this year. As required by the EU Minimum Tax Directive, the law will be effective for accounting periods beginning on or after 31 December 2023.

The introduction to the FBS emphasizes that Irish authorities have not lost sight of competitiveness in implementing the Directive: The Pillar Two framework will have quite significant impacts for Ireland. We have engaged extensively at both OECD and EU level to ensure the agreed rules allow continued support for economic growth and prosperity, and also safeguarding our competitive tax regime for real and substantive activities in the State. The FBS outlines Ireland's approach to transposing the Directive and includes more than 100 pages of possible legislative approaches in this regard. Stakeholders are invited to respond to various queries raised throughout the document on how the Directive will be implemented in Irish legislation. The consultation period will run to the close of business 8 May 2023.

Estonia

On April 10, 2023, the Estonian government approved a new coalition program for 2023–2027. Key proposals include:

- The increase of the corporate income tax rate to 22 percent (currently 20 percent); and
- Eliminating the reduced corporate income tax rate of 14 percent (calculated as 14/86 of the net distribution) introduced in 2019 and applicable to regularly paid dividends.

If enacted, the changes above would apply from January 1, 2025.

Italia

The Italian Council of Ministers approved a set of general principles and criteria for a full reform of the Italian tax system (Draft Framework). The Parliament will now build on the framework to make it final by issuing a law that will enable the government to implement the reform in detail (Enabling Law). From the effective date of the Enabling Law (expected before this summer), the government will have approximately 24 months to execute the reform through one or more Legislative Decrees. The aims stated by the Draft Framework include reducing the tax burden of both corporations and individuals, increasing the degree of legal certainty, reducing litigation, improving the relationship between tax authorities and taxpayers, and outlining a system capable of attracting foreign capital by ensuring consistency with the Organization for Economic Co-operation and Development (OECD) recommendations under the Base Erosion and Profit Shifting (BEPS) project, along with specific reference to Pillar Two measures.

Italian authorities published legislation for the implementation of DAC7 into domestic law. The key takeaways are as follows:

The provisions of the Italian DAC7 law are closely aligned with the text of the EU Directive.

- Failure to comply with the obligations may result in an administrative penalty of between (i) EUR 3,000 to EUR 31,500 (reporting obligations failure), (ii) EUR 1,000 to EUR 10,500 (inaccurate communication of the information), and (iii) EUR 10,000 (violation of the registration requirements);
- Digital platform operators will be required to retain records of information relating to the due diligence procedures and reporting obligations until December 31 of the fifth year following the calendar year in which the information is / should have been disclosed;
- No further procedural guidance has yet been issued to clarify registration and reporting requirements.

The rules will apply effective from January 1, 2023, and initial reporting will be required by January 31, 2024.

On March 16, 2023, the Italian Council of Ministers approved a draft bill directing the Government to issue, within 24 months, legislation aimed at reforming the domestic tax system – which was one of the priorities identified in the National Recovery Plan. The bill comprises three main sections: the overall objectives of the tax reform, intended changes for specific taxes and reforming the tax procedures and related sanctions.

In the field of direct taxes, key suggested changes include:

- A reduced corporate income tax rate applicable to companies that reinvest profits;
- Gradual phasing out of regional production taxes and simultaneous introduction of corporate income tax surtaxes to ensure equivalent tax revenue;
- An overall simplification of the tax system by aligning the tax bases with the book values;
- Review of the deductibility of interest expenses;
- Review of the rules governing the offset of tax losses.

Key proposals in the area of tax procedures include:

- Reinforce the cooperative compliance system by gradually reducing the entry threshold, increasing the associated rewards (especially with regard to administrative and criminal penalties) and introducing special endorsement mechanisms in the form of certificates issued by qualified professionals;
- Eliminate the mediation process in tax litigation and digitalization of tax proceedings.

Kenya

The president of Kenya announced plans to review the currently applicable DST and to align it with the two-pillar solution currently being developed by the OECD inclusive framework. This represents a shift in policy for Kenya, who had represented a shift in policy for Kenya, who had previously opted to maintain a DST and decided against signing the statement of the Inclusive Framework in relation to the two-pillar solution from October 8, 2021.

Kenya issues VAT (Electronic, Internet, and Digital Marketplace Supply) Regulations, 2023.

Luxembourg

Luxembourg amends some procedural tax rules.

The State Council issued comments in relation to the notification requirements for intermediaries, who are subject to legal professional privilege, to notify other intermediaries of their reporting obligation under DAC6. In light of the CJEU decision of December 8, 2022, the State Council refused amendments providing that notifications can only be done to the relevant taxpayer and extending the scope of the CJEU court case to auditors and chartered accountants. In addition, the State Council asked the Luxembourg government to consult with the EC and to ask about the implications of the CJEU court case for the Luxembourg mandatory disclosure rules.

Netherlands

The Dutch tax administration published position papers drafted by twenty-six knowledge groups that deal with specific issues, such as:

- Dutch corporate income taxation;
- Dutch withholding taxation; and
- International tax matters.

The positions given by these knowledge groups will be used to draft guidelines for future tax audits. The website will be updated by adding new and updated position papers.

Nicaragua

Nicaragua National Assembly approves creation of Foreign Trade Platform.

Nigeria

The Nigerian Federal Inland Revenue Service (FIRS) held a workshop with a delegation from the OECD on the Two-Pillar Solution in order to familiarize relevant government officials with the rules and to discuss the potential benefits for Nigeria. Following the workshop, an outcome statement was issued that highlights “the need for Nigeria’s continued participation in the rule development, as a member of the Inclusive Framework, to ensure that the interest of the country and Africa is factored into the design and development of the rules.” The statement further advises that there is a need to consider immediate implementation of fiscal policy measures to address the fact that other jurisdictions have already started implementing the GloBE rules. According to the statement, the application of top-up tax in other jurisdictions would be to the detriment of Nigeria from 2024, if no step is taken. Accordingly, the statement explores tax policy options such as introducing a qualified domestic minimum top-up tax and streamlining tax incentives.

This may represent a shift in the approach of Nigeria, which had previously not signed the statement of the Inclusive Framework in relation to the Two-Pillar Solution from October 8, 2021.

Russia

Recent amendments to guidance (Guidance) adopted by the Russian Governmental Commission (GC) affect "contribution" fees imposed on foreign companies exiting the country, including US multinationals. Under Russian Presidential Decree #618, dated 8 September 2022, the direct or indirect change in ownership of a Russian subsidiary requires approval of the GC. In accordance with the Guidance, adopted by the GC in December 2022, unless the payment of the purchase price is deferred by an agreement between the seller and the purchaser, a "contribution" should be made to the government at 10% of the transaction price. Originally, the "contribution" was designed to support the negotiations of Russian purchasers to delay the payments to foreign sellers, though this objective was not explicitly stated in the Guidance. In March 2023, the Guidance was amended to designate the contribution as a means to increase state revenue and discourage management buyout at a nominal price. If the transaction price represents a discount of less than 90% of the fair market value (FMV), then the contribution should be 5% of the FMV (otherwise it is 10% of FMV). (For example, if FMV is 100 and the transaction price is 10 — 100, then the contribution is 5% of FMV; if the transaction price is 0 — 10, then the contribution is 10% of FMV.) The FMV must be confirmed by an Appraisal Report issued by a Russian certified appraiser (chosen from a list adopted by the GC) and verified by a report issued by a self-regulatory appraisal organization.

The appraisal (and respective "contribution") is now required, whether the purchase price is paid in a lump sum at closing or whether there is a deferral. For the sake of completeness, note that some sources refer the "contribution" as an "exit tax." Please note that, technically, it is not a tax because it is not established in any Russian legislation, but rather is a condition precedent (a requirement established by the GC) for receiving the GC's approval. There is no explicit provision stating (i) whether the Buyer or the Seller should pay the contribution, though in practice it is payable by the Buyer, or (ii) whether it applies for intergroup reorganizations. Based on the public statements made by the Minister of Finance in April 2023, the Government intends to codify the "contribution" by amending the Tax Code to introduce it explicitly.

Rwanda

Rwanda gazettes new Tax Procedures Law.

El Salvador

El Salvador's Bill for the Promotion of Innovation and Technological Manufacturing encourages investment in tech companies, includes tax benefits.

Saudi Arabia

On 7 April 2023, the Zakat, Tax and Customs Authority (ZATCA) announced the issuance of Decision of the Board of Directors of the Zakat, Tax and Customs dated 28/08/1444AH, approving changes that will include zakat payers within the scope of the Saudi Arabian TP Bylaws. The new requirements for zakat payers will be implemented in two phases as the amended TP Bylaws are published; which of the two phases applies will depend on the zakat payers' aggregate value of related-party transactions during the year.

Among the relevant changes, the amended TP Bylaws will include provisions for entering into advance pricing agreements (APAs) negotiated with the ZATCA if requested by income tax and zakat payers.

Spain

Spain published new tax reporting forms, which aim to provide the Spanish tax authorities with information concerning crypto-assets and related transactions. The new legislation will amend the reporting requirements for crypto-asset holders that were introduced as part of a law providing for measures to prevent and fight tax fraud.

The information to be submitted includes the following:

- Personal data of the persons or entities to which the cryptocurrency relates in any time of the year, either as holders, authorized persons or beneficiaries;
- Reporting of the cryptocurrency balance (in EUR) as of December 31; and
- Information relating to transactions with cryptocurrencies and cryptocurrencies held abroad.

Specified entities will be required to file the forms from January 1, 2024.

Sweden

The Swedish tax authorities issued comments regarding the offset of foreign tax credits carried forward from previous tax years. The comments follow a March 16, 2023, Swedish Supreme Administrative Court (Supreme Court) decision that a foreign tax credit carried forward from previous tax years could be used to offset Swedish tax on foreign-source income in the current year, even in cases where the income was not subject to any foreign tax in the current year.

The comments acknowledged that the Supreme Court's decision contradicted previous guidance issued by the Swedish tax authorities and instruct users that the previous guidance is therefore no longer applicable.

Uganda

The Ugandan government issued the draft 2023 tax amendment bill, which includes a proposal for the introduction of a digital services tax to be levied at 5 percent on non-residents providing digital services to customers in Uganda. In-scope digital services include:

- Online advertising services;
- Data services;
- Services delivered through an online marketplace or intermediation platform;
- Digital content services, including accessing and downloading of digital content;
- Online gaming services;
- Cloud computing services;
- Data warehousing;
- Other services delivered through a social media platform or an internet search engine.

Subject to parliamentary approval, the measure would enter into force on July 1, 2023.

United Kingdom

On April 5, 2023, the UK Financial Reporting Council be (FRC) launched a consultation on draft amendments to FRS 101 and FRS 102 in respect of the implementation of the Pillar Two rules. The draft amendments are based on similar proposals made by the IASB.

The objective of the FRC is introduction of "a temporary exception to the accounting for deferred taxes arising from the implementation of the Pillar Two model rules, alongside targeted disclosure requirements." Comments on the draft amendments are requested by May 24, 2023.

New rules for the reporting of Common Reporting Standard (CRS) avoidance arrangements and opaque offshore structures under Mandatory Disclosure Rules (MDR) came into force in the UK from 28 March 2023.

On that date HMRC published two further pieces of guidance, to complete their online service for reporting, and provided an update on reporting under DAC6. Further guidance is expected to be published in the next few months, following informal consultation, to address some remaining areas of detail where clarification is still needed.

USA

The IRS has indicated that it is considering the overarching issue of whether intercompany debt should be priced solely on the borrower's credit rating or using a group approach where a parent would support the borrower if a financial need existed (i.e., implicit support). During a Practicing Law Institute event, Kate Kerrigan, an attorney at the IRS's Office of the Associate Chief Counsel (International), said that the IRS is considering issuing a regulation that would clarify that parental support of a subsidiary's intercompany loan must be considered when pricing the loan. In addition, the IRS's priority guidance plan for 2022/23 listed a project on clarifying the effects of group membership (e.g., passive association) on arm's-length pricing for financial transactions.

The United States (US) transfer pricing regulations employ a definition of the arm's-length standard that is subtly different from the Organization for Economic Co-operation and Development (OECD) definition and does not support an adjustment for implicit support. Treas. Reg. Section 1.482-1 contains the general provisions that apply to all types of transactions, unless modified by more specific provisions.

Treas. Reg. Section 1.482-1 includes a general assumption that arm's-length conditions consist of uncontrolled transactions between uncontrolled entities. Treas. Reg. Section 1.482-2 governs financial transactions and does not include any specific exception to the general rules outlined in Treas. Reg. Section 1.482-1 on implicit support. Thus, both the general provisions under Treas. Reg. Section 1.482-1 and the specific provisions under Treas. Reg. Section 1.482-2 are inconsistent with the concept of implicit support.

Kerrigan pointed to passive association language for services (not financial) transactions that would validate the concept of implicit support. While Treas. Reg. Section 1.482-9 indicates that a related party does not receive a benefit from merely being a member of a controlled group, Treas. Reg. Section 1.482-9, states that issuing a performance guarantee should be considered a compensable service if it enables an affiliate to secure a contract under materially better conditions than it would have without the guarantee.

Kerrigan said a clarifying regulation could require taxpayers determining the interest rate on an intercompany loan to account for a parent's implicit support when rating a subsidiary borrower, just like a credit agency would, even if that support does not entitle the parent to a corresponding fee.

This would align with the OECD transfer pricing guidelines. Kerrigan further explained that the likelihood that parental support might increase the credit rating of a borrower should be considered in pricing the loan, acknowledging that such an impact varies based on the relative importance of the borrower to a group or to the parent.

Generally, implicit support might affect an affiliate's ability to borrow or the interest rate at which a loan is extended to that affiliate. However, as Kerrigan mentioned, that is not always the case, as the likelihood that a parent (or the group) supports an affiliate might depend on the relative status of the entity within the group. Specifically, a group member with a strategic position (e.g., one that operates in the group's core business) might have greater chances of being supported by the parent, whereas an entity that is not integral to the group's identity or future strategy might be less likely to receive such support. In the latter case, the OECD guidelines suggest looking at the entity on the basis of its stand-alone abilities to repay, rather than the group's.

Kerrigan also stated that the Internal Revenue Code Section 482 regulations require everything impacting the pricing of intercompany debt to be considered for transfer pricing purposes, so a potential future regulation accounting for implicit support would only clarify the existing law and not qualify as a new one. Kerrigan expects such a regulation would apply retroactively to all pre-existing intercompany debt or guarantees (i.e., no grandfathering).

Taxpayers should closely monitor any development as any future regulation likely will impact the general approach to pricing intercompany debt when there is implicit support. Furthermore, the potential retroactivity of the clarifications could conflict with foreign jurisdictions, as they may not accept a new pricing approach for transactions already in place.

Contacts

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

About Mazars

Mazars is an internationally integrated partnership, specializing in audit, accountancy, advisory, tax and legal services[1]. Operating in **91 countries and territories** around the world, we draw on the expertise of **40,400 professionals** – 24,400 in the Mazars integrated partnership and 16,000 via the Mazars North America Alliance - to assist clients of all sizes at every stage in their development.

[1] Where permitted under applicable country laws

www.mazars.com