Fiscal Countdown

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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 ninety-fourth edition deals with the new measures published in February 2024 by the Organisation for Economic Co-operation and Development; the United Nation, the European Union and in 22 countries: Armenia, Australia, Belgium, Bermuda, Chile, Croatia, Denmark, Estonia, Cyprus, France, Hungary, Indonesia, Ireland, Latvia, Malta, Moldova, New Zealand, Saudi Arabia, Spain, Switzerland, South Africa and UK.

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OECD

In mid-February 2024, Pillar One has been at the forefront of discussions on international tax. To begin with, Austria, France, Italy, Spain, the United Kingdom (UK) and the United States (US) renewed their Digital Services Tax (DST) standstill commitment until 30 June 2024. This extension does not include India and Turkey, which were part of the DST standstill but did not join this renewal. It remains unclear whether the US will extend the DST standstill with the two countries or impose further trade actions against them with respect to their existing DSTs.

Furthermore, the Organisation for Economic Co-operation and Development (OECD)/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) (the Inclusive Framework) recently released the report on Amount B of Pillar One. The report introduces two options for jurisdictions to simplify and streamline transfer pricing outcomes for baseline marketing and distribution activities; taxpayers may choose the elective option and or adopt the other (mandatory) approach. This simplified and streamlined approach aims not only to reduce administrative burdens and costs, but also to create a more predictable and equitable international tax environment.

In October 2021, the OECD released a statement reflecting the high-level agreement of Inclusive Framework on BEPS member jurisdictions on key parameters of Pillars One and Two of the BEPS 2.0 project, together with an implementation plan. As described in the October 2021 statement, Amount B would simplify and streamline the application of the arm's-length principle to in-country baseline marketing and distribution activities, with a particular focus on the needs of low-capacity countries.

The OECD released a working draft on Amount B in December 2022. This working draft did not yet reflect consensus agreement in the Inclusive Framework and was released to obtain input from stakeholders. In July 2023, the OECD published a second consultation document, which reflected further development of Amount B with some open issues still remaining.

Following the two consultation documents on Amount B, the OECD issued the Report, as approved by the OECD/G20 Inclusive Framework on BEPS, subject to reservations recorded by India. The Report is incorporated in the OECD TP Guidelines as an Annex to Chapter IV.

The Report identifies additional work that is being done with respect to several aspects of Amount B:

- Updated Commentary on Article 25 of the OECD Model Tax Convention (OECD MTC) that will include specific language relating to tax certainty and the elimination of double taxation to ensure that optionality is preserved in all dispute resolution mechanisms for jurisdictions that do not adopt Amount B — expected to be released shortly
- Additional optional qualitative scoping criterion that jurisdictions may choose to apply — to be concluded by the Inclusive Framework by 31 March 2024, with any additions to be incorporated into the OECD TP Guidelines
- List of low-capacity jurisdictions — to be concluded by the Inclusive Framework by 31 March 2024
- Competent authority agreements to be used in the context of bilateral tax treaty relationships where Amount B is applied by low-capacity jurisdictions to avoid double taxation, as well as to prevent double non-

taxation — to be developed by the Inclusive Framework during 2024

- Framework to gather information on the practical application of the Amount B approach once it has been in operation for a period of time — to be developed by the Inclusive Framework during 2024

- Further work on the interdependence between Amount B and Amount A of Pillar One — to be undertaken by the Inclusive Framework before the signing and entry into force of the Multilateral Convention for Amount A

The Report indicates that the OECD will publish a list of the jurisdictions that choose to apply Amount B.

Amount B will be treated as providing an arm's-length outcome only in jurisdictions that choose to apply the approach. In jurisdictions that do not choose to apply it, Amount B will not be treated as providing an arm's-length outcome, including for the purposes of Article 9 of the OECD MTC and by extension Article 25.

The outcome determined under the Amount B approach by a jurisdiction is not binding on the counter-party jurisdiction. Jurisdictions that choose to apply Amount B may choose to apply it by either (1) permitting tested parties resident within their jurisdiction to elect to apply the Amount B approach; or (2) by requiring the use of the Amount B approach in a prescriptive manner by their tax administration and tested parties resident in the jurisdiction.

Regardless of the manner of application, the Report states that the arm's-length outcome for out-of-scope transactions should be evaluated under the guidance included in the other sections of the OECD TP Guidelines.

Moreover, the guidance should not be interpreted as providing a "floor" or a "ceiling" for returns to distribution activities in general.

The OECD notes that because Amount B is incorporated in the OECD TP Guidelines, it is possible that some jurisdictions not participating in the Inclusive Framework will be impacted by these rules.

The Report describes the mechanics of the Amount B approach, addressing:

- Transactions that are in-scope
- Application of the most appropriate method principle
- Determination of the return
- Documentation
- Transitional issues
- Tax certainty and elimination of double taxation

In evaluating the choice of transfer pricing method for in-scope transactions, it is not necessary to prove that a particular method is not suitable, nor is it necessary that all transfer pricing methods are analyzed in depth or tested in each case.

Rather, the transactional net margin method (TNMM) is to be considered the most appropriate method for purposes of applying the proposed pricing methodology to qualifying transactions.

The Report indicates that there may be rare instances in which applying the Comparable Uncontrolled Prices (CUP) method using internal comparables could be more appropriate than the TNMM, notably when the necessary information is readily available to tax administrations and taxpayers. In these instances, the CUP can be used instead of the TNMM.

The Report provides step-by-step guidance on how to price in-scope transactions under Amount B:

1. Use the pricing matrix to determine the return, taking into account the distributor's industry, operating expense intensity and operating asset intensity

2. Apply the operating expense cross-check to mitigate anomalous results

3. Apply an adjustment using the data availability mechanism for qualifying jurisdictions

The Report contains a pricing matrix of arm's-length results based in part on the financial information of a global dataset of companies involved in baseline marketing and distribution activities. The dataset is drawn from the results of a benchmarking study described in Appendix A of the Report.

Return on sales has been selected as the net profit indicator for pricing the in-scope transactions.

The arm's-length range derived from the pricing matrix is based on three industry groups and five categories of operating asset and operating expense intensities (providing for 15 different potential operating margins).

The arm's-length results vary from 1.50% to 5.50% return on sales. If the taxpayer applying Amount B reports a return on sales that is not within 0.5% over or under the identified data point for the particular fact pattern, that return is to be adjusted accordingly.

The industry groupings refer to the below categories:

- Group 1 — perishable food, grocery, household consumables, construction materials and supplies, plumbing supplies and metal

- Group 2 — IT hardware and components, electrical components and consumables, animal feeds, agricultural supplies, alcohol and tobacco, pet foods, clothing footwear and other apparel, plastics and chemicals, lubricants, dyes, pharmaceuticals, cosmetics, health and wellbeing products, home appliances, consumer electronics, furniture, home and office supplies, printed matter, paper and packaging, jewelry, textiles, hides and furs, new and used domestic vehicles, vehicle parts and supplies, mixed products and products and components not listed in Group 1 or 3

- Group 3 — medical machinery, industrial machinery including industrial and agricultural vehicles, industrial tools, industrial components and miscellaneous supplies

The table below shows the returns on sales for distributors based on their net operating asset intensity (OAS), operating expense intensity (OES) and industry groupings:

Industry Grouping 1	Industry Grouping 2	Industry Grouping 3
[A] High OAS /any OOES: >45%/any level		
3.50%	5.0%	5.50%
[B] Med/high OAS/any OES: 30%-44.99%/any level		
3.0%	3.75%	4.50%
[C] Med/low OAS/any OES: 15%-29.99%/any level		
2.5%	3.0%	4.5%
[D] Low OAS/non-low OES: <15%/10% or higher		
1.75%	2.0%	3.0%
[E] Low OAS/low OES: <15% OAS/<10% OES		
1.50%	1.75%	2.25%

An operating expense cross check (cap-and-collar) is then applied as guardrails within which the primary return on sales net profit indicator is to be contained. If the Earnings Before Interest and Tax (EBIT) of the distributor, determined based on the pricing matrix, results in an operating expense to EBIT ratio that is outside of the cap and collar, the EBIT is adjusted accordingly.

The cap-and-collar rates are as follows:

Factor intensity	Default cap rates	Alternative cap rates for qualifying jurisdictions	Collar rate
High OAS [A]	70%	80%	10%
Medium OAS [B + C]	60%	70%	
Low OAS [D + E]	40%	45%	

In addition, the Report provides for an adjustment mechanism in cases where there is no data or insufficient data in the global dataset for a particular qualifying tested party jurisdiction.

Where a tested party is located in a qualifying jurisdiction, the adjustment will be made to the return determined under the previous steps (i.e., net risk adjustment and net operating asset intensity percentage).

The financial ratios used to apply the Amount B approach are to be determined with reference to "Applicable accounting standards," which the Report defines as "any accounting standard that is permitted as a basis upon which to prepare financial statements in the jurisdiction where the tested party performing baseline distribution activities is resident, and to any other accounting standard whose use is permitted by such jurisdiction for purposes of applying the simplified and streamlined approach."

The Report indicates that the analysis supporting the Amount B ranges and the operating expense cap-and-collar rates will be updated every five years (unless interim updates are considered necessary) and the financial data and other datapoints will be updated annually.

The documentation requirements under Amount B build on the existing documentation requirements included in Chapter V of the OECD TP Guidelines (specifically the local file). The Report indicates that this should include: an explanation on the delineation of the in-scope qualifying transaction (including functional analysis), written contracts, calculations needed for application of the framework, and segmentation and reconciliation. When the taxpayer is seeking to apply Amount B for the first time, the taxpayer should include in its local file, or in any other relevant documentation, a consent to apply Amount B for a minimum of three years, unless transactions fall out of scope during that period or there is a significant change in the taxpayer's business. The taxpayer is required to notify the tax authorities of the jurisdictions involved in the qualifying transaction of its intention to apply Amount B.

The Report notes that there may be situations where some MNE Groups may undertake business restructurings to fall in or out of scope of Amount B. It reiterates that MNE Groups are free to organize their business operations as they see fit and tax administrations do not have the right to dictate to MNE Groups how to design their structure or where to locate their business operations. It further states that tax administrations, however, have the right to determine the tax consequences of the structure resulting from the reorganization and that the provisions of Chapter IX of the OECD TP Guidelines on business restructurings would apply.

The Report states that some associated enterprises may attempt to artificially reorganize their arrangements to derive tax advantages from the application of Amount B. Jurisdictions may adopt approaches to address these concerns.

The Report notes that Amount B may apply to a restructured distributor with built-in losses from prior fiscal years. The tax treatment of those losses, in particular whether they can be deductible, would depend on each jurisdiction's domestic legislation and administrative procedures.

The Report describes potential sources of double taxation and the process by which double taxation may be relieved. Some jurisdictions may provide relief from economic double taxation through unilateral corresponding adjustments making use of provisions in their domestic laws. However, most jurisdictions would only be able to consider corresponding adjustments as part of a mutual agreement procedure (MAP) under a bilateral tax treaty. In a MAP or resulting arbitration procedure, when one or more of the jurisdictions relevant to the MAP have not elected to apply or accept Amount B, they must justify their positions on the appropriate corresponding adjustments using the remaining provisions of the OECD TP Guidelines and not the Amount B approach. Agreements reached under Article 25 of the OECD MTC (including bilateral or multilateral Advance Pricing Agreements, as well as MAP cases) prior to the implementation of Amount B will continue to be valid with respect to qualifying transactions.

Because Amount B is not subject to a revenue threshold (in contrast to both Pillar One Amount A and Pillar Two), it is widely applicable. Companies should consider whether they have transactions that may be in scope of Amount B and evaluate the potential impact of the Amount B approach on those transactions. It will be important for companies to monitor whether and how the jurisdictions that are relevant to their business choose to implement Amount B, including assessing whether they may have in-scope transactions that involve a jurisdiction that implements Amount B and a jurisdiction that does not. The dates of implementation by relevant jurisdictions should be monitored as this could be relevant to accounting for the tax impact, and consequently the effective tax rate of the group. We expect that this would become a point of discussion in statutory audits.

On 6 February 2024, 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 Inclusive Framework on BEPS had approved the results on 5 February 2024. The updated results cover new decisions on four preferential tax regimes. According to the press release, a total of 322 tax regimes have been reviewed by the Forum on Harmful Tax Practices (FHTP), and more than 40% of those are either abolished or in the process of being abolished. This latest review reflects that the regimes in Hong Kong (China) and the United Arab Emirates (UAE) have been amended to align with the standard and are now considered non-harmful, and two regimes in Albania and Armenia have been abolished. Additionally, the OECD released updated conclusions on the review of the substantial activities factor for "no or only nominal tax jurisdictions" in connection with the domestic laws of the 12 jurisdictions that have been identified by the FHTP as being a "no or only nominal tax jurisdiction." For eight out of the 12 no issues were identified, while for the remaining four (Anguilla, the Bahamas, Barbados and the Turks and Caicos Islands) the FHTP identified areas for focused monitoring. Additionally, for Anguilla recommendations for substantial improvement were made.

The OECD published the first statistics on the International Compliance Assurance Programme (ICAP) since the start of the program in 2018, covering all 20 cases completed by October 2023. ICAP is a voluntary risk assessment and assurance program under which multiple tax administrations collaboratively risk-assess an MNE group. In return, the program offers MNEs a level of tax assurance that participating tax administrations will not open new tax audits regarding the low-risk covered transactions for a specified period. The statistics provide information on the tax administrations that participated in the completed ICAP risk assessments, the average time taken to complete a risk assessment, the core risk areas covered and aggregated data on the risk-assessment outcomes. The program covers five areas: tangible goods, intangibles, services, financing and permanent establishments (PEs). The statistics also include information on the relationship between ICAP and other routes to tax certainty, such as advance pricing agreements (APAs) and mutual agreement procedures (MAPs).

UN

The United Nations (UN) published the report on the 27th session of the Committee of Experts on International Cooperation in Tax Matters (the Committee) held on 17-20 October 2023 providing a summary of the items discussed and decisions taken during the session. The session covered a wide array of topics including transfer pricing, dispute avoidance and resolution, tax transparency, wealth and solidarity taxes, taxation of crypto assets, digitalization and other opportunities to improve tax administration.

In terms of dispute avoidance and resolution, the report stresses the ongoing collaboration with the Subcommittee on Transfer Pricing to improve guidance on transfer pricing. This effort included a review of a paper by the Subcommittee on APAs. The Working Group is also actively observing discussions in other forums, particularly developments related to certainty elements of Pillars One and Two of the Inclusive Framework.

The need for updates to the Handbook on Dispute Avoidance and Resolution would be assessed based on these developments, with updates presented at future sessions. As for taxation issues related to the digitalized and globalized economy, the report presents the progress on the three workstreams: multilateral implementation of certain UN Model Convention provisions (workstream A); the function and relevance of physical presence tests (workstream B); and cross-border taxation concerning remote workers (workstream C). Subcommittee will continue to consider those issues and report back to the Committee at the 28th session.

Moreover, in the sphere of taxation of crypto assets, the ad hoc group on taxation of crypto assets presented its report including a suggestion for the development of a toolkit to evaluate the tax risks posed by crypto assets. The first part of this toolkit will be introduced during the next session of the Committee, with approval to be sought at the 29th session. The second part of the toolkit will be presented for approval during the same session, and an updated version of the toolkit will be targeted for approval at the 30th session.

Regarding increasing tax transparency, the Subcommittee presented a report outlining the areas of priority for drafting guidance on enhancing tax transparency, including an overview of information exchange; guidance for nations new to information exchange; limitations in addressing tax transparency; non-tax use of exchanged data; and assistance in collection. Committee members supported the priority areas, but suggested that capacity should be considered, including technical assistance, due to the challenges many developing countries face in implementing existing information-exchange standards.

Other areas highlighted for potential future work included reviewing Article 26, addressing issues on real estate information exchange, and considering residence by investment and citizenship by investment schemes. The Committee approved these priority issues, with further discussion to follow in the 28th session, which will be held on 19-22 March 2024

EU

Minimum Tax Directive

The European Commission (the Commission) announced that it initiated infringement procedures against nine Member States – Cyprus, Estonia, Greece, Latvia, Lithuania, Malta, Poland, Portugal and Spain – that had not communicated national measures transposing the Minimum Tax Directive by the 31 December 2023 deadline.

Estonia, Latvia, Lithuania and Malta had communicated their intent to use the delay option granted by Article 50 of the Minimum Tax Directive, but the Commission opened the infringement procedures because the countries were late in implementing legislation on administrative provisions relating to the Minimum Tax Directive that are required despite opting for the delayed introduction of the charging provisions of the Directive.

Cyprus, Greece, Poland, Portugal and Spain have not opted for this delay and are required to transpose the Directive in full and have yet to enact the necessary rules under domestic law. The applicable Member States have two months to reply to the letters of formal notice and complete their transposition, or the Commission may decide to issue a reasoned opinion and provide two additional months to comply. If the reply to the reasoned opinion is not satisfactory, the Commission may refer the case to the Court of Justice of the EU.

DAC 7

On 5 February 2024, the Commission adopted an Implementing Regulation. The implementing regulation grants equivalence between the information required to be automatically exchanged between Canada and EU Member States that have signed the Multilateral Competent Authority Agreement on automatic exchange of information on income derived through digital platforms (DPI-MCAA) and that under Section III of DAC7 (reporting rules for digital platforms).

The DPI-MCAA is signed by the competent authorities of Belgium, Bulgaria, Canada, Croatia, Cyprus, Estonia, Finland, Ireland, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden.

Under DAC7, reporting by non-EU platform operators in a Member State is waived if the information reported in the third country of the platform operator is equivalent to that required under the reporting rules set under DAC7. The Commission determines this equivalence through implemented acts. For the equivalence to take effect, the

Implementing Regulation introduces two conditions: (i) the Canadian legislation must come into force; and (ii) the exchange relationships between Canada and the Member States must be activated. The Implementing Regulation will enter into force on 25 February 2024, the 20th day following its publication on the Official Journal of the EU, and equivalence applies as of 1 January 2024.

The Commission announced that it had initiated infringement procedures against Germany and Poland for failing to communicate transposition of the provisions related to joint audits under DAC7. Germany and Poland have two months to reply to the letters of formal notice and complete their transposition, or the Commission may decide to issue a reasoned opinion and provide two additional months to comply. If the reply to the reasoned opinion is not satisfactory, the Commission may refer the case to the Court of Justice of the EU.

Noncooperative jurisdictions

The EU started working on the list of noncooperative jurisdictions for tax purposes in 2016. On 5 December 2017, the Council published the first EU List of noncooperative jurisdictions for tax purposes, comprised of two annexes. Annex I includes jurisdictions that fail to meet the EU's criteria by the required deadline, and Annex II includes jurisdictions that have made sufficient commitments to reform their tax policies but remain subject to close monitoring while executing their commitments. Once a jurisdiction has executed all of its commitments, it is removed from Annex II.

The initial Annex I list included 17 jurisdictions that were deemed to have failed to meet relevant criteria established by the European Commission (the Commission). Since the release of the EU List, there have been multiple changes to its composition based on recommendations made by the Code of Conduct Group for Business Taxation (COCG). These changes may occur if, for example, the EU COCG identifies new jurisdictions or regimes or reassesses jurisdictions already on the EU List. A de-listing for both Annex I and Annex II is considered justified if an expert assessment establishes that the jurisdiction now meets all the conditions posed by the COCG.

The Commission also instituted the first countermeasures against listed noncooperative tax jurisdictions by adopting a Communication in March 2018 that set new requirements targeting tax avoidance in EU legislation governing, in particular, financing and investment operations. The requirements aim to ensure that EU external development and investment funds cannot be channeled or transited through entities in jurisdictions listed in Annex I without being confronted with countermeasures.

Moreover, in 2019, the Council released additional guidance on defensive measures toward noncooperative jurisdictions. Concurrently, it also released guidance on assessing jurisdictions with notional interest deduction regimes and the treatment of partnerships under criterion 2.2 (existence of tax regimes that facilitate offshore structures that attract profits without real economic activity). In accordance with the guidance on defensive measures mentioned above, EU Member States are required, as of 1 January 2021, to use Annex I in applying at least one of four specific legislative measures:

1. Non-deductibility of costs incurred in a listed jurisdiction
2. Controlled foreign company rules
3. Withholding tax measures
4. Limitation of the participation exemption on shareholder dividends

Many Member States have already adopted or drafted legislation for these defensive measures.

In October 2023, the COCG published its multiannual work package (2023 — 2028), which mentions that the group could explore how to facilitate the proper functioning of the Pillar Two rules by making use of the EU listing process. The COCG will also continue to discuss the new beneficial ownership criterion (criterion 1.4) and the extension of the geographical scope of its EU list screening process, which now encompasses approximately 95 non-EU jurisdictions. On 20 February 2024, the EU Ministers met in Brussels for a General Affairs Council meeting, during which the Ministers adopted the conclusions on the revisions of the EU List.

As noted, the Council adopted a revised Annex I of the EU List by removing Bahamas, Belize, Seychelles and Turks and Caicos Islands. According to the Council press release on the revised EU List, the reasons for removing the four jurisdictions from the list are the following:

- Bahamas and the Turks and Caicos Islands were delisted as they have made significant progress in enforcement of economic substance requirements (criterion 2.2).
- Belize and the Seychelles were removed from the list as the Global Forum has granted them both a supplementary review with regard to exchange of information on request, which will be undertaken in the near future. Pending the outcome of this review, Belize and the Seychelles have been included in the relevant section of Annex II.

The revised Annex I of the EU List now includes 12 jurisdictions: American Samoa, Anguilla, Antigua and Barbuda, Fiji, Guam, Palau, Panama, Russia, Samoa, Trinidad and Tobago, the US Virgin Islands and Vanuatu.

The Council also amended the list of jurisdictions included on Annex II of the EU List, which covers jurisdictions that have made sufficient commitments to reform their tax policies but remain subject to close monitoring while they are fulfilling these commitments. The Council removed Albania, Aruba, Botswana, Dominica, Hong Kong and Israel from Annex II after they satisfied their requisite commitments:

- Albania and Hong Kong fulfilled their commitments by amending a harmful tax regime.
- Aruba and Israel fulfilled all their pending commitments related to the automatic exchange of financial account information in the framework of the common reporting standard.
- Botswana and Dominica received a positive rating by the Global Forum with regard to the exchange of information on request.

As a result, the revised Annex II now comprises 10 jurisdictions: Armenia, Belize, British Virgin Islands, Costa Rica, Curaçao, Eswatini, Malaysia, the Seychelles, Türkiye and Vietnam.

The Council will periodically review and update the EU List, taking into consideration the evolving deadlines for jurisdictions to deliver on their commitments and the evolution of the listing criteria that the EU uses to establish the EU List. Until 2019, the EU List was regularly updated without a fixed schedule to reflect the reforms undertaken by third countries. However, beginning in 2020, Member States agreed that the EU List will be updated no more than twice a year to ensure (i) a more stable listing process, (ii) business certainty and (iii) that Member States can effectively apply defensive measures against listed jurisdictions. Accordingly, the next revision to the EU List is expected in October 2024.

Implications

With its listing process, the EU continues to exert pressure on third states to enhance transparency and remove harmful elements from their tax systems. Businesses with activities in jurisdictions listed as noncooperative are advised to understand the implications of a jurisdiction's being included in Annex I, including:

- Reporting obligations arising from the mandatory disclosure rules (MDR) contained in Directive 2011/16/EU as amended by Council Directive (EU) 2018/822 (MDR Directive or DAC6) require, in part, the disclosure of cross-border arrangements that involve cross-border deductible payments when the recipient of the payment is tax resident in a jurisdiction included on the EU List of noncooperative jurisdictions for tax purposes.
- EU Member States may consider applying one or more defensive measures, including tax and non-tax measures, to prevent the erosion of their tax bases. These may include measures such as nondeductibility of costs, enhanced controlled-foreign-company rules or withholding tax measures, among others.

The lists will also have implications for public country-by-country reporting (CbCR), under which information should be disclosed on a country-by-country basis and thus be disaggregated for all EU Member States and all jurisdictions included in Annex I (on the first of March of the financial year for which the report should be drawn up) and Annex II (on the first of March of the financial year for which the report should be drawn up for two years consecutively) of the EU List. Further, companies cannot delay the publication of commercially sensitive information for up to five years by making use of the safeguard clause included in the public CbCR rules if the information relates to jurisdictions listed on Annex I and Annex II of the EU List.

As the work on the EU List is a dynamic process, companies should continue to closely monitor developments, including other Member States' introduction of defensive measures toward noncooperative jurisdictions.

Annex I:

- American Samoa (added on 5 December 2017)
- Anguilla (added on 4 October 2022)
- Antigua and Barbuda (added on 17 October 2023)
- Fiji (added on 12 March 2019)
- Guam (added on 5 December 2017)
- Palau (added on 18 February 2020)
- Panama (added on 18 February 2020)
- Russia (added on 14 February 2023)
- Samoa (added on 5 December 2017)
- Trinidad and Tobago (added on 5 December 2017)
- US Virgin Islands (added on 13 March 2018)
- Vanuatu (added on 12 March 2019)

Annex II:

- Armenia (added on 4 October 2022)
- Belize (added on 20 February 2024)
- British Virgin Islands (added on 17 October 2023)
- Costa Rica (added on 17 October 2023)
- Curaçao (added on 14 February 2023)
- Eswatini (added on 4 October 2022)
- Malaysia (added on 5 October 2021)

- Seychelles (added on 20 February 2024)
- Turkey (added on 5 December 2017)
- Vietnam (added on 24 February 2022)

Armenia

The President of the Republic of Armenia signed the law approving the accession of the country to the MCAA for the exchange of country-by-country (CbC) reports. The CbC MCAA is one of the model agreements designed to facilitate the implementation and operationalization of the automatic exchange of information pursuant to Article 6 of the Convention on Mutual Administrative Assistance in Tax Matters. In this regard, it establishes the necessary rules and procedures that enable competent authorities in different jurisdictions to exchange information automatically and periodically on CbC reports (BEPS Action 13) that reporting entities of MNE groups submit to their residential tax authority. This automatic exchange of information can be conducted with all signatory jurisdictions of the CbC MCAA (100 jurisdictions as of 5 September 2023) with which there is an active relationship.

Australia

Australia's Treasury released for consultation a revised ED law for the proposed Australian public (CbCR) measures. These additional tax transparency measures were announced in the 2022-23 Federal Budget. This revision follows consultation on the April 2023 ED and includes some refinements intended to align the Australian requirements more closely with the EU's public CbCR Directive.

Belgium

On 26 January 2024, the law from 8 January 2024 amending the Belgian Code of Companies and Associations with respect to the disclosure of income tax information by certain undertakings and branches, commonly referred to as public CbCR, was published in the Official Gazette (available in French and Dutch). The new law implements the EU public CbCR Directive (the Directive). In line with the Directive, the Report should be published within 12 months following the closing date of the financial year for which the Report is drawn up. The King will determine the format and content of the Report through a Royal Decree. The content is however expected to be in line with the Directive. Belgium has made use of the exemption from the publication of the Report on the undertaking's website, provided that i) the website refers to the exemption; and (ii) the website refers to the Report as submitted to and published by the National Bank of Belgium.

The Directive stipulates that Member States may — subject to conditions — allow for one or more specific items of information otherwise required to be disclosed to be temporarily omitted from the Report if their disclosure would be seriously prejudicial to the commercial position of the undertakings to which the Report relates. Information regarding tax havens, however, can never be omitted. Belgium has opted not to implement this option. Consequently, if a Report must be filed in Belgium, all information will have to be disclosed. In line with the Directive, the new provisions concerning public CbCR as implemented in Belgian domestic law will be applicable for financial years starting on or after 22 June 2024. For most Belgian entities/branches, this implies the new requirements will apply for the financial year starting 1 January 2025.

Bermuda

The Ministry of Finance of Bermuda published an updated list of reportable jurisdictions for the 2022 and 2023 reporting periods (starting on or after 1 January 2020) for purposes of the CbCR standard.

Bermuda will provide the jurisdictions included on this list CbC information related to fiscal years 2022 and 2023. The list currently comprises 76 jurisdictions. The newly added jurisdictions are Aruba, Costa Rica, Kenya, Saint Kitts and Nevis and Thailand.

Chile

The President of Chile submitted to the Chamber of Deputies a bill including amendments to the domestic general anti-abuse rule (GAAR). The amendments, in part, changed the scope of the terms “abuse” and “simulation.” The bill also provides details on how the GAAR and specific anti-abuse rules interact. Further, the updated bill introduces a new administrative procedure for the Tax Administration to determine tax avoidance cases and an Anti-Tax Avoidance Committee that will intervene in the decision-making process. The Chamber of Deputies will discuss and vote on the bill and, if approved, forward it to the Senate

Croatia

Croatia published the legislation implementing Pillar Two into domestic law. The legislation is aligned with the EU Minimum Tax Directive and introduces a qualified domestic minimum top-up tax (QDMTT) and an income inclusion rule (IIR) for fiscal years starting on or after 31 December 2023. The legislation also introduces an undertaxed profits rule (UTPR) for fiscal years starting on or after 31 December 2024.

The legislation includes a provision in relation to safe harbor rules, which apply when included in a qualifying international agreement on safe harbors. Accordingly, this provision specifies that the qualifying international agreement includes the transitional CbCR safe harbor, the QDMTT safe harbor and the UTPR safe harbor, making them applicable.

Cyprus

On 1 February 2024, the Cypriot Tax Department issued revised thresholds relating to the taxpayers’ obligation to prepare a Cyprus Local File for transactions in scope of Section 33 of the Income Tax Law (ITL) (i.e., intercompany transactions). In accordance with the provisions of the ITL, the Cyprus Local File obligation arises for connected persons that are tax residents in Cyprus or PEs in Cyprus of non-taxresident persons (Liable Taxpayers) if their transactions with connected persons either exceed (or should have exceeded, based on the arm’s-length principle) €750k in aggregate per category of transaction, per tax year. Discussions that took place with interested parties, including the Ministry of Finance, led to increases in the abovementioned thresholds as follows:

- From €750k to €5m for connected transactions falling under the category “Financing”
- From €750k to €1m for all other categories of connected transactions (i.e., “Goods,” “Services,” “Royalties and Other Intangibles” and “Other”). The increase of the thresholds is effective for the 2022 tax year and the relevant amendment of the ITL is expected to be completed at a later date.

Denmark

Denmark published in its Official Gazette Law No. 107 introducing amendments to the Tax Assessment Act including the alignment of its defensive measures with the EU list of noncooperative tax jurisdictions (EU blacklist) as updated on 17 October 2023.

Estonia

On 8 February 2024, the Ministry of Finance of Estonia announced the government's approval of the Pillar Two legislation. Although Estonia has opted to defer the implementation of the Minimum Tax Directive until 2030, the approved legislation specifically addresses reporting obligations. The next step is for the legislation to undergo review in the Estonian Parliament. If passed by Parliament, the legislation will then be sent to the President of Estonia. The president can choose to sign the bill into law or return it to the parliament for further consideration. Once signed by the president, the Pillar Two reporting obligations would become law on the date specified in the legislation.

France

France introduces new tax and social security measures for 2024.

Hungary

Hungary's National Tax and Customs Administration issued guidance outlining the implementation of domestic rules under DAC7, effective from 1 January 2023. Platform operators are expected to meet notification, registration and reporting obligations.

Indonesia

The Indonesian Ministry of Finance issued Minister of Finance Regulation number 172 of 2023. regarding the Implementation of the arm's-length principle in transactions affected by a Special Relationship (PMK 172). PMK 172 addresses the application of the arm's length principle in Indonesia, transfer pricing documentation requirements, APAs and MAPs. PMK 172 entered into force on 29 December 2023 and revokes the prior Indonesian Ministry of Finance Regulations relating to transfer pricing documentation, APAs and MAPs. The new regulation can be regarded as a refinement of the prior regulations rather than a new transfer pricing framework.

Nonetheless, the new rules include key items for taxpayers to consider, such as how: the arm's-length principle should be applied; transfer pricing documentation for 2023 and 2024 (and later years) should be prepared; the MAP process can help resolve domestic controversy; and the arm's-length principle applies to PEs.

Ireland

Irish tax authorities released the updated Tax and Duty Manual (TDM) Part 35C-00-01 on general anti-hybrid rules to reflect amendments made by Finance (No.2) Act 2023.

Latvia

The Cabinet of Ministers of Latvia approved the Pillar Two legislation. Although Latvia has opted to defer the implementation of Pillar Two as allowed under the EU Minimum Tax Directive, this legislation relates to reporting obligations. Next, the legislation will be reviewed in the Saeima, the Latvian Parliament. If passed by the Saeima, the legislation will be sent to the President of Latvia, who will either sign it into law or return it to the Saeima for further consideration. Once signed by the president, the Pillar Two reporting obligations would become law upon publication in Latvia's Official Gazette.

Malta

Malta transposes EU's Global Minimum Tax Directive reflecting non-implementation position for IIR, UTPR and QDTT.

Malta published in its Official Gazette legal Notice 9 of 2024, extending the application of the transfer pricing rules (TPR) to transactions entered into force before 1 January 2024 (the effective date of Maltese TPR) that have not been materially altered on or after that date. This applies for tax years starting on or after 1 January 2027. Consequently, the grandfathering rule introduced under the Maltese TPR, which exempted arrangements that took place prior to 1 January 2024 and remained unaltered from the Maltese TPR, is now subject to a time limit.

On the same date, the Malta Tax and Customs Administration (MTCA) issued guidelines in relation to the Maltese TPR. According to the guidelines, whether an arrangement has been materially altered is determined on a case-by-case basis. For example, material alterations do not include company re-domiciliation in/out of Malta, but encompass changes in consideration, modifications to rights and obligations, and changes in the agreement's duration. In addition, the guidelines clarify that the application of the TPR takes precedence over the application of the notional interest deduction rules.

Regarding transfer pricing methods, the guidelines indicate that, preferably, Malta's TPR should adhere to the methodology outlined in Chapter II of the OECD TPG. Further, the guidelines state that the taxpayer would be required to disclose its transfer pricing documentation (TPD) to the MTCA only upon specific request.

However, the TPD that taxpayers are required to hold shall be in line with Chapter V of the OECD TPG, including a Master and a Local file. Although TPD are designed for all cross-border arrangements, they will not apply to transactions occurring in a financial period for which the aggregate arm's-length amount of revenue transactions does not exceed €6m and capital transactions does not exceed €20m. Finally, the MTCA will only consider requests for Unilateral Transfer Pricing Rulings for a downward adjustment if the downward adjustment (i) adheres to the arm's-length principle; and (ii) prevents potential double taxation, and the ruling is spontaneously exchanged with the tax administration of the relevant jurisdiction. The guidelines will be reviewed on an ongoing basis.

Moldova

On 9 February 2024, Moldova published in its Official Gazette Order No.9 of 26 January 2024 on transfer pricing implementation rules. The Order includes measures on the introduction of procedures for determining transfer prices in line with the arm's-length principle. In addition, it outlines the conditions for a comparability analysis in controlled and uncontrolled transactions, which are deemed comparable if there are no significant differences in their conditions that could influence contractual terms or if such differences can be adjusted.

Furthermore, the Order specifies the transfer pricing methods to be used (the comparable uncontrolled price method; resale price method; cost-plus method; transactional net-margin method; profit-split method; and any other method recognized under the OECD transfer pricing guidelines) and explains how to determine the most suitable one.

Moreover, according to the Order, related persons can voluntarily correct transfer prices in controlled transactions and adjust prices between the minimum and maximum values of the comparable price range, unless a party is under tax audit examining the transaction's compliance with the arm's-length principle. Nevertheless, the related persons are not allowed to adjust the transfer prices in controlled transactions if the adjustment will reduce the corporate income tax declared to the tax authorities.

Rules are also provided on verifying compliance with the arm's-length principle, including a preliminary verification and tax audit by the tax authorities. Once discrepancies have been identified under the preliminary verification, the taxpayer may adjust the transfer prices related to the verified controlled transactions. If the taxpayer does not make these adjustments voluntarily, the authorities will initiate a tax audit in accordance with the general rules provided by the Moldovan Tax Code. It is also stated that compliance with the arm's-length principle will not be verified for the taxpayers engaged in transactions with related persons if the total value during a fiscal period does not exceed the amount of one million Moldovan Leu (MDL1m) (calculated by adding the value of transactions performed with all affiliated persons, excluding value-added tax). Additionally, the Order: mentions that the OECD TPG need to be considered when applying Moldova's domestic transfer pricing rules; dictates the content of the local file; and provides a template and instructions for the transfer pricing information that local taxpayers are required to prepare and submit to the tax authorities. The rules apply to legal entities registered in Moldova and foreign legal entities with branches or PEs in Moldova. Th Order entered into effect on 9 February 2024 and the rules apply as of 1 January 2024.

New Zealand

The OECD's simplified and streamlined approach provides jurisdictions with an alternative pricing framework to determine a return on sales for eligible distributors. This simplified approach was designed with a particular focus on the needs of low-capacity jurisdictions (i.e., those with limited resources and data availability). The new approach is intended to allow jurisdictions that apply bright-line rules to covered activities to secure revenue while preserving tax administration resources. In developing the framework, the OECD aimed to reduce transfer pricing disputes and associated costs as well as enhance tax certainty. Questions remain, however, on whether this objective has been achieved.

The OECD Inclusive Framework notes that the design of the simplified and streamlined approach was strongly focused on the specific needs of low-capacity jurisdictions that were unable to apply, or experienced extreme difficulties in applying, existing transfer pricing approaches. Given this, the OECD accepts that the approach will not be appropriate in all jurisdictions. By choosing not to adopt the simplified and streamlined approach in New Zealand, Inland Revenue is signaling to taxpayers that its existing transfer pricing regime will continue to apply unaltered. This decision makes any reliance on the simplified and streamlined approach essentially ineffective for New Zealand tax purposes.

New Zealand's decision not to adopt the simplified and streamlined approach means that:

- Foreign-owned distributors operating in New Zealand must continue to apply existing New Zealand transfer pricing rules. The simplified and streamlined approach must not be applied for New Zealand tax purposes.

- New Zealand-owned distributors operating offshore must also continue to apply existing New Zealand transfer pricing rules= with respect to transactions triggering New Zealand tax obligations. This is the case even if the relevant offshore jurisdiction has chosen to adopt the simplified and streamlined approach. This stance may eventually be moderated by a political commitment to respect the application of the simplified and streamlined approach by specified low-capacity jurisdictions, which is currently under development by the OECD.

- Double tax could arise from any differences resulting from the application of these two approaches (namely the simplified and streamlined approach and the New Zealand transfer pricing rules). At this stage, New Zealand's Inland Revenue has taken the position that there would not be any relief under New Zealand's existing tax treaties.

- Penalties could arise, as Inland Revenue has confirmed that any reliance on the simplified and streamlined approach would not be seen as "compliant" for New Zealand tax purposes. If taxpayers relying on the simplified and streamlined approach conclude an amount of compensation different from the amount that would arise under New Zealand's existing transfer pricing rules, they could risk shortfall penalties applying to any difference resulting from the two approaches.

The introduction to the Amount B guidance notes that Inclusive Framework members commit to respect the outcomes under the simplified and streamlined approach for "low-capacity jurisdictions." The list of these jurisdictions will be made available on the OECD website in the coming months. As an Inclusive Framework member, it is possible New Zealand will issue further guidance in respect of its position on low-capacity jurisdictions.

At first glance, New Zealand's decision not to adopt the simplified and streamlined approach for inbound distributors appears somewhat unusual, given the country's general alignment to OECD standards. However, there have been other instances in which New Zealand has dissented from the OECD approach where the approach was considered be detrimental to New Zealand's interests.

In this instance, the messaging from Inland Revenue clearly indicates that taxpayers who adopt the simplified and streamlined approach will face exposure to penalties and double taxation. Multinationals operating with a touch point to New Zealand should be aware of this to help ensure that any application of the simplified and streamlined approach in their group does not have adverse tax implications for their New Zealand tax position. The decision may reflect a perception of the enforcement effort required to ensure that taxpayers meet the requirements to rely upon the simplified and streamlined approach. New Zealand does also have an existing simplification measure available to small foreign-owned wholesale distributors (refer to "Simplification measures for transfer pricing" on Inland Revenue's website).

It is interesting to see Inland Revenue take the position that the simplified and streamlined approach should broadly be disregarded for New Zealand tax purposes, including for taxpayers operating in jurisdictions that have chosen to adopt the approach. This will almost inevitably lead to more complexity and, potentially, to tax disputes where there is a mismatch in approach. It remains to be seen how many jurisdictions choose to adopt the simplified and streamlined approach and the extent to which the risk of double taxation is realized. Nevertheless, the application of different approaches to the same transactions not only increases compliance costs for impacted taxpayers, but also undermines the OECD's broader objective of reducing the risk of transfer pricing disputes and associated compliance costs.

Saudi Arabia

Under the RHQ Tax Rules, RHQ entities established in Saudi Arabia that meet the relevant criteria are granted a 30-year renewable tax incentive of 0% corporate income tax (CIT) and 0% withholding tax (WHT). The WHT exemption applies to the following payments the RHQ makes to nonresidents: (i) dividends; (ii) payments to related persons; and (iii) payments to unrelated persons for services that are necessary for the RHQ's activities.

In applying the tax incentives, the following considerations should be taken into account:

- The tax incentives apply to income from "eligible activities" of the RHQ. These are defined as "activities towards strengthening the group's profile in the region and providing strategic supervision, and administrative guidance and support for the internal business of the company, subsidiaries, and other related companies."
- The RHQ is required to maintain separate books of accounts for any ineligible activities. The income from such activities is taxed in accordance with the applicable provisions of the Saudi Arabian Tax Law.
- The RHQ is required to comply with the Transfer Pricing Bylaws issued by the General Authority of Zakat and Tax Board (now the Zakat, Tax and Customs Authority (ZATCA)) on 31 January 2019 and should conduct all transactions with its related persons at arm's length.
- Regardless of meeting the criteria for the RHQ registration set out by Ministry of Investment of Saudi Arabia (MISA), an RHQ entity must comply with the following Economic Substance Regulations (ESR) requirements:
  - Hold a valid license from the MISA, operating only within its scope
  - Possess adequate premises in Saudi Arabia suitable for RHQ activities
  - Direct and manage RHQ activities in Saudi Arabia, including strategic decision-making at board meetings held there
  - Incur operational expenses in Saudi Arabia commensurate with RHQ activities
  - Generate revenue from eligible activities within Saudi Arabia
  - Have at least one resident director in Saudi Arabia
  - Employ an adequate number of full-time employees proportional to RHQ activities in each tax year
  - Confirm that RHQ employees possess the necessary qualifications and skills to fulfill their duties

Noncompliance with the ESR may lead to penalties of:

i. 100,000 Saudi Riyal (SAR100k) if the violation is corrected within 90 days from the date of the imposition of the fine

ii. SAR400k if the violation described in (i) is not corrected within 90 days from the date of the imposition of the fine or where the RHQ repeats the same violation within three years from the date of imposition of the first fine and corrects the violation within 90 days of imposition of the second fine

iii. Potential revocation of tax incentives if the RHQ fails to remedy any of the violations after the imposition of the second fine

Companies that have already set up or intend to set up an RHQ in Saudi Arabia are encouraged to assess the tax impact of the new RHQ Tax Rules and their eligibility to avail of the tax incentives considering the level of their transfer pricing and ESR compliance.

South Africa

South Africa announces implementation of the global minimum corporate tax.

Spain

Spanish Ministry of Finance approves Ministerial Order implementing DAC7 reporting obligations.

Switzerland

The Swiss Federal Tax Administration (FTA) issued guidance on the application of transfer pricing rules. The guidance is specifically tailored to transfer pricing in a global setting, focusing on the pricing involved in transactions between related parties operating across multiple jurisdictions. The guidelines provide a definition of the arm's-length principle and indicate that the Swiss tax authorities and courts increasingly refer to OECD guidelines in interpreting the principle.

In addition, the document outlines how the arm's-length principle is applied in the context of profit tax and withholding tax in Switzerland and includes an overview of its existing legal basis and interpretation. In assessing whether a transaction is at arm's length, the Swiss tax authorities and courts often refer to OECD's comparability analysis process, although applying this process is not mandatory.

In addition, according to the guidance, the OECD-approved transfer pricing methods should take precedence, with other methods used only for specific cases. In Switzerland, the only obligation relating to transfer pricing documentation concerns CbCR by groups that have a parent company that is tax resident in Switzerland and have a turnover exceeding 900 million Swiss Francs (CHF900m). However, taxpayers must provide, upon request, documentation supporting compliance with the arm's-length principle.

In Switzerland, there is no single authority responsible for all cases involving transfer pricing. Questions in this area are therefore dealt with by different authorities depending on the context in which they arise. For example, the cantonal tax authorities are responsible for transfer pricing in the context of the collection of corporate income tax, while the FTA is responsible for collecting withholding taxes, and the State Secretariat for International Financial Matters is solely responsible for negotiating transfer pricing matters in the context of APAs or MAPs with foreign countries.

UK

His Majesty's Revenue & Customs (HMRC) published new operational guidance (INTM485025) on the role of risk in the accurate delineation of the actual transaction as part of a transfer pricing analysis. The guidance sets out HMRC's interpretation of the six-step process for analyzing risk contained within Chapter I of the OECD TPG and its application to transfer pricing analyses.

HMRC considers the analysis of economically significant risks and their management to be an important component of a comprehensive transfer pricing analysis and will expect taxpayers to submit suitable documentation evidencing this.

Importantly, HMRC's guidance emphasizes that a complete analysis of contributions to the control of economically significant risks should not be limited to parties that are contractually assuming, or being allocated, those risks in the controlled transaction that is being analyzed. The guidance provides extensive insight into HMRC's views on how contributions to the control of risk should be remunerated in an MNE group, and in particular provides considerations for when the transactional profit-split method may be the most appropriate method to reward contributions to risk control.

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[1] Where permitted under applicable country laws

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