

PE Watch: Latest developments and trends, December 2020

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OECD BEPS Multilateral Instrument

On 26 November 2020, Chile deposited its instrument of ratification for the Multilateral Instrument (MLI) and confirmed its preliminary position with respect to the permanent establishment (PE) provisions. Specifically, Chile adopted all PE provisions except Article 14 (contract splitting rule). The MLI will enter into force for Chile on 1 March 2021.

On the same date, Kazakhstan deposited a set of notifications with the OECD to amend or complement its initial MLI notifications. With respect to Article 12 (Agency PE) and Article 13 (specific activity exemptions), Kazakhstan updated a few references on the provisions of its current Covered Tax Agreements (CTAs) that are impacted by the MLI. For Article 14 (contract splitting rule), Kazakhstan had not initially notified any provision of its CTAs as being within the scope of this article. With this update, Kazakhstan listed a few provisions of its CTAs to which, to the extent of a matching position with other signatories, Article 14 would apply to.

Concurrently, Indonesia and Russia notified that they have completed their internal procedures for the entry into effect of the MLI provisions with respect to specific CTAs, which is required when a signatory has made the reservation in Article 35(7)(b) of the MLI. Hence, Indonesia notified 22 CTAs and Russia

notified 7 CTAs. With respect to the PE provisions of the MLI, Indonesia and Russia have adopted all of the PE provisions. The MLI will generally have effect with respect to the notified CTAs 30 days after the date of the notification.

On 27 November 2020, Bahrain signed the MLI. At the time of signature, Bahrain submitted a list of 44 tax treaties in force that it would like to designate as CTAs. With respect to the preliminary PE positions, Bahrain chose not to apply any of the PE provisions of the MLI. The definitive PE positions for Bahrain will be provided upon the deposit of its respective instrument of ratification, acceptance or approval of the MLI.

Domestic law PE developments

Denmark

On 3 December 2020, the Danish Parliament enacted Bill No. L 28 with a number of changes to international tax rules. Among other items, the enacted Bill updated the PE definition to align it with the PE definition set out in Article 5 of the OECD Model Convention (2017), inter alia, broadening the agency PE rule and adding an anti-fragmentation rule. Furthermore, the enacted Bill allows Danish companies to deduct final losses incurred by their foreign subsidiaries subject to a number of conditions.

The new rules are applicable for income years starting 1 January 2021 and thereafter.

See EY Global Tax Alert, [Denmark enacts new rules on international taxation](#), dated 3 December 2020.

Hungary

On 26 November 2020, Hungary published a law (the Law) that includes a number of changes to the *Corporate Income Tax Act*. Among other items, the Law introduces a Service PE provision for the furnishing of services by a nonresident entity in Hungary, but only if the services continue for a period of more than 183 days of activities in any 12-month period. However, the Law includes a contract splitting rule whereby contracts for related projects are artificially split to prevent meeting the time threshold. The Law also provides that a tax treaty has precedence over domestic law on PE matters even if there is no PE under domestic law.

The Law is effective from 1 January 2021.

Iceland

On 11 November 2020, the Ministry of Finance and Economic Affairs of Iceland published Regulation No. [1094/2020](#) (the Regulation) which amends Regulation no. 1165/2016, (the main regulation on PEs). The Regulation adds a new exception on PE, whereby it provides that a home office will not create a PE if all of the following requirements are met: (i) the employer's place of business is abroad; (ii) the employee sets up his workspace without the help of the employer; (iii) the employer does not have access to the employee's house; and (iv) the employee's work is delivered entirely through electronic means for use in the employer's business activity abroad. If one of the listed requirements is not met, the foreign employer may create a PE in Iceland.

The Regulation entered into effect on 11 November 2020.

PE developments in response to COVID-19

Australia

On 10 November 2020, the Australian Taxation Office (ATO) updated its [guidance](#) on COVID-19 and PEs. The updated guidance states that the ATO will not apply compliance resources to determine if a foreign company has a PE in Australia if: (i) the foreign company did not have a PE in Australia before the COVID-19 travel restrictions; (ii) the presence of employees in Australia is related to travel restrictions; (iii) the employees staying temporarily in Australia will relocate overseas as soon as possible following the relaxation of the travel restrictions; and (iv) the foreign company has not recognized those employees as creating a PE in Australia or generating Australian source income for the purpose of the tax laws of another jurisdiction.

Taxpayers can request an early engagement discussion with the ATO if they are seeking advice on how the guidance applies to the taxpayer's specific circumstances and also on the long-term taxation consequence of an employee(s) undertaking activities in Australia.

This guidance is applicable from the beginning of international travel restrictions in March 2020 until 31 January 2021. The ATO may extend the guidance further subject to international travel restrictions.

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