

The Latest on BEPS and Beyond

December 2021

EY Tax News Update: Global Edition

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Highlights

With the rest of the global tax community, the EY Global Tax Policy team has been on top of the Inclusive Framework GloBE model rules (the model rules) released by the OECD on 20 December. In addition, we are eagerly awaiting key proposals by the European Commission to be released on 22 December. More specifically, we are expecting the release of the draft Pillar Two Directive and "UNSHELL" Directive, as well as a proposal on the European Union own resources package to pay back funds borrowed in the context of the €750 billion recovery fund. These releases before year-end indicate that more developments and legislation will be forthcoming in the new year.

The OECD also confirmed on 20 December that the GloBE commentary will be released early 2022. A Global Implementation Framework, including the simplification measures, will be released after that and may only be available shortly before the anticipated entry into force date (1 January 2023). This means that businesses will need to start preparing for the introduction of the minimum tax framework without key details and administrative guidance. And as the model rules now released for Pillar Two reveal, the complexity of the global minimum tax rules and the significant investment needed by companies in scope to be able to comply with them, getting prepared for compliance with these rules will not be an easy task. A detailed Global Tax Alert on the Pillar Two rules to be issued this week will include some examples.

Now that the model rules are out, businesses are starting to realize that they will have to comply with an entirely new tax system. A system that will also require the reporting of vast amounts of data to tax authorities through the new filing GloBE obligations. Businesses will have to collect significant information on an entity and jurisdictional basis in order to comply with the GloBe Information Return and other procedures that will be put in place in the future under the GloBE Implementation Framework. Part of the data to be provided is not yet available and will have to be developed and monitored especially for Pillar Two purposes.

Last but not least, the introduction of the Pillar Two rules will also trigger relevant domestic law changes by individual jurisdictions in 2022 and beyond. Not only will many jurisdictions introduce the Pillar Two model rules into their domestic legislation, but they will also be deciding on changes to their domestic tax architecture to align with the minimum tax rules. This may include, for example, amendments to their incentives regimes and the introduction of domestic top-up taxes.

What can businesses and investors do while the environment remains in flux and many details are yet unknown? It is important for businesses to evaluate the potential impact of the global tax changes both on their tax positions and on their processes and systems. Businesses should consider engaging with the OECD and policymakers at both national and multilateral levels on the business implications of these proposals. The OECD has announced that it will launch public consultations on the Implementation Framework in February and on the Subject To Tax Rule in March 2022. In particular the consultation on the Implementation Framework will provide an opportunity for business to engage in a dialogue on issues relevant for predictability, simplicity and administrability.

Finally, it is important for businesses to recognize that the Effective Tax Rate (ETR) calculations will likely not only have to be provided to governments, but also publicly. The European Commission has announced to come with a Directive in 2022 requiring in-scope MNE's to publish their ETRs calculated on the basis of the BEPS Pillar Two methodology.

Though there is much information to digest, we hope that these releases will not keep you from enjoying holiday festivities and the company of family and friends.

We wish you a joyful holiday season and a very Happy New Year! Stay safe!

OECD

Model Rules on the Pillar Two Global Minimum Tax released

On 20 December 2021, the OECD released the Model Rules on the Pillar Two Global Minimum Tax, as approved by the OECD/G20 Inclusive Framework on BEPS. The Model Rules cover the scope and mechanics of the Income Inclusion Rule and the Undertaxed Payments Rule, collectively referred to as the Global Anti-Base Erosion (GloBE) rules.

Together with the Model Rules, the OECD also released a summary of the rules (The Pillar Two Model Rules in a Nutshell), an overview of the key operating provisions of the GloBE rules (Fact Sheets) and a Frequently Asked Questions document.

The OECD press release indicates that it expects to release the Commentary relating to the Model Rules and to address the interaction with the United States (US) Global Intangible Low-Taxed Income (GILTI) rules in early 2022. In addition, the Inclusive Framework is developing the model treaty provision for the Subject to Tax Rule, which is the third element of the Pillar Two global minimum tax framework, and a multilateral instrument for its implementation, which the OECD expects to release in the early part of 2022 with a public consultation event on it to be held in March 2022. Finally, the OECD notes the work to be done on development of an implementation framework addressing administration, compliance and coordination matters related to Pillar Two and announces that a public consultation event on the implementation framework will be held in February 2022.

See EY Global Tax Alert, [OECD releases Model Rules on the Pillar Two Global Minimum Tax: First impressions](#), dated 20 December 2021.

2020 peer review report on BEPS Action 5 on the Exchange of Information of Tax Rulings

On 14 December 2021, the OECD released the fifth annual peer review report (the report) relating to compliance by members of the Inclusive Framework on BEPS with the minimum standard on BEPS Action 5 for the compulsory spontaneous exchange of certain tax rulings (the transparency framework).

The report covers 131 of the 141 current Inclusive Framework jurisdictions, including all jurisdictions that joined prior to 30 June 2020, and Jurisdictions of Relevance (i.e., jurisdictions that are outside the Inclusive Framework but are deemed to be of interest for the purposes of transparency in tax) identified prior to 30 June 2020. The report assesses the 2020 calendar-year period and contains 66 recommendations for 36 jurisdictions to improve their legal or operational framework to identify and exchange tax rulings. Further, the report indicates that as of 31 December 2020, almost 22,000 tax rulings within the scope of the transparency framework had been issued by the jurisdictions under review, and over 41,000 exchanges of information had taken place.

This report is the first report for the peer review process on BEPS Action 5 conducted under the new transparency framework for the years 2021 through 2025 that was published on 22 February 2021.

See EY Global Tax Alert, [OECD releases 2020 peer review report on BEPS Action 5 on the Exchange of Information of Tax Rulings](#), dated 17 December 2021.

Seychelles deposited the instrument of ratification of the MLI

Also on 14 December, Seychelles deposited its instrument of ratification of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI) with the OECD. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, Seychelles added the tax treaties with Ghana, Kuwait, Lesotho, Malawi and Zimbabwe to its list of Covered Tax Agreements (CTAs). It also removed the statement of acceptance of the principal purpose test as interim measure. The MLI will enter into force for Seychelles on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit of its instrument of ratification, i.e., on 1 April 2022.

Second batch of updated TP country profiles published

On 13 December 2021, the OECD published the [second batch](#) of updated transfer pricing (TP) country profiles reflecting the current TP legislation and practices of 21 jurisdictions. In this update, 3 new jurisdictions were added (Albania, Kenya, Maldives) and 18 jurisdictions were updated (Austria, Belgium, Bulgaria, France, Georgia, Germany, Indonesia, Ireland, Italy, Latvia, Malaysia, Mexico, Peru, Poland, Seychelles, Singapore, South Africa, Sweden).

The TP country profiles include information on the TP treatment of financial transactions and the application of the Authorized OECD Approach (AOA) to attribute profits to permanent establishments (PEs). Currently, the TP country profiles cover 63 jurisdictions and the OECD expects to conduct further updates during the first half of 2022.

Notification made by some jurisdictions with respect to the MLI

On 25 November 2021, Estonia made a notification confirming the completion of their internal procedures for the entry into effect of the provisions of the MLI with respect to seven of its CTAs, i.e., Austria, Cyprus, Finland, Latvia, Poland, Slovak Republic and Ukraine. Estonia had reserved the right to delay the entry into effect of the provisions of the MLI in accordance with Article 35(7)(a) until it completed its internal procedures for this purpose. Now that Estonia has notified the completion of its internal procedures with respect to the notified CTAs, the rule on entry into effect set out in Article 35(1) and (5) of the MLI would apply as from the date that is 30 days after the Depositary has received the notification from Estonia that it has completed its internal procedures, i.e., as from 21 November 2021.

On the same day, Belgium, Qatar and the Netherlands made a notification with respect to the MLI. Belgium made a notification to add the entry into force of its CTA with the Netherlands. Qatar made a notification to extend its list of CTAs to add the tax treaties with Georgia, Kazakhstan and Tunisia. The MLI entered into force for Qatar, Georgia and Kazakhstan but Tunisia has not deposited its instrument of ratification of the MLI with the OECD yet. The MLI will therefore only modify the Qatar-Tunisia treaty after the completion of the relevant procedures in Tunisia. Lastly, the Netherlands notified the extension of its list of CTAs to add the tax treaty with Belgium.

Also, on 14 December 2021, Iceland notified the extension of its list of CTAs to add the treaty with Austria.

2020 MAP statistics published

On 22 November 2021, the OECD held its third Tax Certainty day. During the event, the OECD released the [2020 statistics](#) on Mutual Agreement Procedures (MAPs) and presented the [2020 MAP awards](#). The 2020 statistics include the information from all members that joined the Inclusive Framework on BEPS prior to 2021. As a consequence, a total of 118 jurisdictions have submitted their MAP statistics, an increase from the 105 jurisdictions covered in 2019 data.

Overall, the OECD's MAP statistics post-2016 show a trend of starting and ending inventories of MAP cases continuing to increase in the majority of jurisdictions tracked.

The 2020 MAP awards recognized the particular efforts of competent authorities following the same categories as last year: (i) average time to close MAP cases; (ii) age of inventory; (iii) caseload management; (iv) cooperation. This year, a new category (most improved jurisdiction) was introduced to recognize the jurisdiction that has the greatest increase in cases closed with unilateral relief or full agreement.

See EY Global Tax Alert, [OECD releases 2020 mutual agreement procedure statistics and 2020 mutual agreement procedure awards](#), dated 30 November 2021.

European Union

EU Public CbCR Directive enters into force on 21 December 2021

On 1 December 2021, the public country-by-country (CbC) reporting (CbCR) directive (the Directive) was published in the Official Journal of the European Union (EU). According to the published text, the Directive will enter into force on 21 December 2021 and Member States will have to transpose the Directive into national legislation by 22 June 2023.

The publication of the Directive follows the formal adoption of the proposal by the Council of the EU, i.e., the EU Member States, on 28 September 2021 and its approval by the European Parliament on 11 November 2021.

The rules set forth in the Directive will require both EU-based multinational enterprises (MNEs) and non-EU based MNEs doing business in the EU through a branch or subsidiary with total consolidated revenue of more than €750 million in each of the last two consecutive financial years to disclose publicly the income taxes paid and other tax-related information such as a breakdown of profits, revenues and employees per country. Such information needs to be disclosed for all 27 EU Member States and all jurisdictions included in the Annex I and Annex II of the Council conclusions on the EU list of non-cooperative jurisdictions for tax purposes (so-called EU black list and gray list). For all other jurisdictions, it is sufficient for aggregated data to be disclosed.

For more information on the content of the Directive and the context in which it will be applied, a [replay](#) of the recent EY webcast is available on the Public Tax Transparency - from voluntary to mandatory.

See EY Global Tax Alert, [EU Public CbCR Directive enters into force on 21 December 2021](#), dated 2 December 2021.

Finance Ministers do not reach agreement on Code of Conduct revision

On 7 December, the EU Finance Ministers met in Brussels for the last Economic and Financial Affairs Council (ECOFIN) meeting of this year. In advance of the meeting, the Council presidency published a draft Resolution on a revised mandate for the Code of Conduct for Business Taxation (the Code). The proposal would among others expand the scope of the code to tax features of general application which create opportunities for double non-taxation or that can lead to the double or multiple use of tax benefits for the same amount of income.

The draft was discussed during the Finance Ministers' meeting with the aim to reach a final agreement among all 27 Member States. However, two Member States blocked the agreement as they do not agree with the revisions. The draft Resolution will now be updated in working groups. It is uncertain whether an agreement on a revised mandate will be reached during the next semester under the French Presidency.

Country developments

Belgium - France: New tax treaty signed

On 9 November 2021, Belgium and France signed a [new tax treaty](#). With regards to the permanent establishment (PE) clause, the tax treaty contains an anti-fragmentation rule, the new definition of agency PE and independent agent. Moreover, the tax treaty provides a period of three years for submission of a MAP request beginning on the date of the first notification of the action resulting in taxation not in accordance with the provisions of the treaty. In cases where the competent authorities are unable to reach an agreement after three years of submission, the tax treaty contains an arbitration clause to resolve the case within two years from the presentation of the case to the competent authority of the other contracting state. Further, the tax treaty contains a principal purpose test.

The MLI has no effect on this treaty since Belgium and France have not included this tax treaty as a CTA. For the MLI provisions to have effect on the tax treaty, both jurisdictions would need to include the tax treaty in their respective list of CTAs, indicating whether the tax treaty falls within the scope of any of the reservations made by that respective jurisdiction.

The treaty will enter into force on the last day of the month following the month in which the ratification process is complete and the exchange of ratification instruments has taken place.

See EY Global Tax Alert, [Belgium and France sign new double tax treaty](#), dated 29 November 2021.

Canada: Supreme Court decision on treaty shopping

On 26 November 2021, the Supreme Court of Canada ruled in favor of the taxpayer in the Government's appeal in the Alta Energy case. The Supreme Court decided that the Canadian General Anti-Avoidance Rule (GAAR) should only apply in relation to a tax treaty, by denying tax treaty benefits, under specific circumstances, i.e., when the taxpayer is engaged in a transaction that, despite being in line with the textual or literal interpretation of the rules, is against their purpose in light of their context. When establishing whether a transaction is not in accordance with the unified textual, contextual, and purposive interpretation of the rules, the interpretation should focus on the object, spirit and purpose of the specific provisions and not on an overriding policy objective of the tax treaty as a whole.

At the same time, the GAAR's application should not be based on "a value judgment of what is right or wrong [or] theories about what tax law ought to be or ought to do." The Court also distinguished tax avoidance and tax abuse, stating that taxpayers should be allowed to structure transactions to avoid tax, insofar as it is not considered abusive per se taking into account the object, spirit, and purpose of the specific provisions. On this basis, treaty shopping, on its own, is not inherently abusive. However, it is important to stress that after the introduction of the MLI and the related Principal Purpose Test's application to bilateral tax treaties, this reasoning is not expected to be followed in cases arising in the future.

Cyprus: Extension of the non-application of administrative fines for DAC6

On 22 November 2021, the Tax Department of Cyprus issued an [announcement](#) extending again the reporting deadline for arrangements under DAC6. The announcement states that no administrative fines will be imposed for submitting information by 31 January 2022 and applies to reportable cross-border arrangements made between:

- ▶ 25 June 2018 and 30 June 2020 with a reporting obligation by 28 February 2021.
- ▶ 1 July 2020 and 31 December 2020 with a reporting obligation by 31 January 2021.
- ▶ 1 January 2021 and 1 January 2022 with a reporting obligation within 30 days beginning on the day after they were/will be made available or ready for implementation, or when the first step in the implementation has been/will be made, whichever occurred/will occur first.

The extension also applies to periodic reports for marketable arrangements and reportable cross-border arrangements for which secondary intermediaries provided/will provide aid, assistance or advice, between 1 January 2021 and 1 January 2022 with a reporting obligation within 30 days beginning on the day after they provided/will provide aid, assistance or advice.

See EY Global Tax Alert, [Cyprus further extends non-application of administrative fines for DAC6 submissions until 31 January 2022 and issues circular on DAC6 penalties](#), dated 24 November 2021.

India: Agreement with the US on a transitional approach for the Equalization Levy

On 24 November 2021, the Indian Government issued a [Press Release](#) regarding the transitional approach agreed between India and the US on the application of the Indian e-commerce Equalization Levy, which is levied at 2% (2% EL) on nonresident e-commerce operators. Both countries agreed that the Indian 2% EL can remain in force until Pillar One takes effect. However, India will grant credit of the portion of 2% EL paid during the interim period (beginning 1 April 2022 until the implementation of Pillar One or 31 March 2024, whichever is earlier) against the MNE's future "Pillar One Amount A" tax liability. In return, the US

will withdraw its proposed trade actions against the Indian 2%EL. The final terms are expected to be agreed upon by 1 February 2022.

See EY Global Tax Alert, [India and US agree on transitional approach for India's 2% Equalization Levy prior to implementation of Pillar One rules](#), dated 1 December 2022.

Italy: Guidance on transfer pricing documentation

On 26 November 2021, the Italian Tax Authorities released a Circular Letter providing clarifications on the new instructions introduced in November 2020 regarding the content and validity of the TP documentation to provide administrative penalty protection in the case of a TP assessment.

The circular clarifies certain general concepts introduced in the new instructions from last year and states that the Master file should include specific information about the main transaction flows (i.e., top five products and/or services in terms of the group's overall turnover) and loan agreements. The Local file must include information about the operational structure (e.g., organizational chart), marginal transactions, royalties and interest expenses, reconciliation of financial data and internal dealings between the Italian head office and the foreign PE.

See EY Global Tax Alert, [Italy issues guidance on transfer pricing documentation](#), dated 2 December 2021.

Kenya: Consultation on the Implementation of CbCR Regulations

On 19 November 2021, the Cabinet Secretary for the National Treasury and Planning released a public consultation on the [Draft CbCR Regulations](#). The Draft CbCR Regulations mainly consist of the definitions of the key terms, the filing procedure, notification requirements, the content of the CbC report (the form for filing is yet to be released), and penalties in case of non-compliance. Generally, the rules are broadly in line with the OECD international standards on CbCR with the exception of a significantly lower threshold to file the CbCR. Any Ultimate Parent Entity of an MNE Group with a turnover of €20 million that is a tax resident in Kenya must file a CbC report. The Draft CbCR Regulations also establish certain conditions, which if met, a tax resident Constituent Entity which is not the Ultimate Parent Entity of an MNE Group will be required to file the CbC report in Kenya.

The rules are expected to be effective as of 1 January 2022.

Portugal - Circular updating TP guidelines published

On 26 November 2021, the Portuguese Ministry of Finance published Ordinance No.268/2021 which, among other important changes, increases the threshold required for companies to prepare and submit their TP documentation to the Portuguese Tax Authorities (PTA) when required by law. The threshold has been elevated from €3,000,000 to €10,000,000 of total income (with a de minimis rule of €100,000 of market value controlled transactions per counterparty). One of the new documentation options is the master file/local file structure, although with substantial local requirements. It is specified that the documentation must be submitted in the Portuguese language, although it is possible to request before submission providing it in a different language. A declaration of responsibility is now required from professional services firms that perform TP studies for taxpayers.

The updated TP regulation will enter into force on 27 November 2021, except for its Chapter IV "ancillary obligations of the taxpayers" which will apply to fiscal years started on or after 1 January 2021.

See EY Global Tax Alert, [Portugal modifies transfer pricing regime](#), dated 7 December 2021.

Spain - New MAP guidance published

On 9 December 2021, the Spanish Tax Authorities published new guidance on MAP. The guidance provides how to access the MAP and also provides clarifications and explanations of the applicable legislation. The guide contains two parts: (i) an explanation of the process of mutual agreement and explanation of the different phases; and (ii) frequently asked questions.

The first part explains the initiation and admission of the MAP, the MAP process and termination. Also, it provides details on the arbitration provisions included in tax treaties as well as the Arbitration Convention. The second part provides a series of the most relevant questions and answers on MAP, including the compatibility of anti-abuse clauses with MAP and access to MAP if the relevant tax treaty does not contain a provision similar to Article 9(2) of the OECD Model Tax Convention.

Turkey: Turkey and the US publish joint statement on DST

On 22 November 2021, Turkey and the US announced a [Joint Statement](#) that sets out a compromise on the transitional period of existing unilateral measures before Pillar One enters into force.

The Joint Statement provides that Turkey and the US have agreed that the same terms of the [Joint Statement](#) signed on 21 October 2021 by the US, Austria, France, Italy, Spain and the United Kingdom, i.e., Turkey has agreed to allow a portion of taxes accrued by an MNE under its Digital Services Tax (DST) or any other unilateral measures before Pillar One takes effect to be credited against the MNE's future Pillar One Amount A tax liability when Pillar One rules are in effect. In exchange, the US has agreed to terminate its proposed trade actions against Turkey.

See EY Global Tax Alert, [Turkey announces Joint Statement with the United States on Unilateral Measures Compromise - Digital Services Tax](#), dated 23 November 2021.

UK: Consultation on new mandatory disclosure requirements

On 30 November 2021, Her Majesty's Revenue and Customs (HMRC) published a [consultation](#) on the design of draft regulations for the introduction of new Mandatory Disclosure Rules (MDR), which would implement the OECD's Mandatory Disclosure Rules for Common Reporting Standard (CRS) Avoidance Arrangements and Opaque Offshore Structures. These new rules closely follow the OECD model rules and will replace similar EU rules previously introduced but subsequently limited after the UK's withdrawal from the EU, and will likewise require taxpayers and intermediaries to disclose information on these types of arrangements and structures to HMRC.

With respect to CRS avoidance arrangements, the new rules capture any arrangement "for which it is reasonable to conclude that it is designed to circumvent or is marketed as, or has the effect of, circumventing CRS Legislation or exploiting an absence thereof."

An opaque offshore structure is defined as a passive offshore vehicle held through an opaque structure. A passive offshore vehicle is generally defined as "a legal person or legal arrangement that does not carry on a substantive economic activity supported by adequate staff, equipment assets and premises, in the jurisdiction where it is established or is tax resident". In order to be considered an opaque structure, it should be reasonable to conclude that it "is designed to have, marketed as having, or has the effect of allowing, a natural person to be a beneficial owner of a passive offshore vehicle, while not allowing the accurate determination of such person's beneficial ownership, or creating the appearance that such person is not a beneficial owner."

The consultation runs from 30 November 2021 until 8 February 2022.

UK: Draft legislation on introduction of Master File and Local File documentation requirements forthcoming

On 30 November 2021, HMRC published the [outcome](#) of the public consultation on TP documentation which ran from March 2021 to June 2021. Based on the public consultation, the UK Government has decided that it will legislate to require the largest businesses - which generally cover businesses which are subject to CbCR requirements - to maintain a Master File (MF) and Local File (LF) as well as a supporting summary audit trail. No formal requirements for the preparation or submission of a MF respectively LF have been provided yet.

The Government intends to consult on draft legislation in 2022 and it is intended that the above requirements will take effect from April 2023.

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