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Global Tax Alert

The Latest on BEPS and Beyond

September 2022

EY Tax News Update: Global Edition

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Highlights

"I understand that you would rather keep Pascal and get rid of the Pillars, but unfortunately it's the other way around."

Achim Pross, Head of the International Co-operation and Tax Administration division at the OECD spoke these words during the IFA conference, held on 4-8 September, in response to the announcement of the resignation of the OECD's Director of the Center of Tax Policy and Administration, Pascal Saint-Amans. In combination with Hungary blocking unanimous agreement on the Pillar Two Directive in July and the adoption of the *Inflation Reduction Act* in the United States (US) in mid-August, which showed important deviations between the new US minimum tax rules and the OECD/G20 Inclusive Framework's Pillar Two design, the departure of Pascal Saint-Amans started rumors that both Pascal Saint-Amans and the Pillars could be disappearing. However, this rumor, or hope for some, was nipped in the bud by the 9 September 2022 statement by five of the major European Union (EU) Member States on unilateral introduction of the Pillar Two rules. France, Germany, Italy, the Netherlands and Spain vowed to implement Pillar Two in 2023 "by any possible legal means." Does this mean that the pursuit of a Pillar Two Directive in the EU will disappear, and implementation will be left to unilateral introduction of Pillar Two? Or are the five countries putting pressure on Hungary to show that Pillar Two will be implemented regardless of whether Hungary joins the consensus or not, also impacting minimum tax situations in Hungary?

EY

Building a better working world

While the five EU countries were putting pressure on Pillar Two adoption, the European Commission (the Commission) followed a path to raise the pressure on Hungary from a totally different perspective. On 18 September 2022, the Commission announced that it will freeze €7.5 billion of subsidies available to Hungary based on the EU cohesion policy, a pool of subsidies available for lower income countries in the EU. This freeze comes on top of the €7.3 billion from the EU recovery fund that Hungary still has not received access to. This means that there is almost €15 billion of EU funds that Hungary cannot use for its economy, which like many European economies is facing big challenges. The cut is linked to rule of law and corruption concerns. While apparently specific remedial measures have been developed by Hungary, the key question is whether the country will be able to implement these in time to get access to the billions it desires. For tax people, the key question will be whether Hungary, either as a token of good will, or in the process of the negotiations on this bigger package, will be willing to reverse its veto on the Pillar Two Directive. The coming weeks or month will show whether, like with Poland, the veto of Hungary will be withdrawn in the context of a wider agreement reached between Hungary and the Commission.

In the meantime, practitioners are eagerly waiting for any news from the OECD on the safe harbors, dispute resolution mechanism and implementation package on Pillar Two. Implementation of the super complex rules without fit for purpose safe harbors is not at all an appealing prospect for business.

All in all, it seems that the path of Pillar Two introduction will be laid out this fall. We already know that five countries will be introducing rules. Will other jurisdictions follow? We will keep you informed!

BEPS 2.0

OECD

OECD holds public consultation meeting on Progress Report on Amount A of Pillar One

On 12 September 2022, the OECD held a public consultation meeting on the Progress Report on Amount A of Pillar One, which was released by the OECD Secretariat on 11 July 2022 in connection with the ongoing OECD/G20 project on *Addressing the Tax Challenges Arising from the Digitalisation of the Economy*.

During the public consultation, three panels discussed key elements of the proposed design for Amount A. The first panel focused on several elements of the Marketing and Distribution profits Safe Harbor (MDSH), such as the treatment of withholding taxes, key undefined aspects of the MDSH formula ("Y" and the "multiplier"), and the potential alternatives or supplements to the MDSH. The second panel discussed the elimination of double taxation (EODT), the results of modeling by businesses, the method of EODT and the use of Return on Depreciation and Payroll (RODP) to identify the relieving jurisdictions. Finally, the following issues were discussed during the third panel: scope, revenue sourcing, tax base and unilateral measures.

At the consultation's closing, the Head of the International Co-operation and Tax Administration division at the OECD, Achim Pross, indicated that the written submissions and discussions were extremely rich. He indicated that more work is needed on the MDSH, including the need to do more to minimize distortive results. On revenue sourcing, he said it was a journey from the extreme transactional approach in the initial consultation document to the Progress Report, noting that the work has come a long way. However, there still is a long way to go. He stressed the importance of the treatment of unilateral measures and also the need for a workable certainty system. He expressed the view that to stabilize the system, Pillar One needs to be beneficial on a widespread basis. Finally, he noted the role of Pillar One in alleviating trade tensions.

See EY Global Tax Alert, *OECD holds public consultation meeting on Progress Report on Amount A of Pillar One*, dated 19 September 2022.

European Union

Joint statement on BEPS 2.0 by France, Germany, Italy, Netherlands and Spain

On 9 September 2022, France, Germany, Italy, Netherlands and Spain released a joint statement in relation to Pillar One and Pillar Two. According to the statement, these countries are fully committed to complete the work on Pillar One with the objective of signing the Multilateral Convention by mid-2023. Also, these countries reaffirmed their commitment to implement Pillar Two. Should unanimity not be reached in the next ECOFIN meeting in October 2022, these countries are ready to implement Pillar Two in 2023 by any possible legal means.

See EY Global Tax Alert, *Five major EU Member States commit to swift implementation of Pillar Two by any possible legal means*, dated 13 September 2022.

Country developments

Germany announces Pillar Two implementation

On 3 September 2022, the German Federal Government announced its intention to implement the Pillar Two rules domestically. This announcement was part of a relief package to reduce the burden of high energy prices on German households and businesses.

The announcement does not include additional details, but it makes clear the willingness of Germany to move forward with Pillar Two regardless of the ongoing negotiations at the EU level.

Switzerland opens public consultation on material aspects of the OECD's Pillar Two

On 17 August 2022, the Swiss Federal Council opened the public consultation on the ordinance that will temporarily regulate the material aspects of Pillar Two in Switzerland during a transition phase.

The ordinance includes a Qualified Domestic Minimum Top-up Tax (QDMTT), the Income Inclusion Rule (IIR), and the Undertaxed Payment/Profits Rule (UTPR) in line with the Global Anti-Base Erosion (GloBE) Model Rules. The draft wording of the ordinance mainly refers to the GloBE Model Rules for the determination of the respective taxes and includes only very limited additional Swiss regulations.

All interested parties can comment on the proposed ordinance until 17 November 2022. The ordinance is intended to apply from 1 January 2024. The Swiss Federal Council will release the final version of the ordinance after the formal enactment of the constitutional amendment which will be subject to a public vote in June 2023.

See EY Global Tax Alert, *Switzerland opens public consultation on material aspects of the OECD's Pillar Two minimum corporate tax*, dated 18 August 2022.

Hong Kong delays the implementation of Pillar Two

On 15 August 2022, the Hong Kong Secretary for Financial Services and the Treasury (the SFST) published a letter to provide the latest update of the implementation of the Pillar Two rules in Hong Kong. According to the letter, Hong Kong will delay the implementation of the IIR from the original OECD timeline of 2023 to 2024 at the earliest. As for the implementation of the UTPR and the domestic minimum top-up tax, the SFST will continue to monitor the implementation targets of other jurisdictions as regards those measures without providing any specific timeline.

The SFST also indicated that the Government intends to launch a public consultation by the end of 2022 such that the consultation exercise can benefit from the Implementation Framework for the GloBE rules, which is scheduled to be released later this year.

See EY Global Tax Alert, *Hong Kong delays implementation of OECD Pillar Two rules*, dated 17 August 2022.

Malaysia releases Pillar Two public consultation

On 1 August 2022, the Malaysian Ministry of Finance (MoF) launched a public consultation on the implementation of the GloBE Rules. Malaysia is reviewing the technical details for implementing the IIR and UTPR and considering the possibility of introducing a QDMTT. The consultation document provides an overview of the rules. It also contains a number of questions, including whether 2023 would be an acceptable date to implement the rules, and the approach to charge UTPR (denying a deduction or a separate tax liability). Moreover, the consultation document invites views on a Country-by-Country Reporting (CbCR) base safe harbor (including whether it should require adjustments or a premium Effective Tax Rate (ETR)) and how Malaysia could incorporate its current incentives into the GloBE Rules framework.

The consultation ran until 15 August 2022.

Mauritius Finance Bill includes the introduction of a QDMTT

On 22 July 2022, the Mauritian Minister of Finance, Economic Planning and Development published the Finance (Miscellaneous Provisions) Bill 2022. Among other items, the Finance Bill introduces amendments to the *Income Tax Act*. In that respect, the Finance Bill adds several definitions related to Pillar Two, such as BEPS, GloBE Rules, multinational enterprise (MNE) Group, QDMTT and Top-up Tax. In addition, the Bill introduces a new subsection according to which a company forming part of an MNE group that is liable to a Top-up Tax in a year may be required to compute and pay a QDMTT in such form and manner as may be prescribed. The amendments received the assent of the President on 2 August 2022, but are not yet in force.

South Korea releases draft legislation on Pillar Two

On 21 July 2022, South Korea's Ministry of Finance announced its 2022 tax reform plans. The announcement includes draft rules for the introduction of Pillar Two. The rules are closely aligned with the OECD Model Rules and include the introduction of an IIR and UTPR. However, the draft rules do not include a QDMTT.

South Korea intends to apply these rules by fiscal years beginning on or after 1 January 2024.

See EY Global Tax Alert, *Korea's 2022 tax reform proposals include new global minimum tax rules to align with OECD BEPS 2.0 Pillar Two*, dated 1 August 2022.

United Kingdom releases draft legislation on Pillar Two

On 20 July 2022, the United Kingdom (UK) Government released draft legislation for public consultation on implementing Pillar Two in the UK through the new multinational top-up tax. The draft legislation has been prepared in accordance with the GloBE Model Rules.

The draft legislation provides details on the application of the IIR but postpones commenting on the details on the design and implementation of the UTPR for now. It is expected that the IIR will apply to accounting periods starting on or after 31 December 2023. Further, the UK favors the introduction of a domestic minimum tax (DMT) and confirms that, if a DMT is introduced, the threshold would be €750 million and would apply to both UK-headed and foreign-headed MNEs.

The draft legislation also addresses several technical issues, notably on the interplay between the UK GloBE rules and the US Global Intangible Low-Taxed Income (GILTI) regime. Further, it recognizes that there is significant uncertainty around the effect of Article 9.1.3 of the Model Rules; the transition rule which limits the basis of assets transferred after 30 November 2021. The UK Government agrees there is a need for further guidance on this point and intends to raise this as part of the Implementation Framework.

The draft legislation was open for comments until 14 September 2022. The UK Government will analyze the feedback it receives with a view to including the measures in the Finance Bill to be issued at the end of this year after the UK Budget. The final contents of that Finance Bill will be a decision for the Chancellor.

See EY Global Tax Alert, *UK Government releases draft legislation on new multinational top-up tax*, dated 21 July 2022.

BEPS and other developments

OECD

OECD releases tenth batch of Stage 2 peer review reports on Action 14 (dispute resolution)

On 13 September 2022, the OECD released the tenth batch of Stage 2 peer review reports under BEPS Action 14 (dispute resolution). This report covered the implementation by Aruba, Bahrain, Barbados, Gibraltar, Greenland, Kazakhstan, Oman, Qatar, Saint Kitts and Nevis, Thailand, Trinidad and Tobago, United Arab Emirates (UAE) and Vietnam (the assessed jurisdictions).

The Stage 2 reports evaluate the progress made by the assessed jurisdictions in addressing any of the recommendations that resulted from the Stage 1 peer review reports that were released on 16 February 2021. The results of the reports generally show positive changes across the assessed jurisdictions, although not all show the same level of progress.

According to the reports, Aruba, Bahrain, Gibraltar, Oman, Qatar, and the UAE have addressed most or all of the deficiencies identified in the Stage 1 peer review. Barbados, Greenland, Saint Kitts and Nevis, Thailand, Trinidad and Tobago, and Vietnam addressed some of the identified deficiencies. Kazakhstan has solved none of the identified deficiencies and existing problems have been seen to be exacerbated in Stage 2. With this, the Action 14 peer review process for all reviewed jurisdictions under the current Assessment Methodology has been completed.

Lesotho deposits its instrument of ratification of the MLI

On 28 July 2022, Lesotho 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, Lesotho confirmed its preliminary MLI positions but removed its former agreement with Mauritius from the list of its Covered Tax Agreements (CTAs). The MLI will enter into force for Lesotho 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 their instrument of ratification, i.e., on 1 November 2022.

New peer review results under BEPS Action 5

On 27 July 2022, the OECD released an update on the results of the peer reviews of jurisdictions' domestic laws under Action 5 (harmful tax practices) of the OECD/G20 BEPS Project.

The updated results cover new decisions on 12 preferential tax regimes. According to the press release, the total number of tax regimes that have been reviewed, or are under review, is 319. The reviews were undertaken by the Forum on Harmful Tax Practices (FHTP). Two regimes of Armenia and one of Pakistan were classified as "potentially harmful" and will be subject to further evaluation by the FHTP. The remaining nine regimes on which new decisions were announced have been abolished, are being amended, are under review or are considered to be "not harmful." The FHTP will continue its reviews and will provide periodic updates.

Additionally, the Inclusive Framework concluded its first annual monitoring process for the effectiveness of the substantial activities requirements in previously identified no or only nominal tax jurisdictions. With respect to 8 out of 12 jurisdictions, issues have been identified and recommendations provided.

See EY Global Tax Alert, *OECD releases 2022 update on peer review of preferential tax regimes and no or only nominal tax jurisdictions*, dated 29 July 2022.

European Union

The European Commission proposes measures to promote the reduction of energy consumption and a solidarity contribution

On 14 September 2022, the Commission proposed a new Regulation introducing emergency measures to mitigate high energy prices and the risk of supply shortages in Europe. The proposal follows a request made by the Energy Ministers of the 27 EU Member States during an extraordinary Council meeting on 9 September 2022.

The Regulation includes, among others, two tax-related measures targeting companies in the energy sector that the EU considers having benefited disproportionately from the current high energy prices. These measures are: (i) a revenue cap to a maximum of €180 per MWh on low-cost electricity generating companies (i.e., those whose production costs are unrelated to high fossil fuel prices, such as wind, solar and nuclear producers); and (ii) an EU-wide temporary "solidarity contribution" (effectively a windfall tax) which will be levied at a rate of at least 33% over the profits of oil, gas, and coal companies. The solidarity contribution shall be calculated on the taxable profits as determined under national tax rules in the fiscal year starting on or after 1 January 2022, which are above a 20% increase of the average taxable profit of the three fiscal years beginning on or after 1 January 2019.

The Member States may decide on the proposals during the extraordinary Council meeting on 30 September 2022. Once adopted, the Regulation will enter into force on the day following its publication in the Official Journal of the EU. It will be directly applicable in the Member States for one year from its entry into force.

See EY Global Tax Alert, *European Commission proposes Regulation introducing electricity revenue cap and solidarity contribution of fossil sector*, dated 15 September 2022.

The EU's BEFIT proposal to be part of a Small Medium Enterprise Relief Package expected in October 2022

Also on 14 September, the European Commission's President Ursula von der Leyen delivered the EU's annual State of the Union speech. This speech is addressed annually by the President of the Commission to the European Parliament plenary session and includes the Commission's main priorities and plans for next year.

Among other items, the President announced a broader Small Medium Enterprise (SME) Relief Package. In the context of this package, the Commission will also develop a proposal for a single set of tax rules for doing business in Europe ("Business in Europe: Framework for Income Taxation" or BEFIT). The new tax framework was initially announced in the Communication on Business Taxation for the 21st Century in May 2021. It seeks to move the EU towards a common set of rules for determining taxable income and provide for a more efficient allocation of taxing rights between the Member States. It is expected that the Commission will start stakeholder consultations on BEFIT in the coming months.

The European Parliament brings the EU digital levy back on the table if Pillar One fails by the end of 2025

On 26 August 2022, the European Parliament issued a Draft Opinion requesting the Commission and the Member States to submit a legislative proposal to introduce an "EU Digital Levy" if a "critical mass of countries" does not ratify the Multilateral Convention implementing Pillar One by 31 December 2025. The introduction of the EU digital levy will be part of the new EU-own resources and will fund EU operations if there is a delay in implementing Pillar One. The proposal for an EU Digital Levy will be considered an own resource of the Union, as it was first suggested in July 2021.

The European Parliament only has an advisory role in the legislative process on tax proposals. Hence, adopting the Pillar One Directive or the EU digital levy Directive would require unanimity among all Member States.

EU Member States and European Parliament reach provisional agreement on Regulation to stop distortive foreign subsidies including tax advantages

On 30 June 2022, following a Proposal by the European Commission on 5 May 2021, negotiators for the EU Member States and the European Parliament reached a provisional agreement on a Regulation to deter subsidies, including tax credits and other preferential tax regimes, provided by non-EU countries that cause distortions in the EU Single Market.

Once the Regulation is adopted, the Commission will have the power to investigate financial contributions granted by public authorities of non-EU countries, which benefit companies engaging in economic activity in the EU and redress their distortive effects. In addition, the Commission will be able to examine bids in large-scale public procurements involving a financial contribution by a non-EU government and large concentrations (mergers and acquisitions).

The provisional agreement will now be subject to formal approval by the Council and the European Parliament. Once approved, the Regulation will enter into force on the 20th day following its publication in the *Official Journal of the EU*.

Country developments

Argentina: Mandatory Disclosure Regime suspension

On 1 September 2022, the Argentine Tax Authority (AFIP) published in the *Official Gazette* General Resolution No. 5254/2022 suspending the mandatory disclosure regime (MDR). The Resolution suspends the MDR for 60 calendar days beginning on 1 September 2022. This suspension is motivated by several cases by courts in Argentina where a final judgment is still pending. Furthermore, the AFIP considers appropriate to modify the MDR to make it more effective and efficient.

See EY Global Tax Alert, *Argentine Tax Authority suspends mandatory disclosure regime*, dated 6 September 2022.

Australia releases discussion paper on thin cap rules, royalty deduction and public tax disclosure rules

On 5 August 2022, the Australian Treasury released a discussion paper on *Multinational Tax Integrity and Tax Transparency* to address tax avoidance practices of MNEs and improve transparency through better public reporting of MNEs' tax information. The discussion paper sought feedback on the implementation of proposals to: (i) amend the existing thin capitalization rules; (ii) limit royalty deductions; and (iii) enhance tax transparency by MNEs. The consultation process ended on 2 September 2022.

With respect to thin capitalization, the Government is intending to amend the existing rules to limit interest deductions to 30% of earnings before interest, tax, depreciation and amortization (EBITDA). The proposal, which would replace the current safe harbor debt limit, is intended to align with the OECD's recommended approach under Action 4 of the BEPS program (i.e., fixed ratio rule limiting interest deductions to 30% of EBITDA).

A new integrity measure is proposed to limit MNEs' ability to claim tax deductions for payments relating to intangibles and royalties that lead to insufficient tax paid. It was announced that this measure would apply to significant global entities (SGEs) (broadly global groups with global gross revenue exceeding AU$1 billion) from 1 July 2023. The consultation

paper considered whether the application should be broader than SGEs or limited to corporate SGEs. There is discussion in the consultation paper around what is meant by "insufficient tax paid," one suggestion being that payments made to entities in jurisdictions determined under the Pillar Two rules to have an ETR of less than 15% could be in scope.

With regard to tax transparency, the consultation paper included proposals to ensure enhanced tax transparency by MNEs through the following measures:

- Public reporting of certain tax information on a country-by-country basis
- Mandatory reporting of material tax risks to shareholders
- Requiring tenderers for Australian government contracts to disclose their country of tax domicile

See EY Global Tax Alert, *Australian Treasury releases Discussion Paper on new thin cap rules, royalty deduction rules and public tax disclosure rules*, dated 5 August 2022.

Australia releases examples on treaty shopping arrangements

On 20 July 2022, the Australian Taxation Office (ATO) issued Taxpayer Alert (TA) 2022/2: Treaty shopping arrangements to obtain reduced withholding tax rates. The ATO uses a Taxpayer Alert as an early warning about a new or emerging activity or arrangement that is causing the ATO concern.

This Taxpayer Alert provides two examples of treaty shopping arrangements that the ATO views as higher-risk arrangements which will warrant increased scrutiny by the ATO. The examples focus on arrangements that seek to obtain a treaty benefit through interposition of one or more related entities between an Australian resident entity and the ultimate recipient of a royalty or dividend payment. Typically, the interposed entity is a resident of a treaty partner jurisdiction and the ultimate recipient is located in a jurisdiction that either does not have a tax treaty with Australia or if it is an existing treaty partner of Australia, the treaty benefit obtained under the tax treaty is less favorable.

See EY Global Tax Alert, *Australian Taxation Office issues Taxpayer Alert on treaty shopping arrangements to obtain reduced withholding tax rates*, dated 29 July 2022.

Canada releases draft legislative proposals for MDR and GAAR

On 9 August 2022, Canada's Department of Finance released for public comment draft legislative proposals (and accompanying explanatory notes) to implement most of the remaining income tax measures from the 2022 federal budget, as well as various other measures.

The draft legislation includes revised draft legislation for the previously announced MDR. It includes several changes including: (i) notifiable transactions that the Canadian Revenue Agency (CRA) has found to be abusive, as well as transactions of interest; (ii) introduction of a requirement to report particular uncertain tax treatments to the CRA; and (iii) introduction of penalties for non-compliance. Further, the application date of the rules has been deferred by one year compared to the date initially mentioned in February 2022. Thus, these new rules are intended to be effective in 2023 (i.e., either for taxation years beginning after 2022 or for transactions entered into after 2022).

In addition to the draft legislative proposals a consultation was also launched on the general anti-avoidance rule (GAAR). A consultation document, Modernizing and Strengthening the General Anti-avoidance Rule, was released on the same date as the draft legislative proposals.

See EY Global Tax Alert, *Canada's Department of Finance releases draft legislation for remaining 2022 budget measures*, dated 16 August 2022.

Cyprus Tax Authority issues Notification for transfer pricing rules and documentation requirements

On 29 July 2022, the Cyprus Government published in the *Official Gazette* a notification (the Notification) with effect as of 1 January 2022, providing guidance with respect to the transfer pricing (TP) documentation requirements. Among other items, the Notification provides guidance on content, language, the preparation, retention and submission deadlines of the master and the local files as well as the frequency of documentation updates. Moreover, the Notification provides guidance on content of the Summary Information Table including a template.

See EY Global Tax Alert, *Cyprus Tax Authority issues notification with respect to newly introduced transfer pricing rules and documentation requirements*, dated 5 September 2022.

Germany issues guidance on withholding tax on software payments

On 2 August 2022, the German Federal MoF issued guidance on the withholding tax treatment of remuneration paid to nonresidents for software development services. The guidance focuses on whether transactions should be viewed as a final transfer of a right or as a (temporary) license to use a right for a limited period of time, as only the latter gives rise to withholding tax under domestic law.

In the opinion of the MoF, an economic purchase of rights (not subject to withholding tax) should from the date of the law change (7 June 2021) be possible even if the copyright cannot be legally transferred. However, it depends decisively on the details of the contractual provisions as to whether they provide for the granting of comprehensive, exclusive and irrevocable rights of use and exploitation to the computer program for an unlimited period of time. According to the MoF, a number of specific factors, such as the author/developer has been granted a right to a further (financial) participation, indicate that there is not a final transfer of rights. The MoF also comments on multi-level contractual relationships (e.g., back-to-back transactions).

The guidance applies to all payments made after 6 June 2021. The MoF does not explicitly comment on the tax treatment of payments prior to that date.

See EY Global Tax Alert, *German Ministry of Finance issues official guidance on withholding tax for software development services,* dated 22 August 2022.

German Federal Ministry of Finance published draft DAC7 implementation bill

On 12 July 2022, the German Federal MoF published a draft bill to implement the new rules revising the EU Directive on Administrative Cooperation in the Field of Taxation to extend this Directive to reporting obligations of digital platform operators (DAC7). On 24 August 2022, the next legislative step was taken by initiating the formal legislative process. Under DAC7 digital platforms are obliged to collect, verify and report information on sellers who use their platform to sell defined goods or to provide services. DAC7 also aims to enforce the exchange of information and cooperation between the EU Member States' tax authorities, for example, through a joint audit framework or data breach procedures. Implementation is expected by 31 December 2022, and the Bill will apply as of 1 January 2023.

In the event of non-compliance with the law, the draft bill includes provisions on fines, which classify various violations as administrative offenses.

See EY Global Tax Alert, *German Federal Ministry of Finance publishes draft DAC7 implementation bill*, dated 25 July 2022.

Ireland updates guidance on deductibility of Digital Service Taxes

On 9 September 2022, the Irish Revenue Commissioners published updated guidance on the tax deductibility of Digital Services Taxes (DSTs). Certain DSTs incurred wholly and exclusively for the purposes of a trade are deductible in computing income of that trade for Irish corporation tax purposes. The guidance now applies to the DSTs in the following jurisdictions: (i) Austria; (ii) France; (iii) Italy; (iv) Kenya; (v) Spain; (vi) Turkey; (vii) United Kingdom; and (viii) India (Equalization Levy).

This list may be updated as required in the future.

See EY Global Tax Alert, *Ireland provides guidance on tax deductibility of Digital Services Taxes*, dated 9 September 2022.

Ireland issues guidance on the Interest Limitation Rules

On 4 August 2022, the Irish Revenue Commissioners published guidance on the newly introduced Interest Limitation Rules (ILR) which were brought into Irish law in *Finance Act 2021* following the transposition of the Anti-Tax Avoidance Directive (so-called "ATAD"). The ILR imposes a limitation on "excessive" interest deductions by limiting the net interest deduction to 30% of a taxpayer company (or group's) taxable EBITDA. The ILR applies to accounting periods starting on or after 1 January 2022.

The guidance provides further details and clarifications on a number of key elements of the law, including the meaning of key concepts such as "Interest equivalent," the calculation of EBITDA and spare capacity in the operation of the ILR, among others. The application of the ILR to interest groups, and the reporting obligations of relevant entities and interest groups are also set out.

Kenya updates Country-by-Country reporting requirements

On 23 June 2022, the Republic of Kenya published the updated *Finance Act 2022* in its *Official Gazette*. The Finance Act includes an update of the filing requirements and thresholds regarding the submission of the Country-by-Country (CbC) report, the master file and the local file.

The Finance Bill provides that an entity obliged to file the CbC report is either: (i) the ultimate parent entity (UPE); or (ii) the constituent entity appointed by the group (surrogate parent entity or SPE) of the MNE operating a reportable business unit of the MNE group in Kenya. This obligation applies to MNE groups with consolidated revenue of KES95b (approximately €750m) or more, including extraordinary or investment income.

An exception from filing the CbC report is introduced regarding UPEs obligated to file such report in their jurisdiction of tax residence, provided that such jurisdiction has an agreement for the exchange of information and a competent authority agreement that is in force with Kenya.

The CbC report should be submitted within 12 months from the MNE group's financial year-end. Prior to the CbCR, a notification should be submitted before the financial year-end indicating the UPE or SPE responsible for CbC report filing and the jurisdiction of filing.

There is also a requirement for MNE groups to prepare and submit their master and local files with the Commissioner annually within six months from the financial year end of the MNE group. The master file contains standardized information about the MNE group relevant to all members of the MNE group, while the local file contains information specific to the local entity. The thresholds identified above will also apply in this case.

See EY Global Tax Alert, *Kenya introduces Country-by-Country reporting requirements*, dated 26 July 2022.

Peru: MLI to be approved by the Congress

On 3 September 2022, Peru's Ministry of Foreign Affairs enacted Supreme Resolution 121-2022-RE to send the MLI to the Congress for its approval. In June 2018, Peru submitted its MLI positions, listing its reservations and notifications as well as the seven tax treaties it wishes to be covered by the MLI as CTAs. A definitive list of reservations and notifications will also need to be provided upon depositing the instrument of ratification.

See EY Global Tax Alert, *Peruvian Government sends MLI to Congress for approval*, dated 12 September 2022.

UK and Guernsey sign Memorandum of Understanding on arbitration procedure

The UK and Guernsey have signed a Memorandum of Understanding (MOU) setting out how the arbitration process under Article 25(5) of the UK-Guernsey Double Taxation Agreement (DTA) will be applied. This relates to the "mutual agreement" part of the DTA, which covers situations where it is unclear which territory has the taxing rights. The underlying principle of Article 25 is that the tax authorities of both jurisdictions will work together to mutually agree a solution.

The MoU is comprehensive and reflects the mutual understanding between both competent tax authorities on all aspects and stages of the arbitration process, from request to final decision and implementation thereof. The MoU provides inter alia: (i) rules for appointing an arbitration panel; (ii) arbitration process; (iii) confidentiality; and (iv) final decision.

The MOU has effect from the date of its signing on 16 June 2022.

UK publishes draft legislation on new transfer pricing documentation requirements

On 20 July 2022, the UK Government published draft legislation setting out new TP documentation requirements. These new requirements would apply to large multinational businesses within the scope of CbCR, with global revenues of €750 million or more, operating in the UK.

While the UK has implemented the CbCR minimum standard, there is currently no specific requirement to produce a master file and local file because the UK already had broad record keeping requirements. The Government has noted that the absence of specific TP documentation requirements and supporting guidance has created a degree of uncertainty for UK businesses regarding the appropriate TP documentation they need to keep, leading to inconsistency of approach across businesses.

The draft legislation aims to address this by introducing the compulsory preparation of both a master File and a local File. A summary audit trail will also need to be prepared and would consist of a short questionnaire detailing the main actions undertaken by the business in preparing their local File.

These new requirements would be applicable for accounting periods commencing on or after 1 April 2023.

See EY Global Tax Alert, *UK publishes draft legislation on new transfer pricing documentation requirements*, dated 26 July 2022.

United States introduces a 15% corporate alternative minimum tax

On 16 August 2022, US President Joe Biden signed into law the *Inflation Reduction Act* (the Act). Among other items, the Act includes a 15% corporate alternative minimum tax (CAMT) based on book income. The CAMT applies to any corporation (other than an S corporation, regulated investment company, or real estate investment trust) whose average annual Adjusted Financial Statement Income (AFSI) exceeds US$1 billion for any three consecutive tax years preceding the relevant tax year.

For a corporation that is a member of a foreign-parented multinational group, the three-year average annual AFSI must be: (i) over US$1 billion from all members of the foreign-parented multi-national group; and (ii) US$100 million or more of income from only the US corporation(s), a US shareholder's pro rata share of a controlled foreign corporation AFSI, effectively connected income and certain partnership income.

The Act adjusts the rules in Section 53 (credit for prior year minimum tax liability) to provide a minimum tax credit for applicable corporations. Under modified Section 53, the net minimum tax (i.e., the tax imposed by Section 55) for all prior tax years beginning after 2022 can generally be carried forward and utilized as a credit against the taxpayer's regular tax liability, including any base erosion and anti-abuse tax (the so-called "BEAT") liability.

See EY Global Tax Alert, *US Inflation Reduction Act includes 15% corporate minimum tax on book income*, dated 17 August 2022.

Uruguay publishes draft bill to amend territorial tax system

On 28 July 2022, Uruguay's Ministry of Economy and Finance has published a draft bill for public consultation that would change the source criteria applicable for corporate income tax (CIT) purposes in Uruguay. Currently, CIT applies to income obtained from activities developed, assets located, and rights used in Uruguay. The same type of income generated abroad is not subject to CIT in Uruguay.

The EU has some concerns about this tax system since passive income could be obtained abroad and not subject to CIT. Accordingly, Uruguay decided to make the necessary changes to come into compliance with the EU requirements.

This bill would be applicable to Uruguayan taxpayers that form part of an MNE Group. According to the bill, certain passive income generated abroad can still not be subject to CIT in Uruguay provided the entity meets certain economic substance requirements (e.g., sufficient personnel taking strategic decisions and bearing risks in Uruguay). On the other hand, a company not meeting the economic substance requirement would be considered as "non-qualified" and certain income generated abroad would be subject to tax in Uruguay, including: (i) immovable property; (ii) dividends; (iii) interest; and (iv) royalties.

If approved, the draft bill would be effective for fiscal years starting on 1 January 2023.

See EY Global Tax Alert, *Uruguay intends to change its traditional source criteria for corporate income tax purposes to comply with EU requirements*, dated 4 August 2022.

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