LOYENS & LOEFF

NOVEMBER 2021

2022 Tax trends
and developments

Introduction

As this year nears its end, it is time for our annual tax bulletin. This bulletin not only focuses on the tax trends and developments we foresee for 2022, but also includes some tips and takeaways.

Some of the major developments in 2021 were those concerning the G20/OECD Inclusive Framework's global tax reform and the initiatives following the European Commission's Communication on Business Taxation for the 21st Century. In 2022, these developments will be taken a step further and some of them are already going to come into play as of 2023. Which means that 2022 will be a year with a lot of tax news that may be relevant for MNEs.

Hot topics addressed in this annual tax bulletin include the global agreement on Pillar One and Pillar Two, the European Commission's soon expected proposal on the abusive use of shell entities and its initiative on debt financing (Debt Equity Bias Reduction Allowance (DEBRA)) as well as developments in tax transparency and transfer pricing. For MNEs that may be affected by Pillar One and Pillar Two, 2022 will be the year to assess the impact and potential actions needed to mitigate undesired effects. In transfer pricing, we see more and more multi-jurisdictional audits and multilateral agreement procedures. MNEs may want to prepare for what to do in case they will face these.

In addition, we have included some current tax developments in Belgium, the Netherlands, Luxembourg and Switzerland that might have an impact on MNEs. You will appreciate that the nature of these developments differs per country, so our aim has not been to discuss the same topics for each country.

Given the general nature of this tax bulletin, the information contained in it cannot be regarded as legal advice. But as you know, we are happy to share our ideas with you and discuss tailor-made solutions individually. You are most welcome to contact your Loyens & Loeff adviser if you would like to receive more information on any of the topics included in this bulletin.

Kind regards,


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November 2021

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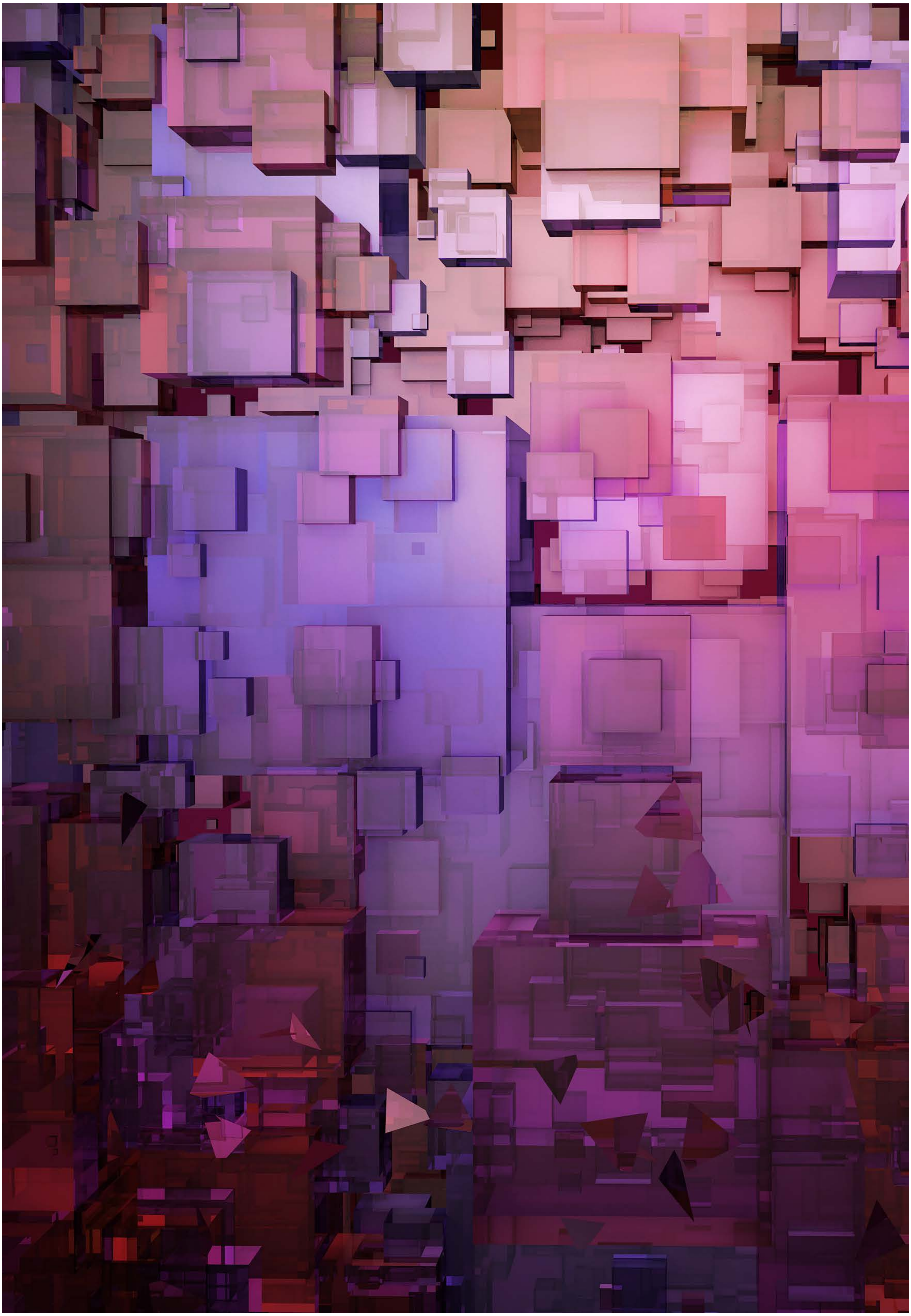

International developments - New ways of taxation to prepare for

Global tax reform

On 8 October 2021, 136 out of 140 members of the OECD/G20 Inclusive Framework officially agreed on certain key parameters to reallocate some taxing rights to market jurisdictions (Pillar One) and to introduce a global minimum effective taxation (Pillar Two).

This initiative started mid-2017 with a focus on MNEs operating digital business models to follow up on the OECD's BEPS Action 1. However, it turned into a discussion on reforming more broadly the international corporate tax regime which had come under pressure as a result of the globalisation and digitalisation of our economies. The reallocation of taxing rights to 'market' jurisdictions was thus broadened to most economic sectors (a few carve-outs subsist under Pillar One), albeit with higher turnover thresholds for MNEs to be in scope. In parallel, to complement the effect of BEPS recommendations, a minimum effective taxation on a jurisdiction per jurisdiction basis was agreed upon. To facilitate the acceptance and implementation, the OECD has sought synergies, where possible, with existing rules and in particular with Country-by-Country reporting.

Pillar One

Pillar One seeks to create a new taxing right for market jurisdictions through Amount A. This new taxing right is independent of physical presence and will be determined based on a formulaic approach.

- **Scope.** Only MNE groups with both a global turnover in excess of EUR 20 billion and a pre-tax profit margin above 10% will be affected by the new taxing right. The turnover threshold will be reduced to EUR 10 billion if, after 8 years, experience shows that Pillar One is a success and legal certainty remains sufficiently high.

- **Market jurisdictions.** At least EUR 1 million of revenue must be realised in a jurisdiction for an Amount A allocation. This threshold is reduced to EUR 250.000 for jurisdictions with a gross domestic product of less than EUR 40 billion.

- **Sectoral exclusions.** MNE groups active in the financial services and extractive industry sectors will not be subject to Pillar One.

- **Amount A calculation.** Amount A will be 25% of the residual profit, i.e., of the profits exceeding 10% of the global consolidated revenue. Losses carried forward will be taken into account. Where the MNE group is already taxable in a 'market' jurisdiction, a reallocation cap, being a marketing and distribution profits safe harbour, will apply.

- **Elimination of double taxation and dispute resolution.** Measures to prevent double taxation will be included in a multilateral convention to implement Amount A with relief to be provided through either the exemption method or the credit method. This convention will also include a binding dispute prevention and resolution mechanism. Finally, all countries participating in the multilateral convention will have to renounce and commit to revoke digital services taxes

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and similar measures. Some European countries[1] have come to an agreement with the United States to continue their digital service taxes until Pillar One comes into effect, but they will grant companies a credit against the future Amount A tax liability for any excess digital service tax due above the Amount A tax liability that would have been due if the new taxing right were already in effect as of 2022.

- **Compliance process.** Details are yet to be provided, but the Inclusive Framework indicates that a single entity of an in-scope MNE group may handle the additional tax compliance processes arising from Pillar One.

- **Amount B.** Work on Amount B, being simplified transfer pricing for baseline marketing and distribution activities, must be completed by the end of 2022.

Next steps
The plan of the Inclusive Framework is to have the multilateral convention determining the features of Amount A developed by early 2022 and to have sufficient ratifications in 2022. As a result, as from 2023, market jurisdictions can start to levy tax on the basis of the taxing rights shifted to them. It is envisaged that the technical work on Amount B will continue throughout 2022.

Pillar Two

Pillar Two seeks to enforce a global minimum corporate income tax at an effective rate of 15%, calculated on a jurisdictional basis. It will apply to MNEs that meet the EUR 750 million threshold as determined under BEPS Action 13 (Country-by-Country reporting). A lower threshold may be applied at the discretion of the countries.

Pillar Two will consist of four different rules:

- two domestic-based rules (together referred to as the GloBE Rules):
  - the income inclusion rule (IIR), which imposes a top-up tax on a parent entity in respect of the low-taxed income of a constituent entity, and
  - an undertaxed payment rule (UTPR), complementing the IRR, which denies a deduction (or requires an equivalent adjustment) to the extent that the low-taxed income of a constituent entity is not subject to tax under an IIR.

- two treaty-based rules:
  - a subject-to-tax rule (STTR), which is a top-up withholding tax on certain mobile payments (primarily interest and royalties) that will be triggered when the payment is subject to a nominal rate or an adjusted nominal rate of less than 9% at recipient level, and
  - a switch-over rule (SOR), to facilitate the application of the IIR in a treaty context.

However, some carve-outs related to the GloBE rules have been agreed:

- **Excluded entities.** Where the ultimate parent entity of the consolidated group would be an investment or pension fund, a government entity, a non-profit organisation, or an international organisation, the GloBE rules will not apply to these entities and to the investment holding vehicles they control. The carve-out does not extend, however, to MNE groups meeting the EUR 750 million global turnover threshold that are controlled by an excluded entity.

1 United Kingdom, Austria, France, Italy and Spain.

- **Sectoral carve-out.** International shipping income (as defined for the purposes of article 8 of the OECD Model Tax Convention) is excluded from the scope of the GloBE rules.

- **Substance-based carve-out.** For the computation of the GloBE effective tax rate, the jurisdictional tax base will be reduced by 8% of the carrying value of tangible assets and by 10% of the payroll. A 10-year transitional period will bring down these carve-out rates to 5%.

- **De-minimis exclusion.** If an MNE realises both less than EUR 1 million of profits and less than EUR 10 million of income in a given jurisdiction, the GloBE rules will not apply to profits realised in that jurisdiction.

- **Specificities of distribution-based tax systems.** If profits realised in such jurisdictions are distributed within 4 years and at that time are subject to the minimum effective tax rate of 15%, the GloBE rules will not apply.

Next steps

The Inclusive Framework intends to release the OECD model rules for Pillar Two, including a model treaty provision for the STTR, in the course of this year. The IIR, the SOR and the STTR would have to apply as from 2023 and the UTPR would have to be effective as from 2024.

For more information on the developments expected in the coming months, we refer to our webpage which will be updated from time to time.

EU implementation of Pillar One and Pillar Two

Ireland, Estonia and Hungary joined the other EU Member States forming part of the Inclusive Framework and signed the agreement reached on 8 October 2021. Cyprus, the only EU Member State that is not an Inclusive Framework member, also stated that it supports the agreement reached. For this reason, the unanimity needed to adopt EU tax directives should in principle not give rise to complications as all EU Member States agreed on the framework for both Pillars.

Pillar One – EU implementation

Once translated into a multilateral convention, the application of Pillar One will be mandatory for participating countries. At this moment, it is not certain whether in addition the European Commission will propose a directive for the implementation of Pillar One in the EU. Neither it is clear whether the European Commission's proposal for the EU own resources that is expected before year-end 2021, will still contain a proposal for the so-called EU digital levy.[2] As indicated above, the agreement calls upon all countries participating in the multilateral convention to renounce and commit to revoke digital services taxes and similar measures (see also on page 5 under 'Pillar 1' under 'Elimination of double taxation and dispute resolution'. The European Commission is still discussing the digital levy, which might be structured as a 'consumer tax' that cannot be seen a digital services tax or a similar measure.

Pillar Two – EU implementation

In order to ensure a consistent application within the EU and compatibility with EU law, the principal method for implementing Pillar Two will be an EU directive which will reflect the OECD model rules with some necessary adjustments. The European Commission has a draft proposal for such directive ready and plans to publish this proposal swiftly after the release of the OECD model rules. The aim of the European Commission is to publish this proposal before year-end 2021.

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2 The EU digital levy would be part of the new own resources the EU wants to introduce to fund the repayment of the borrowing under NextGenerationEU, the EU COVID-19 recovery program for which around EUR 800 billion has been borrowed on the capital markets on behalf of the EU.

It has been agreed that the wording of this proposal will stick as much as possible to the OECD model rules agreed upon or to be agreed upon, also ensuring a swift adoption within the EU. Deviating from the agreement reached, could lead to difficulties in reaching the required unanimity.

Tip

The OECD model rules regarding Pillar One and Pillar Two are expected to enter into force (in a number of jurisdictions) in 2023. Taxpayers that might be impacted by the implementation of Pillar One and/or Pillar Two should prepare for these in advance by:

- **Step 1:** gathering information. This includes collecting information to (i) compute jurisdictional effective tax rates under the GloBE rules, and (ii) assess which jurisdictions could claim taxing rights on Amount A. MNE groups should also monitor which of their tax jurisdictions levy tax on intragroup interest, royalties and some other categories of mobile income at a nominal rate of less than 9%.

- **Step 2:** modelling potential impact. Data used for country-by-country reporting purposes can provide a good start for such assessment but will need to be refined for detailed impact assessment.

- **Step 3:** analysing the need for restructuring. Since most rules are expected to enter into force in 2023, the key lessons drawn from the modelling exercise should help MNE groups in assessing the need for restructuring to mitigate tax compliance complexity and increased taxation. This assessment will notably depend on the national tax reforms further to this global tax overhaul, the cost/benefit analysis of being present in certain jurisdictions, and the available mechanisms to mitigate the risk of double taxation.

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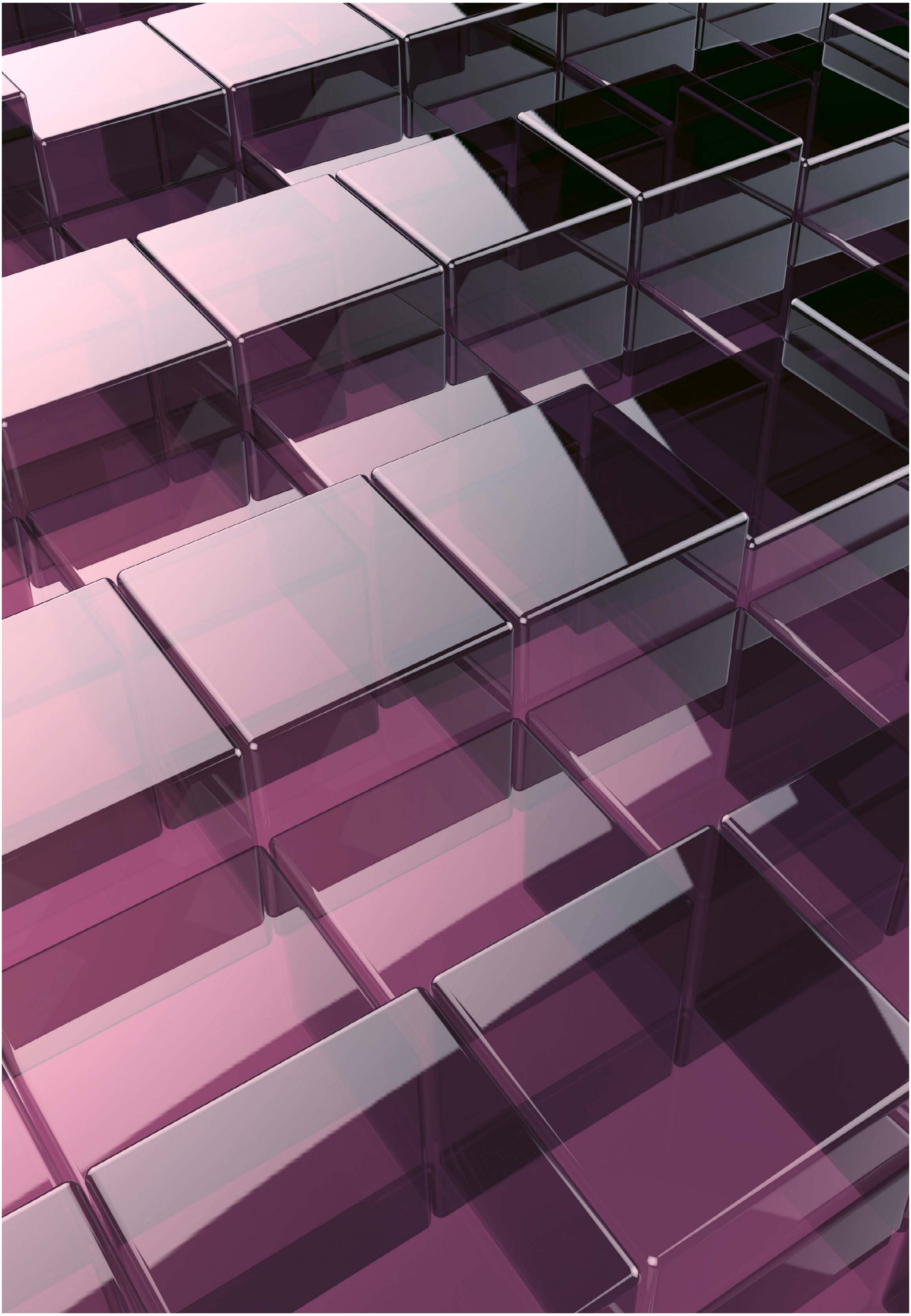

EU developments

Communication on Business Taxation for the 21st Century

On 18 May 2021, the European Commission issued a communication on Business Taxation for the 21st Century (Communication). The announcements made in the Communication will translate into legislative proposals between the end of 2021 and 2024 and will have a significant impact on MNEs' taxation and reporting obligations. The legislative proposals on the one hand aim to increase transparency, making it easier for tax authorities to counteract and deny tax benefits and creating some dissuasive effect for MNEs due to potential adverse PR exposure. On the other hand, they contain targeted measures, inter alia, ensuring effective taxation and supporting green and digital transitions.

In the longer term, probably by 2023, the European Commission will present a new framework for business taxation within the EU: 'The Business in Europe: Framework for Income Taxation' (BEFIT). This framework provides for a single corporate tax rule book for the EU. This framework will replace the still pending proposal for a Common Consolidated Corporate Tax Base (CCCTB), which will be withdrawn.

Annual publication of effective tax rates

The call for transparency in view of taxes paid by MNEs has increased rapidly in recent years. In this respect, the European Commission is working on a legislative proposal that requires the annual publication of the effective corporate income tax rate of certain large MNEs operating in the EU. The ETR will be determined in line with Pillar Two as outlined above.

We understand that the European Commission aims to publish this proposal together with its proposal on the implementation of Pillar 2 and the proposal on the abusive use of shell entities before year-end 2021 (see below). It is not certain whether this timeline will be met.

Fighting the abusive use of shell entities

Also in May 2021, the European Commission published a roadmap entitled 'Fighting the use of shell entities and arrangements for tax purposes'. The roadmap explores the most suitable options to ensure that legal entities and legal structures in the EU without a substantial business presence do not unduly benefit from tax advantages. A public consultation was subsequently open until 27 August 2021. The EU proposal is expected in December 2021 and it remains to be seen what this proposal will exactly entail.

Shell entities have been described by the EU as legal entities and structures without substance in the countries where they are established, created for the main purpose of reducing the tax liability, or disguising improper conduct of the group or operations they belong to. A shell entity exists only if certain criteria are met. Although these criteria have not yet been published, they are expected to include the presence of 'passive income' and cross-border activity.

It is considered that shell entities that would not pass a substance test would face tax consequences. In particular, it is considered that the shell entity may be ignored for tax purposes. This could for instance mean that a different (or no) tax treaty applies.

The European Commission is still considering whether certain carve-outs should be included in the proposal. This could, for example, include entities that meet the criteria of a shell entity but can provide evidence that their presence in the structure does not reduce the group's tax liability.

If adopted, the measures could force MNEs to provide additional proof of the substance and real economic activities of shell entities. Additionally, they would put further pressure on the use of intermediary holding and financing entities (especially in low- or no-tax jurisdictions), where substance is often very limited.

Takeaway and tips

- It is important for businesses to follow any developments related to this roadmap and to evaluate the potential impact of the proposed initiative.
- Substance is not easily defined as its meaning depends on the purpose for which it is used. In light of the EU initiative against abusive use of shell entities and other developments, MNEs are looking for tools to assess their current substance and to set up their business in a way that is efficient from a business perspective and future-proof from a tax perspective. For example, MNEs tend more and more to set up functions in-house. This can be a challenging transition.
- Loyens & Loeff has the tools to assess an MNE's level of substance and the risks from a Dutch, Belgian, Luxembourg and Swiss tax perspective. Furthermore, we can make clear and practical suggestions to improve the structure. Finally, Loyens & Loeff can serve as a sparring partner of local companies that are setting up their functions in-house or have already done so.

Debt-Equity Bias Reduction Allowance (DEBRA)

Currently, companies have a greater incentive to choose for debt financing in view of the distinction made in the deductibility of costs. Costs in relation to debt financing are in general deductible, whereas costs related to equity are generally treated as non-deductible for tax purposes. The European Commission finds it necessary to reduce this debt-equity bias as excessive debt levels make companies vulnerable, lead to the instability of the financial system and increase the risk of bankruptcies.

In spring 2021, the European Commission launched the initiative for a Debt-Equity Bias Reduction Allowance (DEBRA), which aims to mitigate the tax induced debt-equity bias.

In the published documents, the European Commission offers two different solutions for decreasing the debt-equity bias:

1) Disallowing the deductibility of interest payments; or
2) Allowing a notional interest deduction on equity ('Notional Deduction'). There are three alternatives for such Notional Deduction:
   (i) Notional Deduction on all corporate equity;
   (ii) Notional Deduction on new corporate equity; or
   (iii) Notional Deduction on total corporate capital (both equity and debt).

The European Commission noted that these measures need to be accompanied by a comprehensive set of anti-abuse rules to prevent the use of such allowance for tax avoidance purposes.

Tip

A legislative proposal is expected to be published in the first quarter of 2022. MNEs should assess the impact of the envisaged rules.

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Sustainability / green taxation / tax policy

In December 2019, the EU presented its climate plans in the Green Deal. The main objectives are becoming climate-neutral by 2050 and achieving a reduction in net emissions of greenhouse gases (GHG) of at least 55% by 2030 compared to 1990. To achieve these ambitions, the European Commission recently adopted a package of legislative proposals known as the Fit for 55 Package. The Fit for 55 Package includes several measures that are relevant from a carbon pricing and energy tax perspective. Three key measures are:

1. The EU Emission Trading System (EU ETS) will be amended. The EU ETS entails a scheme for GHG emission allowance trading and promotes a reduction of GHG emissions in the EU. Amendments to the EU ETS primarily consist of reducing the amount of emission allowances available ('the Cap'). Furthermore, the European Commission is proposing to tighten the EU ETS for the aviation sector and to include maritime transport in the current EU ETS. The European Commission is also proposing to introduce emissions allowance trading for the building and road transport sectors, which would initially be introduced through a separate system.

2. A Carbon Border Adjustment Mechanism (CBAM) will be introduced for selected sectors. The CBAM puts a carbon price on imports of certain goods from outside the EU and would reduce the risk of carbon leakage. Ultimately, the proposed CBAM would be an alternative to the currently existing free allowances under the EU ETS and other indirect emission costs. The CBAM would be similar to the system of allowances under the EU ETS. Importers would have to surrender CBAM certificates. These certificates are based on the embedded emission intensity of the products imported into the EU and are to be purchased at a price corresponding to that of the EU ETS allowances.

3. The EU Energy Tax Directive (ETD) will be revised. The ETD contains minimum excise duty rates for the taxation of electricity, as well as energy products used such as motor fuel and heating fuel. However, the current ETD does not reflect the EU's climate and energy policy frameworks or the EU's legal commitment to its climate ambitions. To achieve this, the update of the ETD focuses on two main areas of reform. First, the proposal introduces a new structure of tax rates based on energy content and environmental performance of the fuels and electricity. Second, the proposal broadens the taxable base by including more products in the scope and by removing some of the current exemptions and reductions.

Takeaways and tip

- The Fit for 55 Package shows that carbon pricing and energy taxes will play a greater role in the EU's response to climate change. Amendments to the EU ETS may, for example, affect polluters in the industrial, energy, and transport sectors.
- Furthermore, the road transport and building sectors will be subject to emissions trading and MNEs producing outside the EU may have to comply with the CBAM. Changes to the minimum ETD rates for fuels and electricity may, moreover, increase tax obligations in certain sectors.
- The proposed measures may influence the business of MNEs in the near future. We therefore recommend that MNEs evaluate their position in relation to carbon pricing and energy taxes in a timely manner.

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Other EU and international developments

Cross-border employment and substance – Post COVID-19

Many employers are considering implementing more flexible policies for working remotely, including working from abroad for business or personal reasons. Cross-border work may have adverse tax and social security consequences for both the employer and employee.

Takeaways and tips

- We recommend paying close attention to permit requirements and notification requirements when employees are working abroad.
- Working in another country may result in a shift of income tax liability and applicable social security legislation, including tax compliance obligations for the employer and/or the employee. This should be verified upfront. It may be advisable to implement clear policies in this respect.
- It should be assessed whether a change in working location of employees could have an impact on transfer pricing, applicable substance requirements, the recognition of a permanent establishment abroad or even the tax residency of the company. This will of course depend to a large extent on the position of the employee and the functions performed by the employee.

Country-by-Country reporting

Since the implementation of BEPS Action 13 into domestic law of various countries around the world, certain MNEs have been required to comply with country-by-country (CbC) reporting obligations. For most MNEs with a financial year equal to the calendar year, this means that a CbC report needs to be filed and CbC notifications need to be made before year-end.

Tips

Besides complying with the CbC reporting obligations, the CbC reporting data can be used to make various interesting analyses:

- **Red flag analysis** – Tax authorities analyse the data of a CbC report by calculating certain ratios in order to identify red flags. For instance, tax authorities could look at the number of employees in a jurisdiction in relation to the reported profit before tax. Tax authorities use such ratios to decide whether to request an explanation or start an audit procedure. To be one step ahead of tax authorities, taxpayers could prepare their own red flag analysis.

- **Pillar One** – The data included in the CbC report can be used as a starting point for assessing the impact of the Pillar One proposal (see page 5). In close cooperation with our clients, we are able to provide an initial estimate of amount A, and a preliminary analysis of the allocation among 'market' jurisdictions.

- **Pillar Two** – With our CbC reporting software, we can calculate the effective tax rate reported in each jurisdiction. Although the technical definition of 'effective tax rate' is not yet set in stone, we believe this is a good first step to determine which jurisdictions might be affected by Pillar Two (see page 6).

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Public Country-by-Country reporting

Since the publication of BEPS Action 13, certain MNEs are required to file a CbC report. A CbC report contains information relating to the global allocation of the MNE's income and taxes paid, together with indicators of the location of economic activity within the MNE. The filed CbC reports are exchanged between relevant tax authorities. Other stakeholders do not have access to the CbC reports. To make the CbC report also available to the public, the European Commission has been working on an amendment proposal that requires certain MNEs active in the EU to publish key information on where profits arise and where taxes are paid. According to the European Commission, public scrutiny can help to ensure that profits are effectively taxed in the jurisdictions where they are generated. On 11 November 2021, the European Parliament gave its green light to introduce public EU CbC reporting. EU Member States will have 18 months after publication of the directive in the EU Official Journal to transpose the obligations into their national laws. This means that MNEs with a consolidated group revenue exceeding EUR 750 million and with an EU presence will need to comply with the new rules by mid-2024.

The CbC report will be published in a business register, to ensure certainty and availability over time. Public scrutiny is enabled through public accessibility of the reports on organisations' websites for at least five consecutive years. To prevent commercially sensitive information from being published, a safeguard clause has been introduced that EU Member States can implement.

New EU reporting and due diligence rules for digital platforms as of 1 January 2023 (DAC7)

EU and non-EU operators of platforms that are made available to third-party sellers and facilitate certain relevant activities, will qualify as a reporting platform operator (RPO) under DAC7. These new EU rules will take effect on 1 January 2023.

The relevant activities for DAC7 are the delivery of personal services, the sale of goods and the rental of any mode of transport by EU sellers through the platform. The rental of immovable property through the platform is also a relevant activity.

RPOs have to identify the sellers of the relevant activities, conduct due diligence procedures and report certain information about the sellers and their relevant activities, including income realised, to tax authorities. The information must be shared no later than 31 January of the following calendar year. Hence, the information for 2023 will have to be reported for the first time and this first DAC7 report will have to be filed no later than 31 January 2024. These reporting obligations cover both cross-border and domestic activities. RPOs have to start identifying reportable sellers and collecting information about these sellers now, in order to be ready in time.

The new reporting obligations will have an impact on both platforms and sellers. Although DAC7 is not a proposal for a digital tax, it may have consequences for sellers, as EU Member States may decide to increase tax audits based on information received under DAC7. Furthermore, the broad scope ensures that domestic, intra-EU and third-country activities are covered.

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Transfer pricing

Multi-jurisdictional audits

Tax authorities are seeking ways to enhance cooperation with foreign tax authorities to ensure that MNEs are tax-compliant in the various jurisdictions in which they are active. Particularly in respect of transfer pricing, this has resulted in an increased focus on involving foreign tax authorities to audit MNEs. Audits are done either jointly by one cross-jurisdictional audit team or simultaneously by each jurisdiction separately, to assess whether the applied transfer pricing of the MNE is considered at arm's length. We have seen, for example, that the Dutch tax authorities have recently become more determined in this approach, which has resulted in a rise in the number of multilateral audits.

Takeaways and tip

- We find that multilateral audits are often a lengthy process with limited transparency for taxpayers, on both timing and the potential outcome.
- A multilateral audit generally involves extensive information requests and detailed questions. Responding to these requests and questions puts a significant burden on the taxpayer. Such requests and questions are generally subject to the same provisions as a regular domestic audit with compliance often mandatory and subject to sanctions in case of non-compliance.
- We find that tax authorities in, for example, the Netherlands increasingly use the threat of a multilateral audit during discussions to put pressure on taxpayers to accept a settlement proposal. Although taxpayers may be reluctant to comply when being pressured into such settlement discussions, it could still be beneficial in order to prevent a multilateral audit being started.

EU State aid cases concerning tax rulings

The Court of Justice of the European Union is yet to issue its first judgments on the merits of transfer pricing cases (Fiat and Apple). In May 2021, the General Court sided with Amazon in another transfer pricing case; the European Commission has appealed. In ENGIE, the General Court sided with the European Commission; ENGIE and Luxembourg have appealed. The case concerning Belgian 'excess profit rulings' was referred back to the General Court for it to judge on the transfer pricing aspects.

Takeaways

- Under pre-2017 OECD Transfer Pricing Guidelines, it was possible to make key contributions and bear risks in relation to intangibles even without having 'employees'. The latter was considered not relevant by the General Court for a 2003 tax ruling (when the 1995 version applied). Merely finding methodological errors in the transfer pricing analysis does not indicate that there is a selective reduction in tax liability per se. (Amazon)
- Not applying national anti-abuse measures when all conditions are apparently fulfilled can lead to state aid. (ENGIE)

Looking forward

The European Commission has proposed a regulation to address subsidies granted by third countries. It envisages some kind of state aid control of harmful foreign subsidies to entities operating within the EU. It also introduces reporting obligations for entities that engage in an EU merger or joint venture and those who engage in a public procurement tender, if either the entity itself, its group or subcontractors do so with the help of foreign subsidies. The new scheme will be introduced in 2022 and may affect subsidies already granted prior to its introduction. Foreign entities receiving favourable transfer pricing treatment abroad may also be within its scope.

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Mutual agreement procedures

We are experiencing an increasing number of transfer pricing discussions and corrections that tax authorities impose on cross-border transactions. The double taxation that often results can only be resolved through a cross-border mechanism involving the tax authorities of the affected countries. Mutual agreement procedures (MAPs) are an attractive mechanism, although procedures can take several years. For a MAP, taxpayers generally can choose between (i) the relevant tax treaty, (ii) the 1990 EU Arbitration Convention, and (iii) the respective implementation of the EU Directive on Tax Dispute Resolution.The latter two can only be used for disputes within the EU. Since not all tax treaties contain mandatory binding arbitration clauses, the choice between these three alternatives can be relevant to ensure an effective resolution. The average time limit to submit a MAP request is three years, but this may deviate depending on the respective tax treaty.

Although taxpayers are not involved in the discussions between the competent authorities in a MAP, we advise clients to proactively address items in the MAP request and any subsequent requests for information from the competent authorities, to enhance the chance of a successful conclusion. To mitigate the risk of requiring a MAP to resolve double taxation from a transfer pricing dispute, it could be considered concluding a bilateral advance pricing agreement (APA). In some cases, such a bilateral APA also results from a MAP that has been concluded to ensure that both the past and the future is resolved in respect of a specific transaction.

Apart from transfer pricing, another topic on which we expect an increase in the number of MAPs is beneficial ownership in connection with withholding tax relief. Tax authorities in certain EU Member States feel emboldened by the Danish cases of the Court of Justice of the European Union and may increase scrutiny on the substance and beneficial ownership of foreign investors. In these cases too, taxpayers may rely on MAPs to avoid double taxation.

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Special Purpose Acquistion Companies (SPACs)

Blank cheque companies or special purpose acquisition companies (SPACs) have been one of the most popular asset classes in the equity capital markets in the United States and Europe, with record numbers launched in the first three quarters of 2021. According to Bloomberg, Euronext Amsterdam has attracted more SPACs than any other trading venue in the region.

A SPAC is essentially a shell company formed by a sponsor or a team of leading individuals to raise funds through a so-called SPAC IPO without a specific target or business having been identified, but with the purpose of effecting a merger, capital stock exchange, asset acquisition, stock purchase, reorganisation or similar business combination with or acquisition of a target business or entity. Last year, we have mainly seen a rise of private equity sponsors initiating SPACs as an addition to their existing investment strategy. Moreover, SPAC business combinations have already proven to be interesting accelerators for growing companies and exit opportunities for early-stage investors.

For European SPAC IPOs, to date, the most popular jurisdictions to form a SPAC are the Cayman Islands, Luxembourg and the Netherlands where all these entities have been structured such to resemble the US SPAC structure.

Dutch SPACs can be formed as either public companies (*naamloze vennootschappen* or *NVs*) (which are typically used for listed companies) or private limited liability companies (*besloten vennootschappen met beperkte aansprakelijkheid* or *BVs*) (which are typically used for privately held companies). Dutch law in respect of BVs is even more flexible than NV law. Although SPACs are listed companies, they can be formed as BVs thereby making use of the flexibility provided under Dutch law to more closely mirror the US model. While Dutch law does not have rules that apply specifically to SPACs only, Dutch law allows even further flexibility to entities formed as a BV.

The tax aspects in relation to a SPAC strongly depend on its tax residency. We have seen SPACs that are tax resident in their country of establishment (i.e. the Cayman Islands, Luxembourg and the Netherlands) and SPACs that are tax resident in another country by virtue of their effective place of management situated therein. Typical tax elements that may apply are withholding taxes and corporate tax aspects associated with the equity structure (including shares and warrants), the trust account and the business combination (or ‘de-SPACing’). Another attention point relates to the different income tax regimes that may apply to the equity participation of the sponsor and the management team.

Domestic developments in the Netherlands

Interest deduction increasingly restricted and complex

Abuse of law in the context of interest deduction
On 16 July 2021, the Dutch Supreme Court published a landmark decision on abuse of law in the context of interest deduction.

The case at hand concerned an international private equity fund which acquired a retail business in the Netherlands via a Dutch acquisition holding. The Dutch acquisition company financed this acquisition partly with shareholder loans. After the acquisition, a fiscal unity was formed between the acquisition company and the target. As a result, interest payments on the shareholder loans could be offset against profits realised by the acquired operating group while the corresponding interest income received by the private equity fund was not subject to corporate income tax at the level of the fund.

The Dutch Supreme Court ruled that in the case at hand, the deduction of interest would be contrary to the object and purpose of the Dutch Corporate Income Tax Act. It considered that unnecessary legal acts were used with the predominant motive to realise the tax benefit of the interest deduction in the Netherlands.

It is important to note that it is difficult to determine the exact scope of this Supreme Court ruling. It could potentially be far-reaching and may, for example, also apply to other financing structures.

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Proposed changes of the earnings stripping rules
During the political debates on the Dutch Budget 2022, agreement was reached on tightening the earnings stripping rules per 1 January 2022, by decreasing the deductible percentage of EBITDA from 30% to 20%. Under the new rules, the earnings stripping rules would thus limit the interest deduction, insofar as the balance of interest income and costs exceeds the higher of the 1-million-euro threshold or 20% of the fiscal EBITDA.

Takeaways and tip
Interest deduction is increasingly restricted and complex in the Netherlands. We recommend reviewing existing financing structures in light of these developments.

Legislative proposal to eliminate double non-taxation through transfer pricing mismatches

On 21 September 2021, the legislative proposal was published to eliminate double non-taxation through transfer pricing mismatches as from 1 January 2022. On 11 November 2021, the Dutch Second Chamber of Parliament (*Tweede Kamer*) voted in favour of this proposal and it is now pending with the Dutch First Chamber of Parliament (*Eerste Kamer*), which is scheduled to vote on the proposal mid-December.

Based on long-standing case law in the Netherlands, non-arm's length conditions of transactions between related parties are adjusted as if the conditions were made between independent parties. This may result in a downward adjustment of profits for Dutch corporate income tax purposes, irrespective of whether the country of the related party to the transaction applies a corresponding upward adjustment. This has been identified as an undesired source of (potential) international tax avoidance.

The legislative proposal includes three main elements:

1. **Income and expenses.** No downward adjustment based on the arm's length principle of the Dutch taxable profit, being higher expenses or lower income, compared to the agreed or imposed price to the extent that the related party to the transaction does not include a corresponding upward adjustment in its profit tax base.
2. **Transfer of assets and liabilities.** No adjustment in the tax base to the arm's length value for assets and liabilities that are transferred by a related party to a Dutch taxpayer for which the agreed or imposed price is at a value below (for assets) or above (for liabilities) the arm's length value to the extent that no corresponding adjustment is accounted for in the transferor's profit tax base.
3. **Contributions, distributions, mergers and demergers.** In case of capital contributions, profit distributions, repayments of capital, liquidation distributions, mergers or demergers, the tax base to be taken into account by the Dutch taxpayer will be at maximum (for assets) or at minimum (for liabilities) the value that is taken into account in the contributor's or distributor's or transferor's profit tax base.

The amount of depreciation to be accounted for going forward by a Dutch taxpayer on assets acquired from a related party before 1 January 2022 may be limited in respect of assets that were transferred in tax book years starting on or after 1 July 2019 and which would, at the time of transfer, be targeted by the legislative proposal, had the legislation been in force at the time.

These new rules will apply to all Corporate Income Tax Act provisions (including the CFC-rules) but not to any other legislation.

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Takeaway
If approved in its current form, this legislation will put more emphasis on commercially documenting the pricing of related party transactions, to avoid transfer pricing mismatches that could fall within the scope of this legislation. Especially in the case of contributions or distributions, the related party concerned will need to account for the value in its profit tax base to allow for a corresponding tax base for the Dutch taxpayer.

Substance for Dutch holding companies

Some time ago, the Dutch Government announced its intention to introduce substance requirements for Dutch holding companies as of 1 January 2022, but no specific plans or timelines were published since then. On 22 November 2021, the Dutch caretaker government published a report called 'The road to acceptable flow-through' (Report) and its appreciation of the Report. It follows from the caretaker government's reaction to the Report that measures regarding the introduction of substance requirements for Dutch holding companies will be reconsidered by the newly to be formed government in the broader consideration of the proposal for an EU directive fighting the abusive use of shell entities, which proposal is expected at the end of 2021. Reference is made to page 10.

New loss compensation rules

As of 1 January 2022, new Dutch loss compensation rules for corporate taxpayers will enter into force. As a result of these new rules, corporate income tax losses can be carried forward indefinitely, while the carry back period remains one year. However, in contrast to the current rules, annual loss compensation will be limited to EUR 1 million plus 50% of the taxpayer's annual taxable profit exceeding EUR 1 million. The new rules will apply to both losses incurred after 1 January 2022 and existing losses which are still available to taxpayers at the time the new rules enter into force.

Takeaways and tips
- *Direct impact on deferred tax asset position.* Both Dutch GAAP and IFRS require a company to calculate current and deferred corporate income tax. The new loss relief rules should be considered for (interim) reporting periods ending on or after 28 May 2021 (the date on which the new rules were substantively enacted) as part of the valuation of the related deferred tax asset.
- *Potential actions in 2022 and onwards.* Although existing losses and new losses will no longer expire in time, the amount of annual loss compensation will be reduced to EUR 1 million plus 50% of the annual taxable profit exceeding EUR 1 million. There may, however, be ways to mitigate the impact of the new loss compensation rules, such as triggering a capital gain on assets in a loss-making year, or through the allocation of income to loss-making years and expenses to profit-making years within the parameters of the doctrine of 'sound business practice' (goed koopmansgebruik).

New Dutch entity tax classification rules

The current Dutch tax classification rules for Dutch and foreign entities (such as limited partnerships) are unique in the world and this has led to 'hybrid entity mismatches' in an international context. For this reason, the Dutch government published a legislative proposal for public consultation in March 2021 to overhaul these rules.

One of the main proposed changes concerns the tax classification of Dutch limited partnerships (*commanditaire vennootschappen* or *CVs*) and similar foreign limited partnerships. To date, the Netherlands applies very specific rules for determining whether these are considered transparent or non-transparent for Dutch tax purposes. Under the proposal, all Dutch and similar foreign limited partnerships will become transparent for tax purposes. Funds for joint account (*fondsen voor gemene rekening* or *FGRs*) can remain either non-transparent or transparent, but the relevant criteria for determining their tax classification will change.

Due to the concerns raised during the public consultation, the amended legislative proposal to overhaul the tax entity classification rules was postponed and is expected to be published this winter. The new rules may then enter into force as per 2023. It was also announced that the Dutch tax classification rules for Dutch FGRs will be reviewed separately, as part of the evaluation of the Dutch fiscal investment institution regime and exempt investment institution regime. This evaluation is expected in the first quarter of 2022.

Tip
We recommend closely monitoring these developments and checking carefully the potential consequences, as the new tax classification rules may lead to unforeseen tax consequences.

Controversy

The Dutch tax authorities have in recent years become more determined in their approach to tax disputes. This has resulted in a rise in the number of tax audits, adjustments, disputes and finally cases being brought to court. We see an increasing emphasis on transfer pricing. The tax authorities take far-reaching positions, for example, on the arm's-length nature of transactions and the valuation of assets. This leads to arm's length corrections by the tax authorities and potentially even to ignoring transactions and agreements altogether. The tax authorities also do not hesitate to impose penalties in transfer pricing cases.

As there is not much case law on transfer pricing in the Netherlands, still many questions are unanswered. A recurring topic in discussions with the tax authorities on transfer pricing is the division of the burden of proof. Also, there is often discussion as to whether the taxpayer is aware of the alleged or non-alleged non-arm's length character of an agreed price. This is important for the imposition of tax assessments and penalties. The presence of independent expert reports often plays an important role in these discussions. Currently, there is a number of transfer pricing cases pending before the Dutch courts. Loyens & Loeff is assisting a number of clients in these kind of proceedings. It is expected that the decisions in these cases will provide more clarity on the above-mentioned questions.

Proposed tax-exemption for working from home allowance

As part of the Dutch Budget 2022, the Dutch government introduced a tax exemption in the so-called employment costs scheme (*werkkostenregeling*) for working from home expenses. This tax exemption can be applied by the employer for an amount up to EUR 2 per employee per working day at home. This amount is intended to cover additional expenses incurred by the employee when working from home for, inter alia, electricity, water, heating and coffee.

Takeaways and tips

- The proposed tax-exemption for the working from home allowance is an addition to the existing tax exemptions in the employment costs scheme in relation to working from home for (i) working conditions provisions such as an office chair, and (ii) resources that are necessary for working from home (computer, telephone, internet, etc.). The conditions for the respective exemptions differ slightly. For this reason, we recommend carefully assessing the conditions for these tax exemptions.
- To apply the tax exemption for the working from home allowance, certain formalities have to be satisfied, including the designation of the allowance for the employment cost scheme. We recommend verifying that the formal aspects regarding the application of this tax exemption and others are satisfied.
- With regard to the application of the tax exemption for the working from home allowance for employees working partially from home, we recommend that the employer carefully considers the possible overlap between the fixed travel allowance and the fixed working from home allowance. The employer should not only consider the amount of the allowances, but also the consequences of any deviations from the relevant agreements between employer and employee and how the employer will monitor such deviations. If technology is used (e.g. apps with geolocation technology), it would be advisable considering possible privacy issues. We therefore recommend implementing a proper 'working from home policy' before 1 January 2022.

Self-employed individuals

Since the implementation of the Deregulation Assessment of Employment Relationships Act (*Wet Deregulering Beoordeling Arbeidsrelatie (DBA)*) the classification of a working person as an employee or a self-employed person has been a topic of confusion and political debate. The Dutch caretaker government has indicated that they leave it to the new government to decide on this topic and come up with potential new rules. In the meantime, the Dutch tax authorities will continue to apply the 'enforcement moratorium'. In practice, this means that they only enforce if taxpayers deliberately create situations of pseudo self-employment or do not take the guidance of the Dutch tax authorities into proper account.

Takeaways and tips

- Pending the enforcement moratorium, we nonetheless recommend that MNEs carefully consider working relationships with self-employed individuals to ensure that any case of pseudo self-employment cannot be regarded as having been created deliberately.
- In the meantime, many of the model agreements approved by the Dutch tax authorities have expired and new model agreements have been approved. Although this does not mean that existing contracts with self-employed individuals have become invalid, we recommend reviewing new contracts properly to ensure compliance with the new generic model agreements, and to renew the approval of specific model agreements in good time.

Domestic developments in Belgium

Trends in transfer pricing audits

During the last decade, the Belgian tax authorities (BTA) have consistently ramped up their transfer pricing audit capacity and frequency. Audits are carried out by both a dedicated transfer pricing cell within the Belgian tax authorities and by TP specialists active with the special tax inspectorate focusing on combating tax evasion and fraud. In the October 2021 budget agreement of the Belgian government, it was decided to further increase the effectiveness of transfer pricing audits of MNEs by adding additional capacity to the transfer pricing cell.

Many Belgian entities that are part of a multinational group have already been confronted with the standard detailed questionnaire from the BTA, which includes numerous questions focusing particularly on the company's organisational structure, supply chain, segmented P&Ls per business units, functional and risk profile, financial transactions, and transactions involving intangibles. Instead of directly answering such questionnaire, an audit is typically preceded by an informal pre-audit meeting during which a presentation is given with respect to the company's intercompany transactions and the exact perimeter of the responses to be given is agreed in advance. The first written response is then usually followed by additional information requests and meetings, and the audit is often closed by concluding a settlement agreement.

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During such an audit, the BTA notably investigate the reconciliation between the TP policy and annual accounts, the reason and origin of losses, the allocation of synergies with respect to procurement activities and the arm's length character of intra-group service fees, including the cost base in cost plus remuneration. In addition, particular focus is given to intra-group financial transactions, and based on recent experience the following items are scrutinised:

- The delineation of a purported loan for TP purposes and the arm's length debt level of a company, notably by making use of sector based financial ratios found in databases and the financing at group level to assess how a company would be financed on an arm's length basis.
- The arm's length character of cash pool arrangements, in particular the appropriate allocation of cash pool benefits and the reclassification of structural cash pool deposit or borrowing in a term loan. In this respect, the BTA take the view that if during a period of 12 months, a participant has held a given amount as deposit or as borrowing, such amount can no longer be priced as a cash pool transaction but should be priced as a loan.

Takeaways and tips
Belgian companies can prepare for a TP audit by preparing solid supportive documentation for the arm's length character of intercompany transactions, and proactively reviewing their TP policy to identify any risks and weaknesses. As regards financial transactions, attention should be given to compliance of the applicable policy with the latest OECD guidance, notably regarding accurate delineation, and to avoiding structural cash pool deposits by periodically monitoring outstanding positions.

Trends in withholding tax audits

Following the Danish cases decided by the Court of Justice of the European Union, the number of disputes with tax authorities on dividend and interest withholding tax exemptions have significantly increased. In this respect, the BTA are increasingly relying on the abuse-of-law doctrine to challenge the application of the withholding tax exemption in case the activity and the substance of the holding and/or finance company is rather limited and the dividend and/or interest payments are upstreamed soon after their receipt to persons who cannot benefit themselves from a Belgian withholding tax exemption. The amounts at stake are often high since special statute of limitation rules apply to withholding taxes. If, for example, an audit reveals that the national provisions regarding withholding taxes were infringed (e.g. if a domestic withholding tax exemption was unlawfully claimed or if a withholding tax was wrongfully reclaimed), withholding taxes can still be levied with respect to the 5 years preceding the year in which the infringement was established. In such case the BTA have an additional 12-month period after the moment the infringement was established, to levy these withholding taxes.

Takeaways and tips
In order to ensure that holding and finance structures are acceptable from a Belgian tax perspective, it is highly recommended:

- Properly documenting the business reasons for the location and usage of the holding/finance company;
- Monitoring the level of substance;
- Managing the cashflows and, if possible, using the income received for other investments or activities; and
- Paying attention to the language used in board minutes.

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Payments to tax havens

Belgian companies and Belgian permanent establishments (PEs) of foreign companies are required to report in their annual tax returns all payments of EUR 100,000 or more on an annual basis made: (i) to persons or PEs established in tax havens; (ii) on bank accounts managed or held by persons or PEs in a tax haven, and (iii) on bank accounts managed by or held with a financial institution established in a tax haven or managed by their PE located in such jurisdiction. Both direct and indirect payments are covered by this reporting obligation.

The law defines a first category of tax havens as jurisdictions that are considered by the OECD Global Forum on Transparency and Exchange of Information as not having effectively or substantially implemented the OECD exchange of information standard. The Minister of Finance recently confirmed that not only the countries qualified as non-compliant are being targeted, but also, as of assessment year 2021, the countries qualified as partially non-compliant by the OECD. Payments should only be reported if they were made in the period during which the jurisdiction was non-compliant.

The second category of tax havens are jurisdictions that appear on a list of countries having no tax or a low tax. At present, the Minister of Finance is investigating the extension of this list to, amongst others, Hong Kong. As from 31 December 2020, a third category of tax havens includes jurisdictions that appear on the EU blacklist of non-cooperative jurisdictions.

If the BTA determine that a payment was not reported or not correctly reported, the payment will not be deductible for tax purposes. Even if a payment was reported correctly, the payment will be tax deductible only if the taxpayer can demonstrate that the payment was made in the context of an actual and genuine transaction with a person that does not qualify as an artificial construction.

For assessment year 2020, a total amount of approximately EUR 266 billion has been reported by taxpayers. Although these payments can be perfectly legitimate, we notice additional scrutiny from the Belgian tax authorities regarding the genuine nature of the declared payments, their arm’s length character and the level of substance of the person to which the payments are made.

Takeaways and tips

Taxpayers should carefully analyse whether direct and/or indirect payments are made to tax havens and, if so, properly report these payments. In addition, the taxpayer should be able to demonstrate that the payment is made to a non-fictitious person in the framework of a real business transaction and is at arm’s length in order for the payment to be tax deductible. In case of an intra-group transaction, it is therefore highly recommended having transfer pricing policies, transfer pricing studies and agreements in place.

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Domestic developments in Luxembourg

Interest deduction limitation rules

During 2021, the Luxembourg tax authorities published administrative guidance on the interpretation of the interest deduction limitation rule under the Anti-Tax Avoidance Directive (ATAD), which is applicable for tax years starting on or after 1 January 2019. This long-awaited guidance provides limited clarification on the notion of borrowing costs and also notably addresses the grandfathering rule for loans predating 17 June 2016 and the application of the group escape ratio. Taxpayers should continue to review positions taken in respect of the application of the interest deduction limitation rule in light of this new guidance.

Advance tax agreements and advanced pricing agreements

In line with administrative practices in many other countries, advance tax agreements (ATAs) and advance pricing agreements (APAs) can be issued by the Luxembourg tax authorities through their Advance Rulings Commission. Such rulings are valid for a maximum period of five years. The number of such rulings has significantly decreased over the last five years. According to published statistics, the number of approved ATAs was 44 in 2020, compared to 454 in 2015. In the year 2020, there was no approved APA at all, compared to 145 in 2015. That being noted, in some cases an ATA or APA can still be a valuable tool as part of a taxpayer's tax risk management.

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Tax controversy and dispute resolution – trends

The number of tax audits and disputes with the Luxembourg tax authorities is steadily increasing, with an emphasis on transfer pricing, the former IP regime and disputes on the existence of losses carried forward, as well as VAT. While some disputes continue to be settled at the level of the controversy division of the tax authorities, a significant number of cases are brought to court. The Luxembourg tax authorities also increasingly rely on the abuse-of-law rules to challenge existing structures.

In the aftermath of the Danish cases decided in 2019 by the Court of Justice of the European Union, substance and beneficial ownership have attracted considerable attention and are at the heart of mutual agreement procedures between Luxembourg and other EU Member States. These mutual agreement procedures have proved to be an attractive dispute resolution mechanism in a cross-border context but can take several years. Transfer pricing adjustments are the other main topic for MAPs; to mitigate this risk, some taxpayers seek cross-border APAs.

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Domestic developments in Switzerland

Impact of Pillar Two on Switzerland

Switzerland announced that it generally supports the G20 and OECD proposal for a global minimum tax rate, but, with the reservation that it would only support the proposal to the extent that smaller countries like Switzerland would be taken into account when establishing the rules and that the time needed for the Swiss parliament to adopt the legislation should be respected.

The rules to achieve a global minimum effective taxation as set out in the OECD/G20 Inclusive Framework – should they be included in the Swiss tax framework by the Swiss parliament – would have an impact on the MNEs concerned as the combined ETR (federal, cantonal, and municipal) is to date below 15% in several cantons.

The Swiss federal government is currently evaluating how to address the minimum taxation rules to remain attractive for MNEs. One of the working group's ideas involves dual tax rates. On the one hand, a rate applicable to taxpayers that would be subject to the Pillar Two proposal, and on the other hand the current lower tax rates for others. Another idea involves discussions on the tax base for calculating of the minimum tax, such as including higher wage costs in the rate calculation. An official publication of the initial ideas is already expected in the first quarter of 2022.

Swiss withholding tax practice

The Swiss Federal Tax Administration (SFTA) has a wide range of tools at its disposal to combat tax evasion of Swiss dividend withholding tax. One of these rules applies to the financing of acquisitions allowing a foreign investor to obtain funds from a Swiss company without having to pay Swiss dividend withholding tax if a regular dividend distribution to such foreign investor were to be subject to non-refundable withholding tax.

For example, if investors are subject to a 5% non-refundable withholding tax, acquisitions of a Swiss target are usually structured through the interposition of a Swiss holding company financed by nominal share capital, capital contribution reserves or debt, all of which can be repaid without Swiss withholding tax. In these cases, the SFTA will levy withholding tax if a Swiss target makes distributions to the intermediate holding company to ensure that the funds cannot be repaid tax-free solely through the interposition of a Swiss vehicle. This is known as the international transposition theory. While this rule makes sense if the main objective is to avoid taxation on exit from Switzerland, the SFTA now applies this approach even in cases where companies relocate functions to Switzerland or acquire Swiss targets and aim to ensure tax-free repatriation of funds to foreign shareholders. The fact that a transaction can be structured in a different way with the same result apparently no longer convinces the Swiss tax authorities to allow a distribution of funds without paying Swiss withholding tax.

Tip
With respect to Swiss dividend withholding tax, acquisitions of Swiss targets should be carefully structured to ensure efficient profit repatriation.

The Swiss corporate tax reform: preferential taxation of equity

With the latest tax reform, the cantons may introduce a capital tax reduction for equity capital attributable to qualifying participation rights, intercompany loans, patents and comparable rights (Privileged Assets). This leads to a considerable decrease of the capital tax burden compared to regular taxation. As the law does not contain specific rules about the reduction mechanism, there have been different cantonal systems for the equity capital reduction introduced.

As for Geneva, part of the equity capital attributable to Privileged Assets will be taxed at a reduced capital tax rate, namely 0.0005% instead of the regular rate of 0.401%. In Zug, the capital tax rate remains unchanged but only 2% of the equity capital attributable to Privileged Assets will be included in the taxable equity base at 2%.

As the calculation of the capital tax reduction varies from canton to canton, detailed assessment is recommended to fully take into account cantonal particularities when filing the tax return.

Outlook

Swiss withholding tax reform
Interest payments on Swiss issued bonds are subject to a withholding tax of 35%, with no immediate exemption-at-source mechanism available. As a consequence, Swiss companies regularly issue bonds through foreign group companies. Current withholding tax rules may even re-qualify a foreign issued bond as Swiss issued in certain cases. The complex withholding tax rules in place have so far prevented the situation where Switzerland develops as a hub for debt financing activities.

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The Swiss Federal Council published draft legislation on the Swiss withholding tax reform earlier this year. The reform will largely abolish withholding tax on interest payments, with the exception of interests on Swiss bank deposits paid to Swiss resident individuals. Once enacted, the reform will strengthen the domestic debt capital market and group financing activities considerably. The new withholding tax rules will enter into force on 1 January 2024 at the earliest.

Abolishment of stamp taxes

Switzerland levies several stamp taxes at federal level, including a 1% stamp tax on equity contributions and a securities transfer stamp tax of up to 0.3% on the transfer of certain securities such as shares and bonds. In recent years, the Swiss parliament has discussed several proposals to abolish these stamp taxes, either fully or partially. On 30 September 2021, the Swiss parliament decided not to pursue the proposed abolishment of the security transfer stamp tax on domestic securities. Abolishment of the equity stamp tax is likely to face a public referendum vote with a possible entry into force in May 2022.

Tonnage tax

Switzerland intends to introduce a tonnage tax system for shipping companies. Tonnage tax is an alternative method of determining profit tax, generally resulting in a lower tax burden for profitable shipping companies. It is widely accepted internationally. The OECD in particular has confirmed that tonnage tax systems are generally permissible by international standards and such systems are applied by various countries in Europe, such as Germany, the UK, the Netherlands, France and Spain.

Current draft legislation foresees that the profit tax assessment basis would not be the actual profit generated, but the net tonnage (cargo volume of the seagoing vessels) multiplied by a degressive tariff. The amount thus determined is then multiplied by the number of operating days and taxed at the ordinary profit tax rate.

Switzerland is a shipping country. In terms of tonnage, Switzerland has ranked among the top 5 in Europe in recent years. The introduction of a tonnage tax system in Switzerland should further strengthen Switzerland's attractiveness in an increasingly competitive international context. The Swiss Federal Council should present the second draft legislation for approval to the Swiss parliament in 2022.

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You are most welcome to contact your regular Loyens & Loeff adviser if you would like to receive more information on any of the topics in this bulletin.

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Closing date of publication

This publication closed on 22 November 2021. This means that later developments have not been included in this publication. Please note that many of the developments and changes addressed in this bulletin are based on relevant legislative proposals, some of which are expected to enter into force on 1 January 2022 and others at a later date. As some of these proposals still need to be adopted by the relevant legislative bodies in the Netherlands, Belgium, Luxembourg and Switzerland, it is uncertain whether and which of these proposals will enter into force. Moreover, if these proposals do enter into force, this may be in an amended form.

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