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2023

Tax trends and developments for MNEs

Contents

Preface **3**

European tax developments **4**

The future landscape 4
Recent developments 5
The BEFIT proposal 6
The Transfer Pricing proposal 7
The Unshell proposal: what to expect? 8
The FASTER proposal – harmonising withholding tax relief across the EU 9
EU Fit for 55 measures – State of play 10
Tax governance in the context of tax and ESG reporting obligations 12
State aid - Developments for tax and transfer pricing 13
Pillar One: Amounts A and B 14
Public CbC Reporting 16
Framework Agreement on cross-border teleworking 17

The Netherlands
Domestic developments **18**

General developments in the tax landscape 18
Update Pillar Two 20
Update Public CbC Reporting 21
Entity classification rules 21
Conditional withholding tax on dividends per 2024 22
Dividend withholding tax - anti-abuse rule case law 23
Cancellation of the RETT concurrence exemption for certain share deals 24
Employment taxes 24

Belgium
Domestic developments **26**

General developments in the tax landscape 26
Update Pillar Two 27
Update Public CbC Reporting 27
Tax considerations regarding the Mobility Directive 27
Tax impact of the new Insolvency Law 28
What budgetary measures may impact your business? 29
E-invoicing and notification obligation for VAT deduction through pro rata 30
Cross-border teleworking and social security 31

Luxembourg
Domestic developments **32**

General developments in the tax landscape 32
Update Pillar Two 33
Update Public CbC reporting 34
Master file/Local file and BAPA procedure – project for an implementing decree 35
Cross-border teleworking and social security 36

Switzerland
Domestic developments **37**

General developments in the tax landscape 37
Update Pillar Two 38
Cross-border teleworking and social security 39
Cross-border teleworking: updated tax treaties with France, Italy and Germany 40
Updated tax treaties with France and Germany on international developments 41

Preface

As 2023 nears its end, it is time for our annual tax bulletin. This bulletin focuses on the tax trends and developments we foresee for 2024 and includes tips and takeaways.

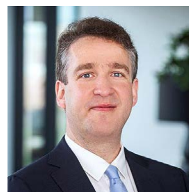
In this update, our specialists inform you about relevant current tax developments and trends in the Netherlands, Belgium, Luxembourg and Switzerland that have an impact on MNEs. You will appreciate that the nature of these developments differs per country, so our aim has been not to discuss the same topics for each country. Our specialists will start with European tax developments and trends, because important corporate tax proposals were released by the European legislator in 2023 and this trend is expected to continue in 2024.

We thank all the authors for their valuable contributions.

Kind regards,

Margriet Lukkien

Marja de Best



Nicolas Lippens

Loyens & Loeff N.V.

30 November 2023

European tax developments

The future landscape

It remains to be seen if and when all Member States can agree on the Commission's ambitious agenda.

In 2023, the European Commission started the implementation of its ambitious tax agenda. We have seen the Court of Justice of the European Union ('EU') rule that no common EU arm's length principle exists, only to see the Commission propose a directive harmonising transfer pricing in the European Union less than a year later. We have also seen the adoption of the Pillar Two Directive at the end of 2022, while the European Commission proposed a directive introducing the common corporate consolidated tax base in 2023 ('BEFIT'). In line with this ambitious agenda, various other directives were proposed by the Commission in the area of direct taxation.

This raises the question what the future of direct taxation in the EU will look like. The most logical takeaway is that direct tax law in the EU is evolving from a national to a pan-European landscape. Direct taxation is currently in principle fully in the sovereignty of Member States, with the Court of Justice of the EU ruling on what is not allowed by Member States under the fundamental freedoms and with only limited areas harmonised through directives. The increase of positive EU direct tax law is expected to continue; more areas will be harmonised through positive EU law and more authority will be delegated to the Commission. With that in mind, direct taxation of the future could well be mainly controlled by the EU, along with own resources for the EU and limited discretion given to Member States.

This being said, tax measures must still be adopted unanimously by the Member States. In addition, the European Parliament has the right to be consulted on tax matters. It can take a long time before all the pending Commission proposals are adopted, if they are adopted at all. We have seen with the Pillar Two Directive that obtaining unanimity can be difficult, even if the directive follows rules established in an international context. Another example is the Unshell proposal, which is moving forward in the Council of the EU rather slowly after quite rapid progress and encouragement by the European Parliament.

It remains to be seen if and when all Member States can agree on the Commission's ambitious agenda. Furthermore, it remains to be seen whether the Commission is sufficiently equipped to govern direct taxation. In a rapidly changing world, directives may need to be updated and amended. Furthermore, in its legislative efforts the Commission should be mindful of the interests of EU citizens; their fundamental rights need to be respected and they need to be represented in decision-making. But the drive is there: direct taxation could significantly supplement the EU's budget (the 'own resources' part) and contribute not only to higher EU investment capacity but also to servicing the EU common debt at a lower cost for Member States.

One thing is certain: the developments around European direct taxation will be very interesting to follow!

Margriet Lukkien

Vincent van der Lans

Jorn Steenbergen

Recent developments

It is recommended for MNEs active in the EU to closely monitor further developments.

On 12 September 2023, the European Commission adopted a new package of initiatives to reduce tax compliance costs for large, cross border enterprises in the European Union. This package consists of:

(i) a proposal for a Council Directive on Business in Europe: Framework for Income Taxation ('BEFIT Directive' or 'BEFIT proposal'); and
(ii) a proposal for a Council Directive on transfer pricing ('TP Directive' or 'TP proposal').

Other developments to keep an eye on include the Unshell proposal, the FASTER proposal, the EU Fit for 55 measures, ESG reporting obligations, state aid developments, progress on Pillar One, public Country by Country Reporting and the Framework Argeement on cross-border teleworking.

These developments will be discussed below. In addition, the Commission published a proposal for a Head-Office Tax system for micro, small, and medium-sized enterprises. For more information on this proposal reference is made to our latest EU Tax Alert.

The adoption of the proposals for Council Directives in the field of taxation requires the unanimous consent of all Member States.

The BEFIT proposal

One common corporate income tax framework within the EU?

On 12 September 2023, the European Commission proposed a Council Directive on 'Business in Europe: Framework for Income Taxation'. The BEFIT proposal contains a common corporate income tax framework for groups active in the EU. At this stage, it is uncertain whether the BEFIT proposal will be implemented in its current proposed form. If adopted within the timeframe envisaged by the Commission, Member States must implement the BEFIT proposal by 1 January 2028 and apply its provisions as of 1 July 2028.

The key elements of BEFIT are:

- **Hybrid scope.** A BEFIT group will generally be formed by a parent company and subsidiaries in which it holds, directly or indirectly, at least 75% of the ownership rights or profit rights. The BEFIT rules are mandatory for EU headquartered groups with annual combined revenues exceeding EUR 750 million (Pillar Two threshold). For groups with non-EU headquarters, BEFIT is mandatory if the relevant EU part raises either at least EUR 50 million annual combined revenues in a certain reference period or accounts for at least 5% of the total group revenue. Groups below these thresholds may opt in for BEFIT, for at least a five-year period, provided they prepare consolidated financial statements.

- **Tax base.** For the computation of the tax base of each group member, BEFIT uses as a starting point the financial accounting net income or loss as stated in the consolidated financial accounts. Adjustments need to be made for, among other things, profit distributions and non-deductible exceeding borrowing costs under the ATAD earnings stripping rule. This will result in a preliminary tax base for each BEFIT group member.

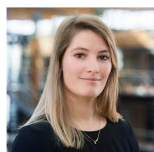
- **Aggregation and allocation.** The preliminary tax results of all BEFIT group members are subsequently aggregated into a single pool to determine the BEFIT group tax base. This aggregated group tax base is allocated to BEFIT group members using a (seven-year) transitional allocation rule. Under this rule, the allocation is based on each BEFIT group member's weighted share in the aggregated tax base in the previous three fiscal years.

- **Specific consequences.** In principle, a BEFIT group member ceases to be subject to its national corporate income tax law in respect of all matters covered by the BEFIT rules. However, Member States may apply deductions, tax incentives, or base increases to their allocated parts.

Takeaways and tip

If adopted, BEFIT contains advantages such as cross-border loss relief and no withholding tax on intra-BEFIT group interest and royalty payments. It would, however, also create new corporate income tax rules that need to be dealt with. In addition, our observation is that MNEs can have both BEFIT filing obligations as well as local corporate income tax filing obligations for entities that do not meet the 75% ownership threshold. Therefore, it is recommended for MNEs active in the EU to closely monitor further developments.

Marieke Bakker



Carlijne Brinkers

The Transfer Pricing proposal

The Transfer Pricing proposal aims to harmonize Transfer Pricing principles across the EU.

On 12 September 2023, the European Commission released a legislative proposal for a Council Directive that integrates key TP principles into EU law (‘TP proposal’).

The TP proposal seeks to harmonise TP norms within the EU through the incorporation of the arm’s length principle into EU law and the clarification of the role and status of the OECD TP Guidelines. To ensure a common application of the arm’s length principle, the 2022 version of the OECD TP Guidelines will be binding when applying the arm’s length principle in the Member States. The TP proposal enables the European Commission to propose common binding rules and safe harbours to specific transactions. If adopted unanimously in the EU Council, Member States must apply the provisions as of 1 January 2026.

Some highlights from the TP proposal:

- **Associated enterprises.** The TP proposal uses a broader term of ‘associated enterprises’ than certain Member States and may therefore increase the number of transactions that have to comply with the OECD TP Guidelines.

- **Fast-track procedure.** The TP proposal provides for a fast-track procedure to resolve double taxation through a corresponding adjustment when there is no doubt that the primary adjustment is well founded or if this results from a joint audit. Such a fast-track procedure must be concluded within 180 days, without the need to open a Mutual Agreement Procedure.

- **Downward adjustments.** Member States are allowed to perform a downward adjustment under certain conditions (e.g. an amount equal to the downward adjustment is to be included in the profit of the associated enterprise in the other jurisdiction and such downward adjustment is communicated to the tax authorities of the other jurisdiction).

- **Most appropriate TP method.** The TP proposal prescribes that the arm’s length price is determined by applying the most appropriate TP method out of the five TP methods included in the OECD TP Guidelines.

- **Use of the interquartile range.** The arm’s length range must be determined using the interquartile range. If a result falls outside the interquartile range, tax authorities must make an adjustment to the median. The rules seem to go beyond the OECD TP Guidelines and domestic legislation in many EU Member States where the use of the interquartile range is not imposed.

- **TP documentation.** The TP proposal requires taxpayers to have sufficient TP documentation. These requirements will be specified by the European Commission at a later moment and may result in an additional compliance burden.

- **Influence European Commission.** The Commission seems to strive for greater influence on future TP legislation, as the TP proposal includes the possibility for the EU Council to adopt further rules on almost all kinds of intercompany transactions.

Takeaways and tip

If adopted, MNEs active in the EU might be subject to stricter rules on transfer pricing and compliance. Further harmonization of TP principles across the EU and the proposed fast-track procedure may be beneficial for MNEs active in the EU in the long term. Therefore, it is recommended that MNEs active in the EU closely monitor further developments.

Natalie Reypens

Jan-Willem Kunen

The Unshell proposal: what to expect?

MNEs should continue monitoring further developments and remain mindful of the Unshell proposal when assessing the level of substance of existing or newly incorporated group companies.

On 22 December 2021, the European Commission published a proposal for a directive laying down rules to prevent the misuse of shell entities for improper tax purposes ('Unshell proposal'). This proposal intends to counter situations where taxpayers misuse EU entities that have no or minimal substance and do not perform any actual economic activity, by introducing reporting obligations, information exchange and possibly denying certain tax benefits. To determine whether a company falls within the scope of the Unshell proposal and what the exact consequences are, specific carve-outs, gateways and substance indicators must be assessed. For detailed information on the Unshell proposal, we refer to our brochure of May 2022.

Although no agreement could be reached to date, discussions are still ongoing under the Spanish presidency, which runs from 1 July 2023 through 31 December 2023. We understand from various sources that a compromise on the current Unshell proposal, especially on the substance indicators and the tax consequences, remains difficult. Given that Member States still differ on these challenging issues, a two-step approach suggested by the EU Council's Spanish presidency was discussed in October 2023. Under this approach, the Unshell proposal would boil down to a DAC9 (i.e. an exchange of information if an undertaking is deemed a shell) and, as a second step, it would be determined whether tax consequences should be included in the Unshell proposal. However, since certain Member States raised concerns on, for example, the administrative burden that would remain, we have been informed that the Spanish presidency will likely not pursue with this two-step approach. Instead, the inclusion of the tax consequences would remain within one single proposal.

We understand from various sources that in November 2023 a new approach was considered, whereby the substance requirements would constitute a minimum standard. This would imply that Member States would be allowed to add additional substance criteria for entities resident there. Entities that would fail to meet such additional criteria would also be presumed shell entities. Entities that would fail to meet the (additional) substance requirements, would not face tax consequences if they declare that they have not been established for the purpose of obtaining a tax advantage and include supportive documentary evidence. Under this approach, the substance criteria would remain unchanged, i.e. the criteria in relation to managing persons, premises, bank account, employees and board meetings. We have been informed that the outsourcing criteria was removed in this approach. We understand, however, that a meeting held on 23 November 2023 revealed that there is not much support for this new approach either.

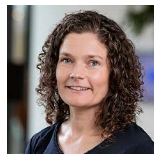
Next steps

On 17 October 2023, the European Commission adopted the 2024 Work Programme in which it indicated that an agreement on the Unshell proposal is imperative. Giving the latest developments an agreement is not expected in the short term. The European Commission can withdraw the proposal if it feels that the proposal is watered down too much. Alternatively, the negotiations will likely be passed on to the Belgian forthcoming presidency, which runs from 1 January 2024 through 30 June 2024.

Takeaways and tips

- It is important for MNEs to continue following the developments regarding the Unshell proposal and to be mindful of its potential impact.
- Having sufficient substance in place according to the Unshell proposal does not mean that a structure can no longer be challenged by tax authorities. Irrespective of the fact that the undertaking would fulfil the (minimum) substance indicators laid down in the Unshell proposal, tax authorities could still challenge a structure based on, for example, the tax residency of the undertaking, national anti-abuse provisions and/or the concept of beneficial ownership.
- Considering the Unshell proposal and the high number of tax audits on withholding taxes in many Member States, MNEs should assess their current substance and set up their business in a way that is efficient from a business perspective and future-proof from a tax perspective.
- Loyens & Loeff has the tools to assess an MNE’s level of substance and the risks from an EU perspective and from a Dutch, Belgian, Luxembourg and Swiss tax perspective. Furthermore, we can make clear and practical suggestions to improve the structure.

Margriet Lukkien



Linda Brosens

The FASTER proposal – harmonising withholding tax relief across the EU

FASTER promises to bring a significant evolution to the withholding tax relief process for cross-border investments.

The European Commission’s recent proposal for the Faster and Safer Relief of Excess Withholding Taxes (‘FASTER’) Directive introduces a unified framework for withholding tax (‘WHT’) relief procedures for dividends and interest on publicly traded instruments. Its core objectives are making relief processes faster and more efficient and preventing tax fraud and abuse. The expectation is that, once unanimously adopted by the Member States, the rules of the FASTER proposal will apply as of 1 January 2027.

Key measures of the FASTER proposal

The FASTER proposal consists of four components:

(i) **Quick relief systems.** Member States are required to introduce either or both of the following systems to expedite WHT relief:
- a relief at source system resulting in withholding the correct amount of WHT;
- a quick refund system resulting in the refund of excess WHT within fifty calendar days.

(ii) **National registers for Certified Financial Intermediaries ('CFIs').** Large institutions and central securities depositaries, which facilitate WHT relief procedures, will be included in national registers as CFIs. Other entities can register voluntarily.

(iii) **Standardised Reporting Obligations.** CFIs will report essential information to competent authorities to identify investors, the entitlement to reduced WHT rates and potentially abusive WHT schemes. It is intended to provide tax authorities with visibility of the financial chain and investor's reclaim eligibility.

(iv) **Common EU Digital Tax Residence Certificate ('eTRC').** The eTRC will facilitate the confirmation of investors' tax residency within the EU and improve the administrative process.

The role of CFIs

CFIs play a pivotal role in FASTER. They will have to implement due diligence procedures to assess investors' reclaim eligibility, including collecting and verifying beneficial ownership declarations and tax residence declarations.

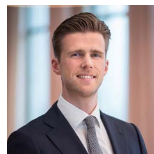
Anti-abuse measures

The FASTER proposal incorporates anti-abuse measures, particularly aimed at preventing WHT fraud and abuse, including Cum/Ex and Cum/Cum schemes. These measures cover distributions on publicly traded instruments that change ownership shortly before the ex-dividend date or that are linked to financial arrangements.

Takeaway and tip

- FASTER imposes new and demanding compliance obligations on financial intermediaries and asset-servicing organisations such as custodian banks. Institutions that are included in the national registers on a mandatory basis should monitor developments and prepare their compliance strategy.
- Investors should prepare to take advantage of FASTER's promise to make WHT relief processes faster and more efficient.

Vincent van der Lans



Dennis Tol

EU Fit for 55 measures – State of play

The Fit for 55 measures will significantly change EU environmental, energy, transport and financial legislation, in order to turn climate goals into hard law.

The Fit for 55 package ('Ff55') is a set of legislative proposals and amendments to existing EU legislation to reduce greenhouse gas ('GHG') emissions and reach climate neutrality. The ambition is to cut European GHG emissions by at least 55% by 2030 compared to 1990, and become climate-neutral by 2050. These goals are binding for the EU and its Member States.

Key measures relevant for the coming years are:

(i) **Reform of the EU Emissions Trading System.** The EU Emissions Trading System ('EU ETS') entails a scheme for GHG emission allowance trading and promotes a reduction of GHG emissions in the EU. The proposed amendments to the EU ETS primarily involve reducing the amount of emission allowances available. The EU ETS will be phased in for the maritime sector between 2024 and 2026, and free emission rights for the aviation sector will be phased out. Emission allowance trading for the construction and road transport sectors will be introduced through a separate system as of 2027.

(ii) **Implementation of the Carbon Border Adjustment Mechanism.** The Carbon Border Adjustment Mechanism ('CBAM') puts a carbon price on imports of certain goods from outside the EU, as an alternative to the currently existing free allowances under the EU ETS and other indirect emission costs. The CBAM was formally adopted by the EU Council in 2023 and is similar to the system of allowances under the EU ETS, in which importers 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. Until the end of 2025, the CBAM only entails a reporting obligation After that date, it will be gradually phased in as an ETS-equivalent system.

(iii) **Revision of the EU Energy Tax Directive.** The EU Energy Tax Directive ('ETD') contains minimum excise duty rates for the taxation of electricity, as well as energy products such as motor fuel and heating fuel. The current ETD does not, however, reflect the EU's (renewed) climate policy and ambitions. The proposed amendments introduce a new structure of tax rates based on energy content and environmental performance of the fuels and electricity. Furthermore, the proposal broadens the taxable base by including more products in its scope and by removing some of the current exemptions and reductions. The revision of the ETD is currently being negotiated within the institutions of the EU and the entry into force will depend on these negotiations.

Takeaways and tips

- The Ff55 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.
- The road transport and construction 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 affect 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.

Mick Knops

Max van Maren

Tax governance in the context of tax and ESG reporting obligations

The implementation of the Corporate Sustainability Reporting Directive will require additional disclosure in the management report section of financial statements and the implementation of the EU directive on public Country-by-Country Reporting requires a separately published report. This will inevitably increase the importance of providing an explanation on tax governance, as these new regulations will demand greater transparency and accountability from corporations.

Tax reporting

The EU Directive 2021/2101 requires large multinational corporations to publicly disclose reports on corporate income tax paid per country. This public Country-by-Country Reporting ('Public CbC Reporting') tax report will become a new mandatory and essential component of corporate communication and reporting to internal and external stakeholders. The aim is to provide comparable and transparent information to all stakeholders about the tax policy pursued, its impact, and related responsibilities or risks. The Public CbC Reporting information must be provided by multinational groups, including unlisted ones, that meet a consolidated revenue threshold of €750 million and will apply to financial years starting on or after 22 June 2024. More details regarding Public CbC Reporting can be found on page 16.

ESG reporting

The Corporate Sustainability Reporting Directive ('CSRD') is a new EU directive that will come into force as of the 2024 fiscal year for the largest, listed companies. Thereafter, the scope will be extended to smaller listed entities and large companies. The CSRD encompasses sustainability in a broad sense and includes disclosure requirements for a wide range of environmental, social, and governance ('ESG') aspects according to the European Sustainability Reporting Standards. Reporting about tax governance may be an important part of ESG reporting.

Takeaway

The reporting of non-financial information will become as important in the EU as traditional financial reporting and should be of the same quality. Not only will these new regulations be entering into force soon, but their requirements are also comprehensive and specific. A comprehensive understanding and effective communication of tax governance strategies will become increasingly crucial.

Bartjan Zoetmulder

Milou Bonnema

Anja Breckling

State aid - Developments for tax and transfer pricing

Status update

The year 2023 has seen further progress in the judicial review of landmark cases concerning tax rulings dealing notably with transfer pricing matters. The Fiat judgment of the Court of Justice of the European Union ('CJEU') published in November 2022 has been invoked by taxpayers, Member States and Advocate General Kokott in other cases, notably ENGIE (Luxembourg), Amazon (Luxembourg) and Apple (Ireland). The opinion of the Advocate General in the Apple case was released on 9 November 2023. The CJEU judgment in the ENGIE and Amazon cases are due to be released on 5 and 14 December 2023 respectively. At lower-tier judicial level, the EU General Court handed down its second judgment dealing with Belgian excess profit rulings, this time finding they constituted unlawful aid. The ongoing investigations of the European Commission in other individual tax rulings in various countries remain open.

Relevant reference framework

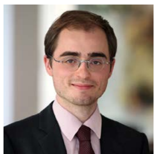
The Fiat judgment gave clear guidance on the definition of the reference framework: only national law can form part of the reference framework. Well-substantiated and consistent administrative practice applying national law should also be taken into account. This judgment raised doubts whether the OECD transfer pricing guidelines may form part of the reference framework when not explicitly implemented in national law.

In her opinion in the Amazon case, Advocate General Kokott concluded that the European Commission had applied a wrong reference framework by disregarding the implementation of the arm's length principle in Luxembourg and instead applying an external standard based, inter alia, on postdating OECD guidelines. The Advocate General even questioned the relevance of these guidelines.

In his opinion in the Apple case, Advocate General Pitruzzella takes the view the Commission applied the correct reference framework but then appears to rely (at least partly) on postdating OECD guidelines for purposes of interpreting the Irish legal provision. Advocate General Pitruzzella also appears to review in depth the functional analysis and various methodological considerations, taking the view that these do not constitute (non-appealable) matters of facts.

Abuse of law review under State aid rules

In her opinion in the ENGIE case, Advocate General Kokott concluded that the Commission misapplied Luxembourg tax law by introducing requirements for the participation exemption or deduction of expenses that were not laid down in law. As to the subsidiary line of reasoning dealing with the non-application of the general anti-abuse rule, she found that Member States should retain a certain margin of flexibility in this matter based on their fiscal sovereignty, and that the Commission should accordingly only be entitled to challenge a manifest misapplication of the anti-abuse rules.



Pierre-Antoine Klethi

Pillar One: Amounts A and B

The envisaged implementation dates for Amount A, Amount B and the extension of the Digital Service Taxes freeze seem unfeasible.

Overview

Pillar One's Amount A seeks to create a new taxing right for market jurisdictions, which will be independent of the physical presence requirement and determined using a formulaic approach. In addition, Pillar One's Amount B aims to introduce simplifications to the transfer pricing approach to what are known as baseline marketing and distribution activities ('BMDA'). Furthermore, Pillar One includes mandatory and binding dispute prevention and resolution mechanisms to mitigate the risk of multiple taxation. In parallel with the multilateral negotiations on Pillar One, many countries around the globe continue to impose and/or propose unilateral measures to tax digital businesses. These measures show various countries' dissatisfaction with Pillar One and/or their scepticism about its potential success. In general, unilateral measures consist of Digital Service Taxes ('DSTs'), equalisation levies or new nexus-based levies in cases where there is a significant economic presence of non-resident businesses in market jurisdictions.

Amount A

Following the historic Outcome Statement agreed on 11 July 2023 by 138 members of the Inclusive Framework ('IF'), on 11 October 2023 the Multilateral Convention ('MLC') package to implement Amount A was released. The package consists of the text of the MLC, an Explanatory Statement ('ES') and an Understanding on the Application of Certainty ('UAC'). This reflects the consensus achieved so far among IF members on the technical architecture of Amount A with some reservations from certain jurisdictions. In turn, the ES clarifies the provisions of the MLC and the UAC contains further details on how aspects of the Amount A tax certainty framework will operate in practice. For more information and an overview of the main features of Amount A, please see our recent website post.

Although having come close to a final agreement, the MLC is not open for signature yet because a number of countries, such as India, Colombia and Brazil, have included reservations on some provisions of the MLC text released on 11 October 2023, which are expressed in footnotes and mainly refer to the marketing and distribution safe harbour, including the treatment of withholding taxes. In essence, these countries fear that they may be allocated too few additional taxing rights by applying this safe harbour.

Furthermore, it should be noted that, in July 2023, the majority of the IF members agreed to extend a freeze on new DSTs and similar measures for one year beyond its December 2023 expiration date or until the MLC's entry into force. However, this extension requires the critical mass of jurisdictions (i.e. 30 jurisdictions, accounting for at least 60% of the ultimate parent entities of in-scope MNEs) to sign the MLC before the end of 2023. If such critical mass, which necessarily requires the United States ('US') to be on board considering its allocated points, is not reached by 31 December 2023, then the DST freeze will expire.

Amount B

In addition to the work on Amount A, during 2023 the IF has also made significant progress on Amount B. On 17 July 2023, the OECD released the latest public consultation document on Amount B which followed a previous consultation launched in December 2022 on this same subject. Loyens & Loeff submitted new input to the latest consultation which provides further comments and suggestions in relation to enhancing tax certainty and reducing resource-intensive disputes between taxpayers and tax administrations, while trying to avoid artificial situations.

Next Steps

According to the OECD, the MLC to implement Amount A will be signed by the end of 2023 with the aim of enabling its entry into force in 2025. If signature, not ratification, by the required critical mass of jurisdictions is achieved by the end of 2023, the DST freeze will be extended until 31 December 2024 or the entry into force of the MLC, whichever is earlier. Otherwise, the freeze will expire and unilateral measures, including DSTs, equalisation levies, expanded withholding taxes on digital services, non-traditional nexus-based levies and suchlike might proliferate.

As indicated above, several countries, including the US, have indicated that they need additional time for internal processes before they can decide whether or not they can sign the MLC. Recent declarations by the US Treasury Secretary and the US public consultation on this matter running until 11 December 2023 confirm that, at least for the US, such process will run into 2024. Since the US alone accounts for 48.6% of affected MNEs and 486 points out of the 600 required for the MLC to enter into force, the fate of Amount A and the DST freeze is in the US' hands. It remains to be seen whether or not the agreements directly entered into by the US with several countries about the treatment of existing DSTs, which also expire on 1 January 2024, will be extended.

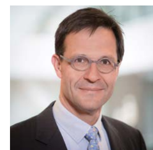
Regarding Amount B, the IF is now considering the feedback received to further develop the framework for the simplified and streamlined application of the arm's length principle to BMDA. The work on Amount B should be completed by the IF by the end of 2023 and the final report on this element is expected to be incorporated into the OECD's Transfer Pricing Guidelines by January 2024. It should however be noted that the developments regarding the MLC may have consequences for Amount B, since a number of countries see the implementation of Amount A and Amount B as part of the same agreement.

Takeaways and tips

- As of October 2023, the envisaged implementation dates for Amount A and the extension of the DST freeze seem unfeasible. This means that, unless further agreements are made, countries could introduce a DST or other unilateral measures as of 1 January 2024
- If Pillar One fails, countries might follow the example of the United Kingdom, Austria, France, Italy, Spain, India, Tunisia, Turkey, Kenia and, more recently, Canada and New Zealand of either adopting or proposing unilateral measures to tax MNEs in the digital sector in the form of either DSTs or similar measures. Furthermore, it cannot be ruled out that, following the previous 2018 attempt, a multilateral DST will again be proposed at EU level.
- In any case, MNEs will need to assess the potential impact of Pillar One and other unilateral measures and take them into account when reassessing their tax positions. Loyens & Loeff can assist in preparing a Pillar One impact assessment model to facilitate such assessment.
- Taxpayers can already assess whether the proposed Amount B rules simplify and streamline the pricing of their BMDA. Our Pillar One and Transfer Pricing teams are available to give support in analysing and modelling the impact of these rules on a group and exploring ways to mitigate increased taxation and complexity.

Juan Manuel Vázquez

Jan-Willem Kunen


Harmen van Dam

Public CbC Reporting

On 21 December 2021, the amendment to Directive 2013/34/EU introducing amended public Country-by-Country Reporting ('Public CbC Reporting') obligations in the EU entered into force.

Based on the amended directive, certain MNEs that are active in the EU with consolidated annual revenues exceeding EUR 750 million will have to publish the amount of tax they pay in each individual EU Member State and, on aggregate, outside the EU ('Public CbC Report'). The data provided by companies needs to be broken down into specific items. These items include the nature of the company's activities, the number of full-time employees, the amount of profit or loss before income tax, the amount of accumulated and paid income tax and accumulated earnings. The Public CbC Report must be published on the internet, using a common template.

The Public CbC Reporting obligations apply to (i) EU headquartered MNEs and (ii) non-EU headquartered MNEs that have medium- or large sized subsidiaries or branches in the EU. Based on the updated version of the directive, which is effective as of 1 January 2024, to qualify as a medium- or large sized subsidiary or branch, two of the following three (accounting) criteria must be met:

(i) a balance sheet exceeding EUR 5 million;
(ii) a net turnover exceeding EUR 10 million; and
(iii) an average number of employees exceeding 50.

These criteria may differ slightly between EU jurisdictions, depending on their national implementation. The directive is generally implemented by EU jurisdictions in a way that requires MNEs to publish their first Public CbC Report for reporting years starting on or after 22 June 2024 (such as in the Netherlands and Luxembourg). However, based on public information, Romanian law already requires certain undertakings to publish a Public CbC Report for reporting years starting on or after 1 January 2023.

Tip

We recommend verifying in which EU jurisdictions your MNE group is active and what the local deadlines are. Loyens & Loeff can assist you in determining the best approach towards meeting the Public CbC Reporting obligations.

Maurice van Klaveren

Daniël van der Vliet

Framework Agreement on cross-border teleworking

Since the COVID-19 pandemic, international teleworking has become an important topic for employers and employees. As of 1 July 2023, new rules apply to employees teleworking from home in cross-border situations within certain European countries ('cross-border teleworking'). If employees telework less than 50% of their agreed-upon working time in their state of residence, the social security legislation of the state in which the employer has its place of business or registered office may remain applicable. The new rules are laid down in a Framework Agreement, which applies to the EU Member States that have signed the Framework Agreement, as well as to Liechtenstein, Norway and Switzerland. The expanded possibility does not apply in relation to countries that have not signed the Framework Agreement. Belgium, Luxembourg, the Netherlands and Switzerland have signed this Framework Agreement. For more information, including a link to the list of countries that have signed the Framework Agreement, we refer to our newsletter.

Jan Bart Schober

The Netherlands
Domestic developments

General developments in the tax landscape

Tax plans 2024
On 19 September 2023, Budget Day 2023, the Dutch Ministry of Finance submitted the 2024 Dutch Budget to parliament. This budget contains various tax proposals for the years 2024 and 2025 ('Tax Plans 2024').

For more information on the Tax Plans 2024 we refer to our tax flash of 19 September 2023. In this tax flash the changes to the Dutch fiscal investment institution regime, i.e. the abolition of direct real estate as qualifying investment for fiscal investment institutions, are among the topics addressed, as well as the Dutch unilateral measures to prevent dividend stripping.

The most relevant proposals for corporate taxpayers are the previously announced changes to the classification rules for Dutch limited partnerships *(commanditaire vennootschappen)*, comparable foreign entities and Dutch funds for joint account *(fondsen voor gemene rekening)*. These changes will enter into force as of 1 January 2025 and the proposals include transitional measures allowing for tax-friendly reorganisations in 2024. On page 21 below these proposals and measures will be discussed in more detail.

On 26 October 2023, the Dutch Second Chamber of Parliament adopted the Tax Plans 2024.

Minimum taxation

On 26 October 2023, the Dutch Second Chamber of Parliament also adopted the Minimum Tax Act 2024 *(Wet Minimumbelasting 2024)* proposed earlier, implementing the Pillar Two Directive in Dutch law. Analysing the impact of the Pillar Two rules for MNEs was one of the main tax challenges in 2023 and will continue to be so in 2024. More details on the Dutch implementation of the Pillar Two rules can be found on page 20.

Amendments to the Tax Plans 2024

Moreover, during the parliamentary proceedings on the recently adopted Tax Plans 2024, Dutch parliament proposed various amendments, some of which were adopted on 26 October 2023. Some of the tax consequences following from these amendments are discussed below.

Increase in Dutch personal income tax rate and scaling back of 30%-ruling

The changes following from the amendments in the parliamentary process partly relate to an increase of the Dutch personal income tax rates and the further scaling back of the 30%-ruling for foreign employees with specific expertise by decreasing the maximum tax-free allowance from 30% to 20% after the first 20 months of the term and from 20% to 10% after the next 20 months and by abolishing the option to opt for the partial foreign taxpayer status. These changes will be addressed on page 24.

Abolition of the tax-free repurchase facility for listed companies

As far as listed companies are concerned, the adoption of the amendments will, amongst other things, lead to the abolition of the tax-free repurchase facility for listed companies as of 1 January 2025. Under this facility listed companies currently can, albeit under certain conditions, repurchase shares without the obligation to withhold Dutch dividend tax. The abolition of this facility means that share buyback programmes of listed companies in the Netherlands will in general become subject to Dutch dividend withholding tax as of 1 January 2025. Such Dutch dividend withholding tax would be due and payable by the listed company, because the company cannot withhold this tax in case of transactions on the stock exchange. Thus, the repurchase price is the after tax profit distribution. This means that the profit distribution amount must be grossed up when calculating the dividend withholding tax due. This results in an effective tax burden of approximately 17.65% of the repurchase price.

For the year 2024, listed companies can still make use of the facility. It remains to be seen if and to what extent abolishing this facility will influence share buyback programmes of listed companies and whether the revenues budgeted by parliament will indeed be realised.

Observations and entry into force

The Dutch parliament made quite a number of changes to the original proposed Tax Plans 2024, which can be seen in light of the elections in November 2023. The First Chamber of Parliament will have to vote on the Tax Plans 2024 and the Minimum Tax Act 2024 on 19 December 2023. If adopted, the new laws will enter into force on 1 January 2024 or on 1 January 2025.

Liesbeth Hendrix

Update Pillar Two

We expect the Minimum Tax Act to be enacted before year-end and apply to financial years starting on or after 31 December 2023.

The Netherlands is on schedule to implement its domestic Pillar Two legislation before the end of 2023, where the Income Inclusion Rule ('IIR') and Qualified Domestic Top-up Tax ('QDMTT') will be effective from 31 December 2023 and the Undertaxed Profits Rule ('UTPR'), in most cases, from 31 December 2024. The legislative proposal for the Minimum Tax Act *(Wet Minimumbelasting)* was published on 31 May 2023 and since then the parliamentary proceedings are progressing. Our summary published earlier on this proposal can be found here.

The Minimum Tax Act mentions that the OECD Model Rules and related Commentary of 11 March 2022 and the OECD Administrative Guidance of 1 February 2023 can serve as interpretation of the Minimum Tax Act to the extent that the Act aligns with the OECD Model Rules. The Netherlands chooses to introduce the QDMTT Safe Harbour and the UTPR Safe Harbour in line with the OECD Administrative Guidance released on 17 July 2023.

The proposal introduces compliance obligations which comprise information returns and IIR, UTPR and QDMTT returns. Whereas the information return follows the OECD concept of a Global Anti-Base Erosion ('GloBE') information return, the IIR, UTPR and QDMTT return should be filed if any of these taxes become due in the Netherlands. All in-scope entities will, to some extent, have some degree of Pillar Two-related compliance.

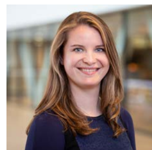
The Minimum Tax Act was adopted by the Second Chamber of Parliament on 26 October 2023. This Act will be voted on in the First Chamber of Parliament on 19 December 2023 and will subsequently be enacted once it has been published in the Official Gazette. We expect the Minimum Tax Act to be enacted before year-end and apply to financial years starting on or after 31 December 2023.

Tip

Our Pillar Two team can assist with the:

(i) Country by Country Reporting ('CbC Reporting') Safe Harbour analysis;
(ii) Pillar Two analysis for disclosure in 2023 financial statements;
(iii) Pillar Two in M&A transactions; and
(iv) Pillar Two analyses and restructurings.

Charlotte Kiès



Agathe van Amerongen

Update Public CbC Reporting

The Dutch Second Chamber of Parliament passed legislation to implement public Country-by-Country Reporting on 6 July 2023. In-scope MNEs are required to publicly disclose a Country-by-Country Report including tax and tax-related information for reporting years starting on or after 22 June 2024.

Maurice van Klaveren

Daniël van der Vliet

Entity classification rules

As part of the Budget Day 2023 tax plans, it has been proposed to overhaul the Dutch entity classification rules as of 1 January 2025 in order to bring them more in line with international standards.

Partnerships

The Dutch non-transparent limited partnership ('CV') and other types of non-transparent Dutch partnerships cease to exist, making all partnerships transparent for Dutch tax purposes.

Funds for joint account

It is further proposed to change the tax classification rules applicable to Dutch funds for joint account (*fondsen voor gemene rekening*, 'FGRs'), which can currently be classified as either transparent or non-transparent for Dutch tax purposes.

An FGR will only be non-transparent if it is regulated according to the Dutch Financial Supervision Act *(Wet op het financieel toezicht)* and the participations in the FGR are tradeable. If the participations in an FGR can be repurchased solely by the FGR, the participations are deemed to be non-tradeable and such FGR will be classified as tax-transparent, even if it is regulated. In all other cases, the FGR will also be classified as tax-transparent.

Foreign entities

The Netherlands currently applies the 'similarity approach' to classify foreign entities. Under the current proposal, the similarity approach remains in force as the primary classification rule. For certain situations where the similarity approach does not provide a solution, there will be two new rules:

- For foreign entities based outside the Netherlands with no clear Dutch equivalent, the Netherlands will follow the tax classification of the home state of the foreign entity (the symmetric approach).

- Foreign entities with no clear Dutch equivalent based in the Netherlands will always be classified as a non-transparent entity for Dutch tax purposes (the fixed approach).

Transitional rules

A shift from a non-transparent classification to a transparent classification for Dutch tax purposes could result in tax becoming due at the level of the partnership or FGR and/or at the level of the partners or participants without cash being generated. Therefore, several facilities are proposed to apply as of 1 January 2024:

(i) a roll-over facility;
(ii) a share-for-share merger facility (including a real estate transfer tax ('RETT') exemption); or
(iii) a deferred payment obligation, spread out over ten years.

Tip

Attention should be paid to existing structures as restructurings may be necessary before 1 January 2025, because restructurings using the above-mentioned facilities should be carried out during the year 2024.

Wouter van der Leij

Conditional withholding tax on dividends per 2024

Profit distributions to entities in low-tax jurisdictions will be in-scope of this conditional withholding tax.

On 1 January 2024, legislation will enter into effect pursuant to which the scope of the existing Dutch conditional withholding tax on intragroup interest and royalty payments ('CWT') will be expanded to also include profit distributions by capital companies, such as the private limited liability company ('BV') and public liability company ('NV'), but also by all cooperatives, including 'non-holding' cooperatives.

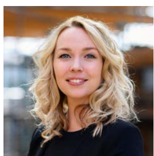
Profit distributions to entities in low-tax jurisdictions, being jurisdictions with a less than 9% statutory profit tax rate, and/or EU-blacklisted jurisdictions ('LTJs') will be in-scope of this CWT. Additionally, profit distributions to certain non-LTJ hybrid entities and reverse hybrid entities are covered, as well as payments in 'abusive situations'. An example of an abusive situation is where the recipient is directly or indirectly held by an entity in an LTJ and the principal purpose of the interposition of the recipient is to secure a more favourable CWT position.

If due, CWT will be levied at the headline corporate income tax rate, i.e. 25.8% in 2024. The existing non-conditional 15% Dutch dividend withholding tax ('DWT') will continue to apply, although any DWT levied will be creditable against the CWT.

The CWT, deliberately, does not assign any value to substance in the Netherlands at the level of the distributing Dutch entity or in the LTJ at the level of the direct or indirect recipient.

Takeaways and tips

- The CWT will only apply to profit distributions made to group companies with a controlling interest in the distributing Dutch entity which exists, in general, in case of more than 50% of voting rights.
- Where it involves Dutch cooperatives, the new CWT has a broader scope than the DWT as under current rules only distributions by holding cooperatives are subject to CWT.
- With regard to profit distributions made to hybrid entities and reverse hybrid entities, it is noted that the number of classification mismatches and, thus, the number of hybrid entities for purposes of CWT should generally be reduced due to the proposed changes to the Dutch entity tax classification rules as of 1 January 2025 as set out on page 21. In relation to limited partnerships equivalent to Dutch limited partnerships ('CVs'), these rules are proposed to be applicable already as of 1 January 2024 but only for CWT on dividends, implying that these entities will be considered tax-transparent for this purpose as of that date.
- MNEs should verify whether the CWT may apply and determine whether any restructuring will be required before 1 January 2024.



Marlous Verhoog

Bamdad Ferdowsi

Dividend withholding tax - anti-abuse rule case law

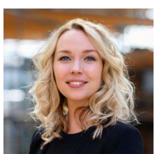
On 2 June 2022, the Amsterdam Court of Appeal ruled in two cases on the application of the domestic exemption from dividend withholding tax ('DWT Exemption') for profit distributions made by Dutch resident entities to Belgian family holding companies that did not have any influence in the day-to-day management of the Dutch entities. These rulings particularly address the anti-abuse test as included in the DWT Exemption and the Court decided that the structures were abusive and the DWT Exemption does not apply.

On 28 July 2023, the Advocate General issued his opinion to the Dutch Supreme Court. Although the Advocate General followed the strict interpretation of the Court of Appeal on the application of the anti-abuse test in the pending cases, he suggested applying the DWT Exemption in line with EU law and case law, where abuse cannot be considered present solely on the basis that the structure leads to a more favourable dividend withholding tax position.

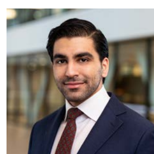
The Supreme Court judgments in these cases are expected in the year 2024.

Tip

It continues to be important to assess on a case-by-case basis whether the DWT Exemption can be invoked in case of profit distributions by Dutch resident entities.



Marlous Verhoog



Bamdad Ferdowsi

Cancellation of the RETT concurrence exemption for certain share deals

RETT exemption no longer applicable to share transactions with respect to real estate companies that own building land and newly constructed real estate used (in part) for VAT-exempt purposes
For envisaged share transactions with respect to shares in a real estate company that owns building land and newly constructed real estate used (in part) for VAT-exempt purposes, it is advisable that such share transactions take place before 1 January 2025.

Currently, newly constructed properties can be acquired without VAT or real estate transfer tax ('RETT') if the shares in the real estate company are acquired.

The government wants to resolve the difference in taxation between asset deals and share deals by levying RETT on certain share transactions. To this end, the government proposes to abolish the RETT exemption for share transactions of real estate companies that own building land and newly constructed real estate, where more than 10% is used for VAT-exempt purposes. To avoid overkill, a new RETT rate of 4% is to be introduced for the acquisition of shares in real estate companies that can no longer benefit from the RETT exemption. We refer to our news flash for more information on this proposal.

The RETT exemption will not be abolished for share transactions in companies holding new real estate used for activities where at least 90% of the VAT is recoverable in the two years following the acquisition. Therefore, in most cases share transactions involving newly constructed logistics, office and retail properties should still qualify for the RETT exemption.

Shares already acquired in an ongoing development project where the company owns building land or newly constructed property?
Transitional rules will be introduced for ongoing development projects. This means that an acquirer is eligible for the RETT exemption (i) if a letter of intent was signed with the intended acquirer before 19 September 2023 at 3:15 p.m., and (ii) provided that the acquisition of the shares takes place no later than 1 January 2030. To apply the transitional rules, acquirers must file a notification with the Dutch tax authorities between 1 January 2024 and 31 March 2024.

Jérôme Ariës

Employment taxes

30%-ruling
As from 1 January 2024, the cap on the maximum tax-free allowance that can be paid under the 30%-ruling (i.e. the Dutch tax regime for foreign employees with specific expertise), as already adopted in the Tax Plans 2023, will enter into force. As part of the Tax Plans 2024, in addition to the cap on the maximum tax-free allowance the Second Chamber of Parliament adopted two additional amendments to further scale back the 30%-ruling. First, this regards (i) the gradual scaling back of the tax-free allowance from 30% to 10% throughout the duration of the 30%-ruling. Second, the possibility to elect to be treated as a so-called partial non-resident taxpayer will be abolished. For more information we refer to our newsletter.

Adjustment pension system

On 1 July 2023, the new Pensions Act *(Wet toekomst pensioenen)* entered into force and by 1 January 2028, the transition to the new pension system will have to be completed. Although the due date of 1 January 2028 still seems far away, in practice employers, pension funds, insurers and asset managers are recommended to initiate the work on the implementation rather sooner than later, as in many situations the impact and workload will be substantial. For more information we refer to our newsletter.

End of enforcement suspension for self-employed individuals

Due to the unclarities in respect of the tax treatment of self-employed individuals, the Dutch tax authorities apply an enforcement suspension *(handhavingsmoratorium)* with respect to the classification of self-employed individuals as independent or employed for wage tax purposes. This enforcement suspension will be abolished as of 1 January 2025. As a result of this abolishment, supervision and enforcement will be strengthened to resolve the current ambiguity regarding the distinction between self-employed individuals and employees. For more information we refer to our newsletter.

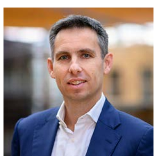
Exemption method for executive and supervisory board remuneration

As of 1 January 2023, the approval to avoid international double taxation on executive and supervisory board remuneration by using the exemption method instead of the credit method expired. It is therefore important to take this change into account when filing the 2023 tax return. For more information we refer to our last year's tax trends and developments brochure for MNEs.

Cross-border teleworking and social security

As mentioned on page 17, the Framework Agreement applies to EU Member States that have signed the agreement, as well as to Norway, Switzerland and Liechtenstein. Under the Framework Agreement, the employer and the employee can opt in for continuation of the social security legislation of the state of the employer's registered office or place of business whilst the employee is cross-border teleworking from home for less than 50% of the time. The Netherlands, Belgium and Germany have signed the Framework Agreement, as a result of which these new rules can be applied in cross-border teleworking situations between the Netherlands and, inter alia, Belgium and Germany. For more information we refer to our newsletter.

Furthermore, the Dutch government focuses on two tax measures to facilitate working from home in cross-border situations. First, the government wants to include a working from home measure in bilateral tax treaties. Second, the government wants to provide more reassurance regarding the non-existence of a permanent establishment of the employer in the employee's country of residence, due to working from home in cross-border situations.



Jan Bart Schober

Belgium
Domestic developments

General developments in the tax landscape

In March 2023, the Belgian Minister of Finance published his proposal for a broad tax reform aiming more generally at modernising and simplifying the tax system and making the system more equitable. Items of the reform that are relevant for MNEs included, for example, changes to the participation exemption regime, the innovation income deduction, the investment deduction regime, the partial wage withholding tax exemption for research & development, the use of the stock option plans and the tax regime of carried interest.

After several months, it appeared difficult to reach political agreement on the various aspects of the tax reform. In July 2023, the Prime Minister announced that negotiations on the tax reform had failed as no consensus could be reached. Although no major reform could be agreed upon, some tax measures have been announced in October 2023 as part of the budget agreement. These are elaborated on in one of the following paragraphs. Apart from these measures, no major tax reforms are expected anymore in this legislature in view of the upcoming elections in 2024.

Update Pillar Two

In-scope MNEs should closely follow up on the implementation of Pillar Two rules in Belgium and monitor the impact on certain tax incentives that are currently being applied.

On 13 November 2023, a draft bill implementing Pillar Two was submitted to parliament in line with the EU directive of 14 December 2022 ensuring a global minimum tax ('the Directive'). The draft bill contains an Income Inclusion Rule and Qualified Domestic Minimum Top-up Tax for fiscal years starting on or after 31 December 2023, and an Undertaxed Profits Rule for fiscal years starting on or after 31 December 2024.

The draft bill largely follows the Directive to ensure a consistent implementation among Member States. For more information on the highlights of the draft bill we refer to our tax flash of 16 November 2023

Takeaways and tips

- The entry into force of the Pillar Two rules is rapidly approaching and MNEs must get ready for this new reality. It is expected that the draft bill will be published before year-end, thereby safeguarding a timely transposition of the Directive. In-scope MNEs should therefore closely monitor the impact of the Pillar Two rules in Belgium on, for example, certain tax incentives that are currently being applied.
- Our Pillar Two team can assist with the:
  (i) Country by Country Reporting ('CbC Reporting') Safe Harbour analysis;
  (ii) Pillar Two analysis for disclosure in 2023 financial statements;
  (iii) Pillar Two in M&A transactions; and
  (iv) Pillar Two analyses and restructurings.

Update Public CbC Reporting

The Belgian government adopted a draft proposal on the Public Country-by-Country Reporting Directive on 13 October 2023, which considers the comments of the Council of State. It is expected that the draft proposal will soon be submitted to parliament.

Tax considerations regarding the Mobility Directive

MNEs should carefully assess the tax consequences of the various reorganisation options.

The Mobility Directive aims to facilitate cross-border reorganisations while increasing protection for stakeholders. Member States had to implement this directive by 31 January 2023. On 25 May 2023, the Belgian Law implementing the Mobility Directive regarding cross-border conversions, mergers and divisions was finally adopted ('Belgian Mobility Law'). The Belgian Mobility Law entered into force on 16 June 2023, except for certain provisions.

The Belgian Mobility Law introduced, among other things and subject to certain conditions to be fulfilled, the following new types of reorganisations or new features:

- A cross-border demerger in which the demerged company transfers part of its assets and liabilities to one or more recipient companies. In exchange, the demerged company itself, not the shareholders of the demerged company, receives shares in the recipient company or companies.
- A merger between sister companies in which the acquired company or companies transfer all their assets and liabilities to another company, with the acquired company or companies being dissolved without going into liquidation and without the acquiring company issuing any new shares.
- In case of a partial demerger it also becomes possible to issue shares of the partially demerged company and no longer only of the acquiring company. A combination of both is also possible.

Although the Belgian Mobility Law and the Mobility Directive intend to facilitate reorganisations, adverse tax consequences may still hamper these reorganisations. The Belgian Income Tax Code has not yet been adjusted to these new types of reorganisations. However, a draft bill has recently been submitted to parliament to ensure that these reorganisations can also occur in a tax-neutral manner.

In case of cross-border reorganisations, the Belgian Mobility Law has also significantly reinforced the gatekeeper function assigned to Belgian notaries. The documents that need to be provided to and verified by the Belgian notary have, among other things, been expanded. In this respect, companies will also be required to submit a tax and social security certificate to the notary showing the outstanding tax liabilities and social security contributions. This requirement will in principle enter into force on 15 December 2023.

Takeaways and tips
If an MNE plans a certain type of reorganisation, due consideration should be given to the tax consequences associated with such reorganisation and to the impact of procedural aspects on timing.

Tax impact of the new Insolvency Law

MNEs should not overlook the tax consequences of insolvency procedures offered to companies in distress.

On 1 September 2023, the reformed Belgian Restructuring Law entered into force. The law implements the EU Insolvency Directive 2019/1023 and aims to offer companies in distress a wider array of tailer-made restructuring tools.

In order not to jeopardise the chances of success of a restructuring procedure, the Belgian Income Tax Code explicitly foresees with respect to certain restructuring procedures that (i) the profit realised by the debtor upon a partial or full debt waiver is treated as tax-exempt, and (ii) any impairment on a receivable that is accounted for by the creditor is treated as tax deductible, even if the loss is not yet certain. Although these specific tax provisions have not yet been aligned with the new procedures introduced by the Belgian Restructuring Law, a draft bill has recently been submitted to parliament to address this gap. The draft bill also provides specific rules to ensure that the exemption at the level of the debtor will be temporary in nature. Due to some potential remaining differences and specifics, it remains imperative to always monitor carefully the tax consequences associated with each restructuring procedure that would be considered.

Takeaways and tips

- Although the Belgian Restructuring Law offers more restructuring options for companies in distress, adverse tax consequences might hamper the chances of success. The draft bill which intends to align the tax provisions with these new restructuring options is therefore a positive development.
- It remains nonetheless imperative to closely monitor the tax consequences associated with each possible restructuring option as some differences and specifics may remain.

What budgetary measures may impact your business?

It is recommended that MNEs follow the budgetary measures closely during the coming months so they can assess the impact on their business.

The Belgian government reached agreement on 9 October 2023 on various budgetary measures, including some tax measures that may impact MNEs. The most important ones can be summarised as follows. Please note that no official documents have been published.

- The current Controlled Foreign Corporation ('CFC') regime will be changed. The Anti-Tax Avoidance Directive ('ATAD') obliged Member States to implement a CFC rule. The ATAD left Member States the option to:
  (i) either include non-distributed specific types of passive income in the taxable basis of the controlling taxpayer (Model A); or
  (ii) include non-distributed income arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage (Model B).

  Belgium opted for the latter approach, implying that CFC income can only be taxed in Belgium if it is attributable to the significant people functions carried out by the Belgian controlling taxpayer. This CFC rule entered into force in 2019, but the Minister of Finance confirmed in May this year that this rule was never applied in Belgium in so far as it overlaps with transfer pricing rules.

  The Belgian government has now decided to switch from Model B to Model A, which is the other, more far-reaching other option that the ATAD provided.

  Under the new proposed CFC rule, specific types of non-distributed passive income will be included in the corporate income tax base of the Belgian parent company, unless the CFC carries on substantive economic activity supported by staff, equipment, assets and premises as evidenced by relevant facts and circumstances. The passive income targeted includes interest income (or equivalent), dividends, income from the disposal of shares (or equivalent), royalties, income from leasing, income from banking, insurance and other financial activities and income from the purchase and sale of goods and services that add little or no economic value. The CFC rule will not apply if one third or less of the income accruing to the CFC falls within these types of passive income.

  It is expected that the new CFC rule will enter into force as of 2024.

- Two specific anti-abuse provisions would be brought in line with case law of the Court of Justice of European Union. These provisions target certain payments to or certain transactions with directly or indirectly related foreign persons that are subject to no or low corporate income tax. The provisions will not apply if the Belgian taxpayer demonstrates that (i) the recipient is subject to a tax that equals at least half of the tax that would be due if the recipient was established in Belgium, or (ii) the transaction has been entered into for commercial or economic reasons that reflect economic reality.

- More rigorous tax audits will be performed on the application of non-legal entities taxation and special regimes under the corporate income tax.

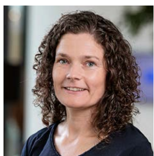
- The investment deduction will be increased for sustainable and socially-responsible investments and the rules will be simplified.

- Specialised real estate investment funds ('FIIS/GVBF') will be subject to an additional tax of 10% if a real estate asset leaves the FIIS/GVBF tax regime within five years after payment of the 15% corporate exit tax. This latter tax is due if the FIIS/GVBF registers itself on a list maintained by the Ministry of Finance, which results in the application of a special FIIS/GVBF tax regime consisting of a limited tax base.

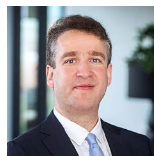
- The rate of registration duties on long-term leases and rights to build would be increased from 2 to 5%.

Takeaways and tips

- Although no official text is available yet and the above measures might be subject to change, MNEs are advised to assess now the impact of these budgetary measures on their business.
- If the new CFC rule is adopted, increased discussions on the substance of a CFC can be expected. In anticipation of the new CFC rule, MNEs with subsidiaries in low-tax or no-tax jurisdictions are therefore recommended to verify whether an adequate level of substance can be demonstrated in these jurisdictions, which is to be assessed on a case-by-case basis, and to prepare a defense file in this respect.



Linda Brosens



Nicolas Lippens

E-invoicing and notification obligation for VAT deduction through pro rata

MNEs should start to prepare for e-invoicing, while businesses deducting VAT through a pro rata should review their deduction processes.

Mandatory e-invoicing was initially part of the failed tax reform but was relaunched as a separate measure by the Belgian Minister of Finance at the end of the summer 2023. The new proposal makes e-invoicing mandatory for businesses established in Belgium in a B2B context as of 1 January 2026. Although no official draft text is available, it was indicated that a broad transition period will be granted, allowing businesses to align their accounting / invoicing software with the Pan-European Public Procurement Online ('PEPPOL') network. It is expected that the largest companies will need to adopt e-invoicing first and smaller companies only later in 2026 or 2027.

The Belgian mandatory e-invoicing is linked to the VAT in the Digital Age ('ViDA') proposal launched by the European Commission late last year. The ViDA proposal imposes an e-invoicing obligation for all transactions within the EU as of 2028. Both the Belgian and European proposal on e-invoicing constitute a necessary step towards digital transaction-based reporting ('e-reporting') allowing VAT authorities to monitor transactions and invoicing flows in real-time. While e-reporting would be phased in for intra-Community transactions as of 2028, there is no timeline on e-reporting in Belgium.

The Belgian parliament has also adopted a legislative proposal requiring mixed taxable persons and partial taxable persons to notify the VAT authorities electronically of the general pro rata or specific pro rata they respectively apply. A similar notification obligation was introduced for mixed taxable persons deducting VAT through the 'real use' method at the start of 2023. Although the proposed measure is of a technical nature, in practice it requires partially taxable persons, such as, active holding companies that are not involved in the management of all their subsidiaries, to notify the VAT authorities of their deduction method for general costs. General costs are costs having no direct link to either the taxable activity or the activity that is out of scope of VAT. The notification obligation enters into force on 1 January 2024. Taxable persons already deducting VAT through a general pro rata must notify the VAT authorities before 1 July 2024.

Takeaways and tips

- It is strongly recommended that MNEs get started on an e-invoicing roadmap, as making the required updates to the internal accounting and invoicing software can be time-consuming.
- For the VAT deduction notifications, it should be assessed whether a notification should be made and whether the current deduction method is correct. It is expected that the data collected by the VAT authorities after a notification will allow for more targeted VAT audits.

Bert Gevers

Bernard Claessens

Cross-border teleworking and social security

As mentioned on page 17, the Framework Agreement applies to EU Member States that have signed the agreement, as well as to Norway, Switzerland and Liechtenstein. Under the Framework Agreement, the employer and the employee can opt in for continuation of the social security legislation of the state of the employer's registered office or place of business whilst the employee is cross-border teleworking from home for less than 50% of the time. Belgium, France, Germany, Luxembourg and the Netherlands have signed the Framework Agreement, as a result of which these new rules can be applied in cross-border teleworking situations between Belgium and, inter alia, these countries. Since the United Kingdom did not sign the Framework Agreement, this rule cannot be applied between Belgium and the United Kingdom. For more information we refer to our newsletter.

Kevin Gomez

Luxembourg
Domestic developments

General developments in the tax landscape

As has been the case for several years now, the main changes in the Luxembourg tax environment derive from EU or international tax developments and this will continue. Monitoring these developments and their implementation in Luxembourg law is a matter of course. Having an insight into the developments of the Luxembourg tax authorities' expertise, which is associated with an increase in audits and disputes, should help MNEs to set their next priorities.

The analysis of the impact of the Pillar Two rules on the organisation of MNEs has been one of the main focuses in 2023. For many MNEs with Luxembourg presence, the relevant items were the deferred tax assets resulting from carried forward losses of periods up to 30 November 2021 and the rules on intragroup financing arrangements. Considering the complexity of the rules and the fact that some of the OECD administrative guidance has been issued since the adoption of the Pillar Two Directive, the efforts required by MNEs to fully assess the tax impact of the Pillar Two rules will need to be continued in 2024 in parallel with the adaptation of their data process systems in order to be ready for the Pillar Two tax filings.

The proposal for the Unshell proposal will most likely evolve and might require a further simplification and rationalisation of the holding structures of MNE groups.

2023 was an election year in Luxembourg at federal level. However, the new government, once formed, is not expected to introduce major changes to the taxation rules of companies. It is very likely that the enlargement of the teams at the Luxembourg tax authorities will further increase the number of audits and litigation cases. MNEs should be prepared for this and, in addition to the required transfer pricing documentation, MNEs should not only ask advice on the tax impact of an envisaged restructuring but should also ensure that the legal documentation implementing the restructuring is reviewed from a tax perspective.

Christine Beernaerts

Update Pillar Two

On 4 August 2023, Luxembourg published a legislative proposal to transpose the EU directive implementing Pillar Two into domestic law as of 31 December 2023. On 13 November 2023, amendments to the proposal were published aiming at implementing some items of the OECD Administrative Guidance from February and July 2023.

The proposal, as amended, implements the Global Anti-Base Erosion (‘GloBE’) Rules in an autonomous law, i.e. separate from the regular income tax law, introduces a Qualified Domestic Minimum Top-up Tax (QDMTT), transitional Undertaxed Payment Rule (‘UTPR’) and Country-by-Country safe harbours, a QDMTT safe harbour, a permanent safe harbour (still to be agreed at the OECD level), and integrates some elections in line with OECD Guidance. Essentially, the proposal reflects the directive and OECD Administrative Guidance with a few additional elements, such as the confirmation that Luxembourg corporate income tax, municipal business tax and net wealth tax are covered taxes for Pillar Two purposes. Under the current wording, the QDMTT is aligned with GloBE Top-up Tax computations and, as a general rule, would be calculated following local GAAP. Subject to certain conditions IFRS or the qualifying financial accounting standard used for consolidation purposes should be followed. The proposal introduces compliance obligations which comprise both information returns and Income Inclusion Rule (‘IIR’), Undertaxed Payments Rule (‘UTPR’) and QDMTT returns. Whereas the information return follows the OECD concept of a GloBE information return, the IIR, UTPR and QDMTT returns should be filed if any of these taxes become due in Luxembourg. All in-scope entities will have some degree of Pillar Two-related compliance.

The parliamentary examination of the proposal is expected to continue before it is adopted, as the new members of parliament have taken office, and a new Luxembourg government is in place. In parallel, certain bodies such as the Chamber of Commerce and the State Council will also have to issue their (non-binding) opinions on the Luxembourg legislative proposal, as amended. The official intention remains for the legislative proposal to be adopted prior to 31 December 2023.

Takeaway and tips

- While some amendments may still take place, the current proposal already provides relevant elements to be considered.
- MNEs and large-scale groups in scope of Pillar Two with presence in Luxembourg should take action to ensure an efficient Pillar Two outcome in Luxembourg.
- Our Pillar Two team can assist with the:
  (i) Country-by-Country Reporting ('CbC Reporting') Safe Harbour analysis;
  (ii) Pillar Two analysis for disclosure in 2023 financial statements;
  (iii) Pillar Two in M&A transactions; and
  (iv) Pillar Two analyses and restructurings.

Aline Nunes

Update Public CbC reporting

A brief overview

On 19 July 2023, the Luxembourg parliament adopted the law implementing the EU Directive 2021/2101 which introduces a new public Country-by-Country Reporting ('Public CbC Reporting') obligation.

Who should disclose?

Subject to some carve-out and exclusions from the scope of application, EU-based multinational enterprises ('MNEs') and non-EU based MNEs doing business in Luxembourg via a subsidiary or a branch with a consolidated annual turnover of at least EUR 750 million for two consecutive years will need to publish and provide certain information. Reporting obligations for entities having a Public CbC Reporting obligation are broader than those under the regular existing CbC Reporting obligation. Luxembourg companies part of a MNE group should verify how the new Public CbC Reporting obligation applies to them.

What information to disclose?

The Public CbC Report should include, amongst other things, for the financial year concerned a list of all subsidiaries included in the consolidated accounts, a brief description of the nature of the activities, the amount of profit or loss before tax, the amount of corporate income tax and withholding tax paid, and the number of FTEs.

How to disclose?

In-scope entities must file and publish the Public CbC Report with the Luxembourg Trade Register *(Registre de Commerce et des Sociétés)* and make available its content in one of the EU languages on the website of the MNE free of charge. The entity is exempt from publication on the website provided that the information is accessible to the public free of charge in one of the EU languages and the link to the register is put on the website.

Any possible deferral?

Luxembourg opted to allow in-scope entities to defer, under certain conditions and for a maximum of five years, the disclosure of some commercially sensitive information where such disclosure may seriously prejudice the commercial position of the undertaking. Any omission should be clearly indicated and accompanied by an explanation.

Timing of the first Public CbC Report?

The Public CbC Report will apply to financial years starting on or after 22 June 2024. The first public report will need to be published within 12 months of the closing of the financial year for which the declaration is drawn up. More specifically, for companies closing their accounts on 31 December, the new rules will start applying from 1 January 2025 and the first report will need to be filed and/or published by 31 December 2026 at the latest.

Sanction?

Failure to comply with the new Public CbC Reporting obligation may lead to a fine of between EUR 500 and EUR 25,000 for the management, administrative or supervisory boards, as well as branch representatives.

Takeaway and tip

Given the publication of the information and the personal responsibility of managers, MNEs should prepare their Public CbC Reporting obligation as soon as possible.

Master file/Local file and BAPA procedure – project for an implementing decree

On 28 March 2023, the Luxembourg government presented a legislative proposal to reform certain tax administrative and procedural aspects, as well as documentation requirements.

Amongst the different measures, the government proposes to introduce a new provision where taxpayers will need to submit their transfer pricing policy to the Luxembourg tax administration on demand. A draft Grand Ducal regulation was published, simultaneously with the abovementioned legislative proposal. This draft regulation provides for a new master file and local file obligation.

On this basis:

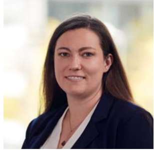
- Any constituent entity of an MNE group with a CbC Reporting obligation must prepare a local file detailing the transfer pricing analysis of the transactions with related parties, and this analysis must be available at all times to the Luxembourg tax authorities.

- Any constituent entity of an MNE group with a CbC Reporting obligation and either having a net turnover for an operating year of at least EUR 100 million or having a balance sheet total of at least EUR 400 million must prepare a master file, that is available at all times to the Luxembourg tax authorities.

The contents of the local file and master file are both aligned with the requirements included in the BEPS Action 13 report. Large holding companies should carefully check whether they meet the threshold for the proposed master file obligation.

Under the same legislative proposal, the government has also proposed a draft Grand Ducal regulation introducing a new bilateral and multilateral APA (‘BAPA’, ‘MAPA’) procedure, based on the provisions of Article 25(3) of the OECD Model Tax Convention. The APA request must contain the information, consistent with what is already requested for a MAP. While it is already possible to request a BAPA or a MAPA, following this draft regulation the application will be subject to an application fee ranging from EUR 10,000 to 20,000, regardless of the outcome.

To date, the legislative proposal has faced much criticism, both from stakeholders and the State Council *(Conseil d'Etat)*, as it restricts taxpayer rights. It remains to be seen whether the proposals will be adopted or whether they will undergo significant amendments. That being said, the intention to align transfer pricing documentation with the BEPS Action 13 Report is set and taxpayers should make sure that all related party transactions are supported with ad hoc transfer pricing documentation.



Sophie Ogden

Cross-border teleworking and social security

Luxembourg tax and social security rules on working from home: towards a harmonisation of the tax tolerance thresholds and greater flexibility in social security rules

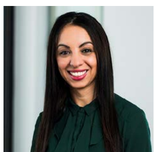
Since 1 January 2023, changes in tax and social security legislation in Luxembourg to facilitate access to working from home ('teleworking') have continued to evolve so that the Luxembourg tax and social security rules do not represent an obstacle in enabling cross-border employees of Luxembourg companies to telework.

Luxembourg has been able to harmonise the tax thresholds for working days spent outside Luxembourg, including teleworking days, with its neighbouring countries of Germany, Belgium and France. As of 1 January 2024, the tax tolerance threshold will be 34 days per annum for German, Belgian and French residents.

These tax tolerance thresholds allow non-resident employees to work outside Luxembourg without triggering taxation in their country of residence. In other words, cross-border workers who do not exceed the tax tolerance thresholds in a certain year, remain subject to Luxembourg taxation.

From a social security point of view, on 5 June 2023 Luxembourg has signed the Framework Agreement based on Article 16 of the Regulation (EC) No 883/2004 related on the coordination of social security systems. For further information we refer to page 17 and our newsletter.

In application of the Framework Agreement which came into force on 1 July 2023, cross-border workers can telework while remaining subject to Luxembourg social security legislation, provided that the time worked in their respective countries of residence is less than 50% of their actual working time. These new developments will help Luxembourg employers to implement a teleworking procedure based on equal treatment between employees regardless their respective countries of residence, provided they are resident in a country that has signed the Framework Agreement. Employers should declare any teleworking activities carried out by the employees to the Luxembourg social security authorities.



Kheira Mebrek

Switzerland
Domestic developments

General developments in the tax landscape

The year 2023 saw a multitude of new tax legislation and projects being put forward which may alter the Swiss tax landscape both internationally and domestically in significant ways.

Switzerland has committed to implementing Pillar One and Pillar Two legislation. The constitutional basis recently approved by Swiss voters will serve as the entry point for both projects. Whereas Pillar One is still work in progress, Pillar Two is expected to apply as of 1 January 2024 (for IRR and QDMMT) and 1 January 2025 (for UTPR) respectively. See pages 38 and 39.

On the transactional side, the failed attempt of the Swiss government to abolish interest withholding tax and securities transfer stamp tax means that current financing transactions still need to adhere to the non-bank rules to avoid attracting interest withholding tax. Based on longstanding practice of the Swiss federal tax administration, internationally accepted financing structures not attracting interest withholding tax can be implemented, provided certain conditions are met. The same applies to securitisation deals in case of a true-sale structure. Existing practice has clear guidance on when such true-sale structure exists from a Swiss tax perspective. Tax practice is in constant development and it is therefore crucial to review financing structures with Swiss parties in detail in order to ensure compliance with local requirements.

For M&A transactions, Swiss securities transfer stamp tax ('STT') remains an important point for attention. Due to recent case law, Swiss holding companies registered as Swiss securities dealers for STT purposes may even be liable to STT in the event that they are not formally acting as a party on the buy or sell side – but, based on all facts and circumstances, only as an intermediary to a transaction. This can be the case in particular if the senior management of such a Swiss entity is actively and publicly involved in the negotiation or closure of a deal. As the STT can be up to 0.3% of the fair value of the deal, the risks can be significant if not addressed properly.

In addition, the expansive application of dividend withholding tax anti-avoidance rules continues to establish a strong incentive to use non-Swiss acquisition vehicles in transactions. This because domestic vehicles are subject to very strict anti-avoidance rules, typically resulting in some form of non-refundable dividend withholding tax. Especially in transactions with roll-over or re-investments for management, the current dividend withholding tax practice hinders internationally standardised structuring options and imposes a Swiss finish to achieve a similar outcome. Therefore, M&A transactions should be carefully reviewed to avoid pitfalls with respect to Swiss withholding tax.

Switzerland has also renegotiated and concluded several new tax treaties, notably with France, Italy and Germany with a focus on cross-border teleworking. See pages 39, 40 and 41.

Fabian Sutter

Update Pillar Two

On 18 June 2023, Switzerland held a popular referendum vote to adopt domestic Pillar Two legislation. The proposal put forward to voters provides for the approach by way of a federal ordinance with direct reference to OECD Model Rules, Commentary and Administrative Guidance and would notably introduce the Income Inclusion Rule ('IIR'), a Qualified Domestic Top-up Tax ('QDMTT') and the Undertaxed Profits Rule ('UTPR').

As Swiss voters accepted the proposal, the Swiss federal government has launched a public discussion draft of the implementation ordinance and indicated that it will enact the IIR and QDMTT as of 1 January 2024, with the UTPR following as of 1 January 2025.

The implementation ordinance is temporary in nature and will be replaced by a federal ordinance during the coming years. The public discussion draft on the ordinance predominantly covers certain elections for jurisdictions under the OECD Model Rules as well as procedural rules. For instance, as Switzerland, similar to the United States, has a multi-tiered tax system where both the federal government as well as cantons and municipalities levy corporate income tax, the implementation ordinance provides that only one designated canton is competent to levy QDMMT or IIR if an MNE has a taxable presence in different cantons. Specifically, the designated canton will be the one where an MNE had the highest average income after tax or equity in the past three fiscal years.

Due to the direct reference to OECD rules, the Swiss government expects the Swiss QDMTT to be accepted as qualifying QDMTT with respect to the safe harbour rules. Under the latest public discussion draft, the government also proposed to calculate the QDMTT in line with the accounting standard applicable to the Ultimate Parent Entity ('UPE'). In the public consultation procedure, certain advisers asked to switch to a domestic standard, Swiss GAAP FER, in this respect. This would, however, require non-Swiss MNEs with Swiss operations to conduct yet another calculation under Swiss GAAP FER as a jurisdiction can only elect one specific standard, namely either domestic standard or UPE standard, for purposes of the QDMTT. Although the revised implementation ordinance has not yet been published, the federal government has already indicated that it does not intend to burden foreign investors with more administrative work by adopting a domestic standard, as there is little to no added value in doing so under the QDMTT.

In view of the expected domestic implementation as of 1 January 2024, many MNEs in scope of Pillar Two have reviewed Swiss operations and acted where required in view of differing domestic taxes and Pillar Two rules. During the coming years, cantons will also have to publish their strategy on whether they will adopt measures, such as qualifying refundable tax credits ('QRTCs'), which are accepted promotion measures under Pillar Two. The federal government has already published a survey covering all cantons, but plans are still in their early stages.

It cannot be excluded that the Swiss government would delay the implementation process depending on international developments and domestic support for the project towards the end of 2023.

Tip

Our Pillar Two team can assist with the:

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(ii) Pillar Two analysis for disclosure in 2023 financial statements;
(iii) Pillar Two in M&A transactions; and
(iv) Pillar Two analyses and restructurings.

Fabian Sutter

Selina Many

Cross-border teleworking and social security

As mentioned on page 17, the Framework Agreement applies to Switzerland, as well as to EU Member States that have signed the agreement, Norway and Liechtenstein. Under the Framework Agreement, the employer and the employee can opt in for continuation of the social security legislation of the state of the employer's registered office or place of business whilst the employee is cross-border teleworking from home for less than 50% of the time. Switzerland, Austria, Germany, Liechtenstein and France have signed the Framework Agreement, as a result of which these new rules can be applied in cross-border teleworking situations between Switzerland and, inter alia, these countries. However, since Italy has not yet signed the Framework Agreement, in cross-border situations involving Italy, the usual rules should apply unless the employer and the employee request a mutual agreement under art. 16 of Regulation 883/2004. For more information we refer to our newsletter.

Cross-border teleworking: updated tax treaties with France, Italy and Germany

Tax treaty with France

Switzerland and France have agreed to sign a mutual agreement amending the existing double taxation agreement and include new rules for working from home ('teleworking'). These rules have provisionally been applied since 1 January 2023 and will be formally included in the updated agreement signed on 27 June 2023.

The main provision allows cross-border commuters to work from home up to 40% of their working time per calendar year without affecting the taxation rights of the countries. Thus, below the 40% threshold, the telework salary is taxable in the contracting state where the employer is located.

Switzerland and France have also agreed on a common definition of 'teleworking activities carried out from the country of residence'. Teleworking activities include, on the one hand, temporary assignments carried out by the employee in the state of residence or in a third state, up to a maximum of 10 days per year and, on the other hand, 40% of the working time per year spent teleworking. This 10-day tolerance period for temporary assignments is intended to complement the concept of teleworking and provide flexibility compared to the normal rules applicable before the COVID-19 pandemic. Thus, days spent by employees on temporary assignments in their country of residence or in a third country will be treated as days spent teleworking in their home country, up to an annual limit of 10 days. This new tolerance of 10 days can be combined with the 40% telework quota.

With regard to the allocation of tax revenues, the state of the employer (Switzerland) will pay 40% of the taxes it has levied on the remuneration paid for telework to the state of the employee's residence (France). The revised agreement provides for the automatic exchange of information on salary data between Switzerland and France.

Tax treaty with Italy

The agreement between Switzerland and Italy on the taxation of cross-border commuters entered into force on 17 July 2023, marks an important milestone in the bilateral relations between the two countries. The new agreement brings significant improvements in the current arrangements for taxing cross-border commuters. From 1 January 2024, Switzerland will retain 80% of the withholding tax deducted from the income of cross-border commuters who entered the Swiss labour market after 17 July 2023 (i.e. new cross-border commuters). In addition, these cross-border commuters will be subject to ordinary taxation in Italy but will not be subject to double taxation as a result of the application of a tax credit.

There is a transitional provision for existing cross-border commuters who worked in the cantons of Graubünden, Ticino or Valais between 31 December 2018 and 17 July 2023. These cross-border commuters will continue to be taxed only in Switzerland, and Switzerland will pay financial compensation to the Italian border municipalities, equal to 40% of the withholding tax collected, until the end of the 2033 fiscal year.

In addition, following this agreement the Swiss Federal Department of Finance has also made changes to the Swiss ordinance on withholding tax as part of the direct federal tax for Italian cross-border commuters, which will enter into force on 1 January 2024.

Tax treaty with Germany

Switzerland and Germany signed a comprehensive protocol amending the double taxation agreement (DTA Switzerland-Germany) on 21 August 2023. The protocol contains provisions for cross-border commuters, in particular with regard to Article 15a paragraph 2 of the DTA Switzerland-Germany, which describes the characteristics that must be fulfilled for a cross-border commuter to be classified as such.

Fabian Sutter

Anaïs Naescher

Updated tax treaties with France and Germany on international developments

Tax treaty with France

Switzerland and France have agreed to sign a mutual agreement amending the existing double taxation agreement. These amendments include a number of more general updates. These mainly concern updates required under the Multilateral Instrument ('MLI'), such as the Principal Purpose Test ('PPT'). The revised treaty also includes an exclusion for all taxes levied under the OECD Pillar Two.

Pending formal approval by their respective parliaments, France and Switzerland have agreed to apply the provisions of the additional agreement until 31 December 2024.

Tax treaty with Germany

Switzerland and Germany signed a comprehensive protocol amending the double taxation agreement on 21 August 2023. This protocol includes several adjustments, such as improving legal certainty and cooperation in tax matters between the two contracting countries. It also includes provisions that were previously contained in reciprocal agreements and introduces clear deadlines for possible mutual agreement or arbitration procedures.

The protocol of amendment also reflects international developments at OECD level since the last protocol of amendment was concluded on 27 October 2010. In particular, the OECD minimum standards will be applied bilaterally in accordance with the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent the Base Erosion and Profit Shifting. This is reflected in particular in the introduction of the Principal Purpose Tests ('PPT') as an anti-abuse clause. It also incorporates certain provisions of the 2017 OECD Model, in particular with respect to profits of permanent establishments. The protocol of amendment still needs to be approved under the respective national legislative procedures, which means that it is expected to enter into force on 1 January 2025 at the earliest.

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Editors

Liesbeth Hendrix and Jurgen Kuiper.

Contact

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.

Closing date of publication

This publication closed on 24 November 2023. 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 2024 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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