LOYENS LOEFF

NOVEMBER 2022

Tax trends and developments for MNEs

Introduction

As 2022 nears its end, it is time for our annual tax bulletin. This bulletin focuses on the tax trends and developments we foresee for 2023 and includes some tips and takeaways.

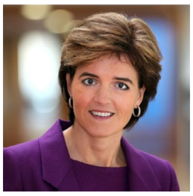
Topics addressed in this bulletin include the next steps in the implementation of the global agreement on Pillar One and Pillar Two, the European Commission's proposals on the abusive use of shell entities and on debt financing as well as developments in tax transparency and transfer pricing. For Multinational Enterprises ('MNEs') that may be affected by Pillar Two, 2023 will be the year to assess the impact and potential actions needed to mitigate undesired effects. In transfer pricing, we see more and more multi-jurisdictional audits and multilateral agreement procedures. MNEs may want to prepare what to do in case they have to face these procedures.

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

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

Kind regards,


Peter Adriaansen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November 2022

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1. Two-Pillar solution

Pillar One

Pillar Two

The 2021 agreement on reallocating taxing rights to market jurisdictions ('Pillar One') and on the introduction of a global minimum taxation ('Pillar Two') has been joined by 137 members of the OECD/G20 Inclusive Framework (the 'Inclusive Framework').

Pillar One

The goal is to have Pillar One into force in 2024. MNEs will need to assess the potential impact and take Pillar One into account when reassessing their transfer pricing models.

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

During 2022, the OECD's Committee on Fiscal Affairs released several requests for input on proposed elements under Amount A through public consultations. Those public consultations concerned the draft model rules for (i) nexus and revenue-sourcing (February 2022), (ii) tax base determinations (February 2022), (iii) the scope (April 2022), (iv) the extractives exclusion (April 2022), (v) the regulated financial services exclusion (May 2022), and (vi) tax certainty aspects (May 2022).

Following these requests for input, the OECD's Committee on Fiscal Affairs released two public consultation documents in the form of the Progress Reports on Amount A ('Progress Reports'). The first Progress Report (July 2022) includes a consolidated version of the operative provisions of Amount A, reflecting the technical work that was completed before the release of this Progress Report. The second Progress Report (October 2022) includes the rules on the administration and the tax certainty aspects of Amount A.

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Pillar One

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Based on the Progress Reports, the proposed core elements for negotiating the multilateral convention ('MLC') through which Amount A will be implemented are:

- **Scope.** Only MNEs with both a global turnover above EUR 20 billion and a pre-tax profit margin exceeding 10% are in scope of the new taxing right. The global turnover threshold is expected to be reduced to EUR 10 billion eight years after implementation of Pillar One. The pre-tax profit margin threshold must be cumulatively met in the current period, in at least two of the four prior periods and on average across all four prior periods. The period means the reporting period for which the MNE prepares consolidated financial statements. Furthermore, the MNE's revenues should be corrected by excluding revenues and profits from extractives and regulated financial services.

- **Nexus.** At least EUR 1 million of revenue must be generated in a jurisdiction for an Amount A allocation. This threshold is reduced to EUR 250,000 for jurisdictions with a gross domestic product of less than EUR 40 billion.

- **Revenue-sourcing.** A methodology is introduced to determine where the revenues of an MNE are generated. This methodology is based on information that identifies the source of the revenues or, alternatively, based on an allocation key.

- **Tax base rules.** The consolidated financial statements of an MNE form the starting point for determining the tax base. The rules include a limited number of book-to-tax adjustments and a framework allowing MNEs to carry forward losses.

- **Profit allocation rules.** Amount A will be 25% of the residual profit, i.e. of the profit exceeding 10% of the global consolidated revenue. Where the MNE is already taxable in a market jurisdiction, a reallocation cap applies, being a marketing and distribution profits safe harbour.

- **Elimination of double taxation rules.** Measures to prevent double taxation will be included in the MLC to implement Amount A, with relief to be provided through either the exemption method or the credit method.

- **Administration process and innovative tax certainty processes.** A tax certainty framework will be implemented through mechanisms that guarantee certainty for in-scope MNEs across all aspects of Pillar One, including double taxation relief. These mechanisms are supported by a binding determination panel to resolve any disagreements that arise. In addition to the tax certainty framework, in-scope MNEs benefit from dispute prevention and resolution mechanisms in a mandatory and binding manner.

Next steps

The Inclusive Framework ('IF') is working on the detailed provisions of the MLC that will establish the legal obligations of the parties to implement Amount A. It is aiming to finalise the MLC by mid-2023 with the objective of enabling the MLC to enter into force in 2024. In addition to the work on Amount A, the IF is making progress on advancing the work on Amount B, which it expects to deliver in the first half of 2023.

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Pillar One

Pillar Two

Takeaways and tips
- It remains to be seen whether the envisaged implementation dates are feasible.
- In any case, MNEs will need to assess the potential impact and take Pillar One into account when reassessing their transfer pricing models. Loyens & Loeff can assist in preparing a Pillar One Impact Assessment Model to facilitate such assessment.

Jan-Willem Kunen

Gijs van Koeveringe

Pillar Two

MNEs should check whether they are expected to be in scope of Pillar Two rules.

Pillar Two seeks to enforce a global minimum corporate income tax at an effective rate of 15%, calculated on a jurisdiction-by-jurisdiction basis. Under OECD rules, it will apply to MNEs that meet the consolidated group revenues of EUR 750 million per year. If the minimum 15% effective tax rate is not met in each jurisdiction, a top-up tax will apply.

The OECD Global Anti-Base Erosion ('GloBE') Rules were released in December 2021, followed by commentaries in March 2022. A public consultation meeting on the implementation of the framework for the global minimum tax was held in April 2022.

At EU level, a draft directive on Pillar Two was initially released in December 2021, followed by an updated version in March 2022. The EU draft directive is generally consistent with OECD GloBE model rules, with a few exceptions, among which, the applicability of the rules to purely domestic groups meeting the revenue threshold. For more information reference is made to our Tax Flash of 16 March 2022. Throughout 2022, different Member States have opposed the implementation of the Pillar Two Directive, and the consensus needed could not be reached until now. There is however still a possibility that consensus will be reached during the upcoming ECOFIN meeting on 6 December 2022.

For more information on the most recent developments we refer to our webpage which will be updated from time to time.

State of play in the Netherlands

In September 2022, France, Germany, the Netherlands, Spain, and Italy released a statement supporting the implementation through 'enhanced cooperation' (a procedure which allows Member States to issue legally binding directives amongst a smaller group of participating Member States). Germany announced its willingness to pursue unilateral implementation should an agreement not be reached.

Pillar One

Pillar Two

Furthermore, on 24 October 2022, the Netherlands launched a public consultation on the draft bill to implement Pillar Two as of 31 December 2023. The Dutch government has repeatedly stressed its preference for a multilateral solution and that it remains committed to find consensus within the EU. The aim of the public consultation is to improve the quality of the definitive legislation based on the input provided by the public. For more information reference is made to our Tax Flash of 25 October 2022.

State of play in Belgium

In October, the Belgian Finance Minister announced in the Chamber of Representatives that Belgium is willing to participate in the enhanced cooperation procedure should an agreement not be reached.

Although no concrete steps have been taken to implement Pillar Two, a temporary substitute for the Pillar Two minimum tax will be introduced as of 2023 based on existing rules. Under these existing rules, companies can carry forward tax losses indefinitely, but their use per taxable period is limited to EUR 1 million + 70% of the taxable result exceeding EUR 1 million. As a result, 30% of the taxable income exceeding EUR 1 million remains taxable. Under the new rules applicable as of 2023, the limit will be cut to 40%, implying that 60% of the taxable income exceeding EUR 1 million will be taxable at a rate of 25%, resulting in a minimum tax of 15% (60% x 25%). The aim is to replace this minimum tax once Pillar Two is introduced.

State of play in Luxembourg

In Luxembourg, no proposal to implement Pillar Two has been released while it awaits the outcome of the agreement to be reached at EU level.

State of play in Switzerland

Switzerland too is in the process of introducing the Pillar Two rules into its national law with the aim of passing a constitutional amendment in a public vote during the course of 2023. Such constitutional amendment will allow for an implementation of the new rules based on an intermediary ordinance as of 1 January 2024. Such ordinance would later be replaced by a formal law. A draft of the intermediary ordinance was in public consultation until 17 November 2022. It provided for maximum consistency with the OECD GloBE rules via a direct reference to these rules.

Despite the uncertainties as to when and how Pillar Two rules will be implemented, experience has shown that MNEs in scope should already take actions based on the existing framework.

Takeaways and tips

- Check whether your group is expected to be in scope of Pillar Two rules or whether your group may be in scope in the future. In both cases, the transition rules already apply.
- Start modelling the impact of the rules to identify red flags and action points.
- Identify the points in the transition rules that require attention. Such points, for instance, include recognition of existing tax attributes, such as tax losses, as well as the Pillar Two effect of business restructurings taking place during the current transition period.
- Pillar Two rules are intricately linked to accounting standards. Significant data gathering and calculations will be needed.
- Prepare for the additional compliance burden as a result of the Pillar Two rules and check whether there is sufficient budget available to bear this burden.

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Pillar One

Pillar Two

Charlotte Kiès

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Aline Nunes

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2. EU Business Taxation for the 21st Century

On 18 May 2021, the European Commission issued a communication on Business Taxation for the 21st Century ('Communication'). The announcements made in the Communication will translate into legislative proposals in the years up to and including 2024 and will have a significant impact on MNEs' taxation and reporting obligations. On the one hand, the legislative proposals aim to increase transparency, making it easier for tax authorities to counteract and deny tax benefits and create some dissuasive effect for MNEs due to potential adverse publicity exposure. On the other hand, they contain targeted measures that, amongst other things, ensure effective taxation and support green and digital transitions. Since then, the European Commission has launched several public consultations and legislative proposals. The initiatives outlined below are relevant for MNEs.

The Unshell Proposal: what to expect?

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.

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.

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The proposal was open for feedback until 6 April 2022 to give stakeholders a voice and to feed the legislative debate. The European Commission received quite some critical comments from stakeholders who expressed worries about, amongst others, the additional compliance, the vague wording and the use of criteria referring to physical presence to define abuse, especially in the current remote working culture.

Discussions are still ongoing at EU level and several options to amend the Unshell Proposal are being considered. We understand that among these options, the possibility of merging the gateways and the substance indicators is being considered, including the modification or removal of some of them. Various options are also on the table with respect to the tax consequences.

Next steps

It is expected that a progress report on the Unshell Proposal will be presented at the December 2022 Economic and Financial Affairs Council meeting. Both the Czech Republic and Sweden have expressed their doubts about the need for the Unshell Proposal and Sweden will take over the EU Council presidency from the Czech Republic in January 2023. It is to be awaited whether Spain puts this high on the agenda when it assumes the presidency in July 2023.

Takeaways and tips

- It is important for MNEs to follow the developments regarding the Unshell Proposal and to evaluate 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 fulfill 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 increased 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

Daniël van der Vliet

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BEFIT high on the agenda of the European Commission

Will the EU have a single corporate tax rule book in the future?

With its publication of 13 October 2022, the European Commission opened the consultation for the new framework for business taxation within the EU: 'Business in Europe: Framework for Income Taxation' ('BEFIT'). This framework provides for a single corporate tax rule book for the EU, based on the key features of a common tax base and the allocation of profits between Member States based on formulary apportionment.

The European Commission's key objectives are inter alia the increase of businesses' resilience, the removal of obstacles to cross-border investments and the provision of sustainable tax revenue. The Commission wants to receive feedback on the various policy options. Under the policy options still to be decided upon are the scope, the tax base calculation, i.e. whether or not to set up a comprehensive set of tax rules, and the allocation of profit to related entities outside the group, i.e. whether or not to create a simplified approach to transfer pricing in this respect.

Next steps

Businesses are welcome to provide their feedback through the public consultation until 26 January 2023. A legislative proposal is expected to be published by Q3 2023.

Debt-Equity Bias Reduction Allowance

The European Commission finds it necessary to reduce the debt-equity bias.

In May 2022, the European Commission published the proposal for a Debt-Equity Bias Reduction Allowance Directive ('DEBRA Proposal') introducing a voluntary tax-deductible allowance on equity to incentivise equity funding instead of debt funding. According to the European Commission, companies currently have a greater incentive to choose for debt financing in view of the distinction made in the deductibility of related costs. The European Commission finds it necessary to reduce this debt-equity bias as excessive debt levels make companies vulnerable, may lead to the instability of the financial system and increase the risk of bankruptcies.

Besides an allowance on equity, the DEBRA Proposal also includes a new interest deduction limitation rule which would apply regardless of the opt-in or opt-out decision made by businesses with respect to the allowance on equity and which contains various far-reaching anti-abuse measures.

Next steps

The DEBRA Proposal is currently subject to debate amongst Member States and various Member States have indicated their reservations against the DEBRA proposal in its current form and at the current time.

European Withholding Tax Framework

A European withholding tax framework should reduce existing complexities for investors.

The European Commission is preparing an initiative on improving withholding tax ('WHT') procedures for non-resident investors. The initiative finds its origin in current domestic WHT refund or relief procedures having been found to be resource-intensive for investors and tax administrations.

On 1 April 2022, the Commission opened a public consultation, which ran from 1 April 2022 until 26 June 2022. Most respondents strongly agree that the current functioning of WHT refund procedures hinders cross-border investment in the EU securities market. Further to this, almost all respondents strongly support the need for EU action to make the WHT procedures more efficient.

The policy options that follow from the consultation comprise the following:

(i) Improving the existing WHT refund procedures by creating a single web portal through which the refund claims are handled, standardised and same language forms and the ability to e-request tax residence certificates along with a digitalised verification system.
(ii) Establishing a common EU-wide WHT relief system at source which covers dividends, interest, royalties and other passive income payments.
(iii) Broaden the administrative cooperation framework in the EU to include additional financial information related to payments received. The latter in combination with the aforementioned measures.

Next steps
A further consultation will need to be conducted regarding other crucial aspects of an EU-wide WHT relief system. Such aspects are liability, entitlement under double tax treaties and potential exchange of information between financial authorities and tax authorities. A proposal for a directive regarding this initiative is expected to be presented in the first half of 2023.

Tip
Although these proposals are not yet finalised, we recommend that MNEs monitor these developments.


Imme Kam


Charlotte Haarsma-den Dekker


Denis Bykov

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EU Fit for 55 measures

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 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 consist of reducing the amount of emission allowances available. Furthermore, the EU ETS will be tightened for the aviation sector and will be extended to include maritime transport. Emission allowance trading for the building and road transport sectors will initially be introduced through a separate system.

(ii) **Introduction of a 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 would be similar to the system of allowances under the EU ETS, in which importers would have to surrender CBAM certificates. These certificates are based on the embedded emission intensity of the products imported into the EU and are to be purchased at a price corresponding to that of the EU ETS allowances.

(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 used such as motor fuel and heating fuel. The current ETD does, however, not 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 the scope and by removing some of the current exemptions and reductions.

The proposals are currently being negotiated within the institutions of the EU. The procedure to find common agreement on the legislative acts may mean that certain Ff55 measures are adopted earlier than others. Entry into force of the revised EU ETS, CBAM and ETD will depend on the pending negotiations.

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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 building sectors will be subject to emissions trading and MNEs producing outside the EU may have to comply with the CBAM. Changes to the minimum ETD rates for fuels and electricity may, moreover, increase tax obligations in certain sectors.
- The proposed measures may influence the business of MNEs in the near future. We therefore recommend that MNEs evaluate their position in relation to carbon pricing and energy taxes in a timely manner.

Mick Knops

Max van Maren

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3. Other EU and international developments

EU State aid developments for tax and transfer pricing in 2022

The reference framework: how to define 'normal taxation'

The key development in fiscal State aid matters in 2022 is the judgment of the Court of Justice of the European Union ('CJEU') of 8 November 2022 finding that Luxembourg did not grant unlawful State aid to Fiat by means of a transfer pricing ruling, contrary to the European Commission's claims.

While the CJEU did not discuss the transfer pricing details of the case, it clearly sets a framework for the European Commission's State aid investigations in transfer pricing cases. The European Commission must look only at national law and administrative practice on transfer pricing, i.e. at the actual implementation of the arm's length principle. Since direct taxes remain a competence of Member States, the European Commission cannot derive an autonomous arm's length principle from Article 107(1) of the Treaty on the Functioning of the European Union. Therefore, it cannot compare the position of the beneficiary of a transfer pricing ruling with that of any other taxpayer in the same Member State, unless it can show that the transfer pricing rules systematically favour group companies over standalone companies.

This judgment is likely to boost the chances of other taxpayers and Member States to prevail in pending cases (Apple, Amazon and ENGIE are awaiting an oral hearing before the CJEU).

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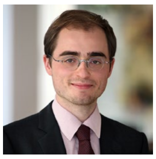
Access to information by the taxpayer

On a procedural matter, Huhtamäki successfully claimed it should be granted access to other Luxembourg tax rulings addressing the imputation of interest on interest-free loans. The European Commission had refused information-sharing on grounds of confidentiality. The General Court, in its judgment of 2 March 2022, annulled the European Commission's decision rejecting the request to access a non-confidential version of the rulings, finding that the European Commission had failed to properly justify its decision.



Pierre-Antoine Klethi

Mobility Directive

It can be expected that the procedure for cross-border conversions, mergers and certain demergers within the EU will become lengthier and more burdensome.

Over the last 20 years, the number of cross-border mergers and conversions taking place within the EU has increased substantially. Where in 2001 only two such transactions took place, 2019 accounted for 1,203 intra-EU conversions, mergers, and demergers of companies.

Since 2005, European Union rules have been in place containing the corporate framework for cross-border mergers of limited liability companies (Directive 2005/56/EC of 15 December 2008; Directive 2017/1132/EC of 14 June 2017). These rules exist alongside case law of the Court of Justice of the European Union ('CJEU') supporting the possibility also to do cross-border conversions and demergers of companies (for example, C-210/06 Cartesio 17 December 2008, C-378/10 VALE 12 July 2012).

Considering the increased number of cross-border conversions, mergers and demergers, the EU decided that harmonisation of the corporate procedure for these was needed. The EU adopted Directive 2019/2121/EC of 27 November 2019 ('Mobility Directive') to provide for this. Dubbed the 'Mobility Directive,' this directive aims to remove corporate obstacles in cross-border reorganisations by finetuning the rules already in place, expanding the harmonised framework to cross-border conversions and certain demergers and by increasing protection for a number of stakeholders.

The Mobility Directive provides for a harmonised corporate law framework on the abovementioned types of restructuring. One of the new requirements in each of these reorganisations will be that, before a transaction can be effected, the departure Member State's competent authority should issue a pre-transaction certificate attesting to compliance with all relevant conditions and to the proper completion of all procedures and formalities. Such attestation is to be denied where it is determined in compliance with national law that a transaction is set up for abusive or fraudulent purposes leading to or aimed at evading or circumventing European Union or national law, or for criminal purposes. The exact scope of this anti-abuse test is not fully clear.

Member States must implement the Mobility Directive by 31 January 2023.

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EU State aid developments for tax and transfer pricing in 2022

Mobility Directive

Mutual agreement procedures

EU windfall tax for the fossil industry

Takeaways and tips

- Despite the benefits of harmonisation, given the new procedures and the abovementioned anti-abuse test it can be expected that the procedure for cross-border conversions, mergers and certain demergers within the EU will become lengthier and more burdensome.
- If it is important to implement a covered transaction soon, it is recommended verifying if the cross-border conversion, merger, or demerger can take place prior to the domestic implementation of the Mobility Directive, under existing procedures.

State of play in the Netherlands

On 7 February 2022, the Netherlands published a draft legislative proposal for consultation on the domestic implementation of the Mobility Directive. The draft proposal received 23 publicly available reactions, based on which the proposal received certain updates. A revised draft legislative proposal was sent to the Dutch Council of State, that advises the government on legislation. The draft proposal designates Dutch notaries as the competent authority playing a key role in the corporate procedure of covered cross-border reorganisations. The Council of State issued its advice on 5 October 2022. It is expected that the final legislative proposal will be sent to Parliament in the short term and that a legislative proposal containing specific tax measures will be introduced thereafter.

State of play in Belgium

No official documents on the implementation of the Mobility Directive have been published.

State of play in Luxembourg

On 27 July 2022, Luxembourg published a draft legislative proposal for the domestic implementation of the Mobility Directive. The draft proposal designates Luxembourg notaries as the competent authority playing a key role in the corporate procedure of covered cross-border reorganisations. Notaries should thus, for example, refuse to issue the pre-transaction certificate if the substantive conditions under the Mobility Directive are not met, or where they determine that the anti-abuse test is met. Where they suspect abuse, fraud, or crime, notaries may undertake additional investigations.

Rick van der Velden

Tom Hamen

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Mutual agreement procedures

The new EU Directive on Tax Dispute Resolution provides taxpayers with more safeguards to resolve disputes with tax authorities within the EU.

The increasing number of mutual agreement procedures ('MAPs') is expected to persist, as transfer pricing discussions arise more frequent and cross-border transactions remain under the scrutiny of tax authorities across the globe. MAPs remain an attractive cross-border mechanism to resolve double taxation that often results from a unilateral correction by a tax authority.

A MAP request can generally be based on either (i) the relevant tax treaty, (ii) the 1990 EU Arbitration Convention, or (iii) the national implementation of the EU Directive on Tax Dispute Resolution ('Directive'). The latter two legal bases can only be used for disputes within the EU.

In comparison to the EU Arbitration Convention and bilateral tax treaties, the Directive generally provides more safeguards to derive a mandatory and binding resolution of tax disputes arising within the EU in a timely manner. If a tax dispute cannot be resolved by mutual agreement between the EU Member States involved, an arbitration commission can be formed at the request of the taxpayer. This commission will then issue its advice on resolving the dispute. Moreover, where the EU Arbitration Convention only provides for the elimination of double taxation arising in transfer pricing cases, the scope of the Directive includes any dispute arising from the interpretation and application of tax treaties and conventions.

MAPs under the Directive can be requested for disputes that relate to fiscal years starting on or after 1 January 2018. With the Directive, taxpayers are in a better position to resolve their tax disputes. For example, the Dutch tax authorities have indicated that going forward they prefer this new mandatory and binding tax dispute resolution mechanism.

Jan-Willem Kunen

Gijs van Koeveringe

EU windfall tax for the fossil industry

The EU emergency measures against the surge in energy prices include a solidarity levy for the fossil industry, which can best be interpreted as a form of a windfall tax.

In October 2022, the Council of the European Union agreed on a package of temporary and extraordinary measures against the rising energy prices. This agreement resulted in the EU Regulation on an emergency intervention to address high energy prices ('Regulation') and includes, amongst others, a retroactive solidarity contribution for the fossil industry.

The contribution will be introduced as a temporary mandatory solidarity contribution from the profits of companies operating in the oil, natural gas, coal and refinery sectors. This contribution is applied in addition to domestic taxes and levies. It is calculated from taxable profits according to national tax regulations for the full fiscal year 2022 and/or 2023, which are above a 20% increase of the average taxable profits generated in the four fiscal years starting on or after 1 January 2018. This taxable base will be taxed at a rate of at least 33%, although EU Member States may choose a higher percentage.

EU Member States may however maintain national measures that are equivalent to the solidarity levy if they are compatible with the objectives of the Regulation and bring at least comparable returns.

Takeaways and tips

- The EU emergency measures against the surge in energy prices will have an impact on MNEs operating in the European energy sector.
- These measures have been introduced through an EU regulation, including a solidarity levy for the fossil industry (of at least 33%) with possible retroactive effect over 2022.

Mick Knops

Max van Maren

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4. Tax transparency

New reporting and due diligence rules for platform operators as of 2023 (DAC7)

Crypto-Asset Reporting Framework and DAC8

Public CbCR

Publication of the effective corporate tax rate

Other transparency measures under the Unshell Proposal and the EU-wide system for withholding tax

As part of the European Commission's continued efforts to enhance tax transparency within the single market, during 2022 several transparency measures have been adopted and/or proposed within the EU. While, in some cases, these measures aim to cover emerging economic phenomena (e.g. the platform and crypto economies), in others the measures aim to combat tax avoidance by means of using 'public scrutiny' and/or 'reputational pressure' on the corporate income taxes borne by MNEs carrying out cross-border activities in the EU.

The following paragraphs offer a short overview of these measures which include (i) the DAC7 Directive, (ii) the DAC8 initiative, (iii) the Public CbCR Directive, (iv) the still awaited proposal on the publication of the effective corporate tax rate, and (v) the tax reporting requirements included under the Unshell Proposal.

As if the neverending shifting in tax compliance frameworks would not be enough of a challenge, MNEs must also address the rise of Corporate Social Responsibility ('CSR') and Environmental Social and Governance ('ESG') awareness, in relation to which taxation is playing a more and more prominent role. As a consequence of this CSR/ESG trend, mere compliance with mandatory tax reporting obligations under existing regulatory regimes is already viewed as inadequate by a large part of the CSR/ESG community.

All these recent developments have demonstrated that the global push for greater tax transparency has still momentum in the global tax agenda and that policymakers' actions in this field are far from over.

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New reporting and due diligence rules for platform operators as of 2023 (DAC7)

Besides online marketplaces and app stores, business in traditional industries can also fall within the scope of the DAC7 Directive

The DAC7 rules, which apply as of 1 January 2023 in the EU, impose new obligations on platform operators. DAC7 requires platform operators to collect, validate, store and report certain information about the sellers using their platform and about the relevant activities of these platforms. Non-EU platform operators also fall under DAC7 in relation to relevant activities of EU sellers and the rental of immovable property located in the EU. The DAC7 obligations cover both cross-border and purely domestic activities.

DAC7 applies a broad definition of platform operator that can also cover businesses other than online marketplaces and app stores. A platform operator is an operator of a website, a mobile application or any type of software that allows sellers to be connected to other users for the purpose of carrying out what is referred to as a 'relevant activity'. A relevant activity is any of the following activities:

- sale of tangible or intangible goods,
- rental of immovable property,
- rental of any mode of transport or
- provision of personal services.

For practical examples of the application of DAC7, also in group situations, please take a look at our website post.

Takeaways and tips

- A platform operator has to share the reportable information in respect of a calendar year with tax authorities no later than 31 January of the following calendar year. Platform operators will have to start identifying reportable sellers and collecting information about these sellers as of 2023, in order to comply with these new rules.
- Besides online marketplaces and app stores, business in traditional industries can also fall within the scope of DAC7. This is the case if they connect third-party sellers and users through their website for the performance of relevant activities. Businesses will have to perform a DAC7 analysis of the business models and business lines applied.

Gino Sparidis

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Crypto-Asset Reporting Framework and DAC8

Companies in scope of the new EU and OECD crypto-asset transparency initiatives could soon be severely impacted by a new compliance burden.

Crypto-assets have been around for more than a decade now. As the interest in crypto-assets of both individuals and companies has risen steeply over the past few years, governments and regulators have come to realise that they are in a poor position to scrutinise any transactions and holdings involving crypto-assets. This is particularly true for tax administrations tasked with verifying the accuracy of taxable income reported in the tax return of both companies and individuals.

In order to increase tax administrations' insight into taxpayer compliance, several tax transparency initiatives have been launched by both the EU and the OECD. On 22 March 2022, the OECD presented the public consultation draft of the Crypto-Asset Reporting Framework ('CARF'), of which a final version was published on 10 October 2022.

The CARF is intended to ensure collection and exchange of information on transactions in crypto-assets in a manner similar to the Common Reporting Standard. Crypto-assets falling within the definition of the CARF include cryptocurrencies, stablecoins, derivatives issued in the form of crypto-assets, and certain non-fungible tokens.

The CARF provides that those intermediaries which as a business provide services effectuating transactions in crypto-assets, for or on behalf of customers, would become subject to a reporting obligation. Such intermediaries will include crypto-asset exchanges and wallet providers, and the CARF also encompasses traditional companies (such as brokers and dealers) which offer trading in crypto-assets as part of their portfolio. Some parties have been excluded from the CARF such as investment funds, miners/stakers and issuers of crypto-assets.

Intermediaries would be required to carry out due diligence procedures aimed at identifying clients in accordance with specific rules and report information on all transactions involving crypto-assets to the local tax administration. Transactions are to be reported on an aggregate basis categorised by type of crypto-asset. This information could be then shared with foreign tax administrations.

The OECD is expected to publish its final guidance soon, which includes a framework for a bilateral or multilateral competent authority to facilitate information exchanges and further guidance on the effective implementation of the CARF. At the same time, the EU is set to publish a new directive ('DAC8') which will essentially impose rules similar to the CARF on intermediaries with a sufficiently strong EU nexus. This proposal is expected to be published by the end of 2022.

Pepijn Pinkse

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Public CbCR

It is recommended that MNEs assess in what jurisdictions and to what extent the new obligations may apply.

On 24 November 2021, the European Commission published a directive to introduce public country-by-country reporting obligations in the European Union ('Public CbCR Directive'). Based on this directive, (i) EU- headquartered multinationals and (ii) certain non-EU headquartered multinationals and their subsidiaries with consolidated annual revenues exceeding EUR 750 million, will have to publish the amount of tax they pay in each Member State. The data provided by companies will need to be broken down into specific items. These 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 information will need to be made publicly available on the website of the MNE, using a common template and in a machine-readable format. MNEs falling within the scope of the directive will need to comply with the new rules by mid-2024. For further background information, reference is made to our website post of 10 January 2022 and to our video.

Tip
Each jurisdiction has its own specific rules as to which subsidiaries will fall within the scope of the public country-by-country reporting obligations. It is recommended that MNEs assess in what jurisdictions and to what extent the new obligations may apply.

Maurice van Klaveren

Publication of the effective corporate tax rate

It is recommended that MNEs follow this initiative closely during the coming months so they can actively engage in its consultation process.

In addition to the more recently adopted Public CbCR Directive, the European Commission is currently developing a legislative proposal that will require the annual publication of the effective corporate tax rate ('ETR') of MNEs with operations in the EU ('ETR Proposal'). This initiative is one of the five short-term actions included in the Commission's Communication on Business Taxation for the 21st Century of May 2021.

The ETR Proposal will provide for the annual publication of the ETR of certain large companies with operations in the EU, using the methodology agreed for the calculation of the OECD's Pillar Two. The aim of this initiative is to continue improving public transparency and scrutiny around MNEs and, in particular, around the real effective tax rate experienced by large EU companies.

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New reporting and due diligence rules for platform operators as of 2023 (DAC7)

Crypto-Asset Reporting Framework and DAC8

Public CbCR

Publication of the effective corporate tax rate

Other transparency measures under the Unshell Proposal and the EU-wide system for withholding tax

Although not yet clear, the scope of ETR proposal is expected to be aligned with those of Pillar Two and the Public CbCR Directive. The ETR Proposal has been announced but not yet published. Since its brief description in the May 2021 Communication, there have been no further official developments regarding this initiative. So, more information on its actual content is not yet available.

Other transparency measures under the Unshell Proposal and the EU-wide system for withholding tax

It is recommended that MNEs follow these two initiatives closely during the coming months so they can timely assess the impact on their businesses.

In addition to the pure transparency measures adopted and/or proposed in the EU, it is worth considering certain tax reporting requirements included in the Unshell Proposal and the EU-wide system for withholding tax.

The Unshell Proposal is relevant for the purposes of transparency, since it includes an annual reporting requirement for undertakings that are in scope and cross all gateways. The proposed directive establishes transparency standards around the use of shell entities, so that possible abuse can be detected more easily by tax authorities.

In addition to the Unshell Proposal, the new EU-wide system for withholding tax proposed by the European Commission is also relevant for the sake of transparency since, as part of such system, a new exchange of information and cooperation mechanism between tax administrations might be developed. Among the three policy options that the European Commission considers under this EU-wide system for withholding tax, there is a specific option that would imply enhancing the existing administrative cooperation framework to verify entitlement to tax treaties' benefits.
This option envisages a reporting and subsequent mandatory automatic exchange of information of beneficial owner-related information, to inform both the residence and source country that the correct level of taxation has been applied to the non-resident investor.

Juan Manuel Vásquez

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5. The Netherlands - Domestic developments

Entity classification rules

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Windfall tax national implementation

Public CbCR national implementation

What are the general tax developments?

The Dutch government recently announced that, on the one hand, attention will continue to be given to undesired tax avoidance practices while, on the other hand, the international tax competitiveness of the Netherlands, including a steady tax climate, needs to be monitored.

Based on the plans revealed on Budget Day, in comparison with previous years, there will be relatively few alterations to the Dutch corporate income tax ('CIT') Act as of 2023. If adopted, the main change of the CIT Act relates to the tax rates, entailing that the lower bracket of the CIT will be reduced from EUR 395,000 to EUR 200,000 and in addition, the tax rate for this bracket will be raised from 15% to 19%. Profits exceeding EUR 200,000 will be taxed at the general corporate income tax rate that will remain at 25.8% in 2023. Moreover, in 2023, the annual budget of the energy investment deduction will be increased by EUR 100 million and the annual budget of the environmental investment deduction by EUR 50 million.

Direct investments in real estate as of 2024 out of scope of the Dutch investment institution regime

Under conditions, a company qualifies for the fiscal investment institution regime resulting in a 0% corporate income tax rate. It has been announced that as of 1 January 2024 direct investments in real estate will be regarded as disallowed investments, which will result in losing the fiscal investment institution status. A fiscal investment institution continues to be permitted to hold indirect investments in real estate, owned by a regular taxpayer. The government acknowledges that, in anticipation of these new rules, listed and non-listed investment institutions may want to restructure their investments. The goverment is currently investigating whether accompanying measures, such as a real estate transfer tax reorganisation facility, need to be taken. The changes to the investment institution regime are expected to be presented on next year's Budget Day.

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Entity classification rules

A relevant development for corporate taxpayers relates to what are known as the entity classification rules. In 2021, the Netherlands proposed to overhaul its tax classification rules for Dutch and foreign entities such as limited partnerships. The legislative proposal is scheduled to be submitted in the second quarter of 2023 with an envisaged entry into force as of 1 January 2024.

Liesbeth Hendrix

Ruben van der Wilt

Do Dutch base-erosion rules infringe EU law?

It is recommended reviewing existing financing structures where the deductibility of interest payments is denied based on the Dutch anti-base erosion rules.

On 2 September 2022, the Dutch Supreme Court asked the Court of Justice of the EU ('CJEU') to clarify whether the Dutch anti-base erosion rules infringe the EU Treaty freedoms.

The case at hand concerned a Dutch taxpayer that acquired a Dutch target company. The Belgian listed parent company made a capital contribution into a Belgian group financing company, which subsequently on-lent the funds to the Dutch taxpayer for the financing of the acquisition. The Belgian group financing company benefitted from a reduced tax rate. According to the lower courts, the financing structure was mainly motivated by tax reasons and interest deduction was denied. The taxpayer argued that the denial of interest deduction under the anti-base erosion rules is in breach of the EU Treaty freedoms.

The Dutch Supreme Court concluded that the Dutch anti-base erosion rules are not in breach of EU law, as the anti-base erosion rules are aimed at preventing wholly artificial arrangements between related entities which do not reflect economic reality and which erode the Dutch tax base.

The Dutch Supreme Court also specifically addresses the CJEU judgment in the Lexel case, in which the CJEU ruled that a Swedish anti-base erosion measure was in breach of EU law. It might be inferred from the Lexel case that loans which are concluded on arm's length terms cannot constitute a wholly artificial arrangement and that a denial of interest deduction on such loans would infringe EU law. The Supreme Court does not subscribe to this view, but it acknowledges that there is uncertainty on this question and, therefore, refers several questions to the CJEU.

Tip

Pending the decision of the CJEU, it is recommended reviewing existing financing structures where the deductibility of interest payments is denied based on the Dutch anti-base erosion rules and to assess whether an objection can be filed by reference to this case.

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Joost van Helvoirt

Frederieke van de Langerijt

Employment Taxes

Working from home, working from abroad and cross-border employment lead to a variety of questions and may affect MNEs with an international workforce.

Working from home, working from abroad and cross-border employment lead to a variety of questions and may affect MNEs with an international workforce.

With respect to employment taxes, we notice that employees have an increased focus on work-life balance. Also, partly as a result of the COVID-19 pandemic, many employees have enjoyed and still enjoy the benefits of remote working, both working from home domestically, as well as short-term or long-term working from abroad. Employers are more open to allow flexible work locations, or even to hire employees internationally. As a result, we see an increasing variety of questions around working from home and especially around cross-border employment.

Furthermore, the following legislative developments may affect multinationals with an international workforce.

The 30% ruling

Be aware that the tax-free allowance for expats will be restricted from 2024.

The 30% ruling offers expats a tax-free allowance that is intended to cover extraterritorial expenses incurred due to working for a Dutch employer. This 30% allowance is based on the total Dutch taxable remuneration of the expat. As of 2024, the government will introduce a maximum basis for the calculation of the tax-free allowance. This maximum basis will be capped at an annual amount of EUR 216,000 (the 2022 level of the Standards for Remuneration Act). For expats already using the 30% ruling in 2022, the capping will not take effect until 1 January 2026.

Despite the potentially lower basis, the 30% ruling remains an attractive scheme for most employees because, on balance, the tax burden is lower than the tax burden for employees without this ruling. In addition, an employee being granted this ruling may elect not to pay tax in the Netherlands on savings and portfolio investments.

Tip
We recommend that employees consider more carefully whether the 30% ruling is the preferred option in a particular situation or whether it may be more beneficial to reimburse actual extraterritorial expenses on a tax-free basis.

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Change of taxable moment employee stock option benefits

The proposed bill providing share option rights will make the granting of stock option benefits more attractive.

Many multinational companies grant their employees stock options. Currently, employee stock option benefits are taxed when the stock option rights are exercised. However, if the employee is unable to sell the shares acquired upon exercise, there may not always be (sufficient) liquid assets to pay the tax due. In particular, start-ups and scale-ups considered that this makes stock options less attractive as a tool to attract and retain talent. Therefore, a bill was adopted to shift the taxable moment for options from the moment of exercise to the moment on which the shares acquired become tradable. Since liquidity may not be an issue in all cases, the bill offers the employee the option to elect to be taxed upon exercise, as it still is today. The new rules will apply in principle as from 1 January 2023. The bill is yet to be considered and passed by the First Chamber. Should this vote no longer take place this year, the date of entry into force will be suspended.

Takeaways and tips

The amendment is welcomed by many start-ups and scale ups. However, if employees work in multiple countries, the amendment may increase the risk that the taxable moment in the Netherlands does not match the taxable moment in other countries. This could have an impact on the possibility to claim relief from double taxation. We therefore recommend duly informing employees and ascertaining that this element, as well as tax settlement arrangements, are addressed properly in the option plan documentation.

Changes in avoidance of double taxation for Dutch resident board members

Directors and supervisory directors residing in the Netherlands may be confronted with higher income tax.

Based on national law, the board member fee paid by a foreign company to its Dutch tax resident formally appointed board member or supervisory board member is taxable in the Netherlands for personal income tax ('PIT') purposes. However, tax treaties generally allocate the right to levy tax to the country of residence of the company. For the avoidance of double taxation, most tax treaties provide for a credit of the tax paid in the other country against the Dutch PIT for this type of income.

However, for many years, the Dutch State Secretary of Finance allowed, under certain conditions, board members to claim an income exemption for Dutch PIT purposes for their foreign board member fee. This approval will end as of 1 January 2023.

If the applicable tax treaty holds that a tax credit applies for avoidance of double taxation in respect of a board member fee, the board member fee will, in the end, be taxable at the highest applicable tax rate of the two countries involved. For most Dutch tax resident members of the board of a foreign company this will, on balance, lead to a higher PIT on their foreign board member fee. The withdrawal of the approval will have no effect on situations where the tax treaty includes an exemption for avoidance of double taxation.

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It should be noted that the new rules only apply to statutory directors. A titular director who has no corporate powers is considered an employee under tax treaties and is therefore not affected by this policy change.

Tax treatment of international severance payments

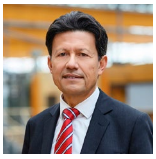
Which country has the right to levy taxes on international severance payments in cross-border situations?

Based on the OECD commentary to Article 15 of the OECD Model Convention and following Dutch Supreme Court case law, a severance payment was generally allocated and taxed on the basis of the last 12 months of employment. It has, however, become apparent that various treaty partners do not apply the twelve-month guideline as the main rule and give a different interpretation to the OECD commentary than the Netherlands.

Therefore, an amendment to this policy entered into force on 5 February 2022. The main rule now is that an international severance payment is in principle taxed on the basis of the entire employment history with the relevant employer, unless this is not possible. If, for example, due to the lapse of time the course of the employment cannot be traced in full or partially and the correct allocation cannot be reasonably determined in any other way, the last 12 months of employment with the relevant employer will still be used as the basis.

If the severance payment of an employee with an international employment history is subject to double taxation, the Dutch State Secretary of Finance has indicated that the Netherlands will, upon request, enter into a mutual agreement procedure based on the OECD commentary. Although this procedure is not simple, solutions can be found.

Jan Bart Schober



Ralph Ferouge

New Decree on the Attribution of Profits to Permanent Establishments and new Transfer Pricing Decree

Taxpayers should carefully assess the impact of the new PE Decree and the new TP Decree on a case-by-case basis.

On 1 July 2022, the Dutch State Secretary of Finance ('State Secretary') published the new Transfer Pricing Decree ('TP Decree') and the new Decree on the Attribution of Profits to Permanent Establishments ('PE Decree'). Both decrees took effect as of 2 July 2022. These decrees represent the views of the State Secretary (and, by extension, of the Dutch Ministry of Finance and Dutch tax authorities ('DTA')) on the interpretation of the relevant provisions, where taxpayers can still take deviating positions within the confines of Dutch legislation and case law.

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PE Decree

Developments in the area of profit allocation to permanent establishments, including the results of the OECD's BEPS project, led to an update of the PE Decree, which dated from 2011. The main changes to the PE Decree focus on preventing double non-taxation.

The PE Decree underlines the State Secretary's preference for the 'capital allocation approach' in combination with the 'fungibility approach' with respect to the allocation of interest costs to a permanent establishment. The capital allocation approach assumes that the permanent establishment has a credit rating equal to that of the legal entity as a whole. Under the fungibility approach, the interest expense of the entity is allocated to the permanent establishment in proportion to the debt allocated to the permanent establishment pursuant to the application of the capital allocation approach.

The new PE Decree establishes that existing OECD practices with respect to profit allocation to PEs are in accordance with the State Secretary's view.

TP Decree

The previous TP Decree has been modified textually and in terms of content to be more closely aligned with the terminology of the 2022 OECD Transfer Pricing Guidelines ('TPG'). The main changes include changes to the guidance on financial transactions and the treatment of financial service companies ('SCs').

The updated section on financial transactions in the TP Decree has been aligned with the content of Chapter X of the TPG. This section emphasises, amongst others, that it should first be determined whether a prima facie loan should be considered a loan for transfer pricing purposes. If adjusting the interest rate and/or other conditions of the loan transaction is not sufficient to make the transaction at arm's length, part of the loan may be reclassified to equity for transfer pricing purposes. The State Secretary believes that an arm's length interest charge should then be determined only for the remainder of the loan. Partial reclassification of a loan into equity contradicts with existing case law of the Dutch Supreme Court and it remains to be seen whether the view of the State Secretary holds before the court.

Furthermore, the TP Decree contains guidance on the treatment of intercompany guarantees. If the provision of such a guarantee enables the borrower to attract a higher amount of debt than it could in the absence of the guarantee, the State Secretary states that the additional amount of the loan must be treated as a loan to the guarantor followed by a capital contribution into the borrower. Again, with this statement the State Secretary deviates from the Supreme Court's case law at this point, according to which the civil-law form of a provision of monetary funds is decisive for the classification for tax purposes (unless it is deemed to be a sham loan, loan functioning as equity or a so-called bottomless pit loan).

The TP Decree further addresses the treatment of SCs. The State Secretary states that debt that can solely be attracted by means of a guarantee from a related entity should be considered as a capital contribution into the SC, in line with the guidance on the treatment of intercompany guarantees. In addition, the State Secretary stresses that the remuneration of SCs must be aligned with the control over the credit risks and financial capacity to bear the potential negative consequences when such risks materialise.

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The State Secretary distinguishes three situations in determining the remuneration of SCs in this respect:

(i) the SC has both full control over the credit risks and sufficient financial capacity, in which case an arm's length remuneration must be determined based on a comparability study performed for each individual intercompany transaction. For intercompany loans, the State Secretary considers the comparable uncontrolled price ('CUP') method as the 'most appropriate transfer pricing method to determine an arm's length remuneration;
(ii) the SC has no control over the credit risks and/or insufficient financial capacity, in which case the arm's length remuneration of the SC must generally be based on its operational costs; and
(iii) the SC has shared control over the credit risks and has the according financial capacity, in which case it would make sense to allocate the upsides/downsides of the risks on a pro rata basis.

Especially the latter situation gives rise to uncertainty, as it remains unclear when such fact pattern arises and what the resulting allocation should be.

Takeaways and tips

- Although not confirmed by the State Secretary, existing structures set up under the old TP Decree could also be impacted by the new SCs rules.
- For both existing and new structures that involve Dutch SCs, taxpayers should therefore carefully assess the impact of the new TP Decree on a case-by-case basis. This will be especially relevant for SCs that rely on the application of Dutch tax treaties for the reduction of withholding taxes.

New legislation on eliminating double non-taxation through transfer pricing mismatches

This new legislation requires MNEs to ensure that transactions are priced at arm's length and correctly documented.

As of 1 January 2022, the Netherlands has legislation that eliminates double non-taxation through transfer pricing mismatches. The new legislation may affect both existing and new cross-border situations involving the Netherlands.

The new legislation includes three main elements:

(i) The arm's length principle is not applied if this leads to a reduction of the Dutch taxable profit (e.g. through an 'informal capital contribution' or a 'deemed dividend') to the extent that the related party to the transaction does not include a corresponding upward adjustment in its profit tax base. If there is no such corresponding adjustment, the agreed or imposed price would be used for Dutch corporate income tax purposes. This has to be assessed on a transactional basis and in principle no aggregation of transactions can take place.

(ii) No adjustment in the tax basis to the arm's length value for assets and liabilities that are transferred by a related party to a Dutch taxpayer for which the agreed or imposed price is at a value below (for assets) or above (for liabilities) the arm's length value, to the extent that no

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corresponding adjustment for the arm's length value is taken into account in the transferor's profit tax base. Again, the agreed or imposed price would be used for Dutch corporate income tax purposes if there is no such corresponding adjustment.

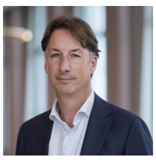
(iii) With respect to transfers of assets and liabilities through contributions, distributions, mergers and demergers, the tax base for Dutch corporate income tax purposes is at maximum (for assets) or at minimum (for liabilities) the value included in the transferor's tax base. This provision does not include a provision to fall back on the contractually agreed or imposed price such as for the two previously described transfer pricing mismatch provisions.

In addition, the amount of depreciation to be taken into account by a Dutch taxpayer on assets acquired from a related party before 1 January 2022 may be limited going forward when the transfer of the assets occurred in tax book years starting on or after 1 July 2019 and which would, at the time of transfer, have been impacted by the new legislation, had the legislation been in force at the time.

The new legislation applies to all Dutch Corporate Income Tax Act ('CITA') provisions (including State Profit Share) and not to any other legislation, most importantly not for purposes of Dutch withholding taxes on dividends, interest and royalties. The legislation also applies to the CFC rules included in the CITA, in which respect no additional rules have been established to account for possible double taxation in cases where both the transfer pricing mismatches rules and the CFC rules apply. Furthermore, the State Secretary clarified that the new legislation equally applies to transactions with entities that are exempt from corporate income taxation, i.e. that a corresponding upward adjustment cannot be considered to be included in a profit tax for such entities.

Takeaways and tips

- Taxpayers bear the burden of proof for the inclusion of a corresponding upward adjustment in the foreign profit tax base. Therefore, the legislation puts more emphasis on the need for appropriate transfer pricing documentation or other documentation. Not only to substantiate the arm's length character of the intercompany transactions, but also for the purpose of substantiating that the related counterparty has accounted for the value in its profit tax base in case of contributions or distributions.
- In any case, taxpayers should closely review the arm's length character of all intercompany transactions, and carefully review all transfers, contributions, distributions, mergers and demergers as from 1 July 2019 for possible amortisation/depreciation restrictions and as of 1 January 2022 for the general impact of the transfer pricing mismatch rules on their tax base.
- The impact of the rules on intercompany flows between hybrid entities that may result in non-recognition of transactions must be carefully assessed.


Rogier Sterk


Jan-Willem Kunen


Gijs van Koeveringe

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Windfall tax national implementation

Following the EU measures to address high energy prices, the Dutch government intends to introduce a temporary solidarity contribution for Dutch companies active in the fossil industry.

On 1 November 2022, the Netherlands published a legislative proposal that implements the solidarity contribution outlined in the EU Regulation on an emergency intervention to address high energy prices.

In scope are Dutch corporate income taxpayers that realized at least 75% of their turnover through certain economic activities related to the production of oil and natural gas. The tax base for the contribution is the fiscal profit of 2022 which is above a 20% increase of the average profit of the four previous years. This taxable base will be taxed at 33%, which is in accordance with the EU Regulation.

The Dutch government does not intend to levy the solidarity contribution over any (excess) profits of the year 2023, as it already plans to levy a specific mining turnover tax (*cijns*) during 2023 and 2024.

Mick Knops

Max van Maren

Public CbCR national implementation

On 1 July 2022, the Minister for Legal Protection published its legislative proposal to introduce public country-by-country reporting obligations in the Netherlands. Based on this legislative proposal, the obligation will ultimately apply to certain multinationals with financial years starting on or after 22 June 2024.

Maurice van Klaveren

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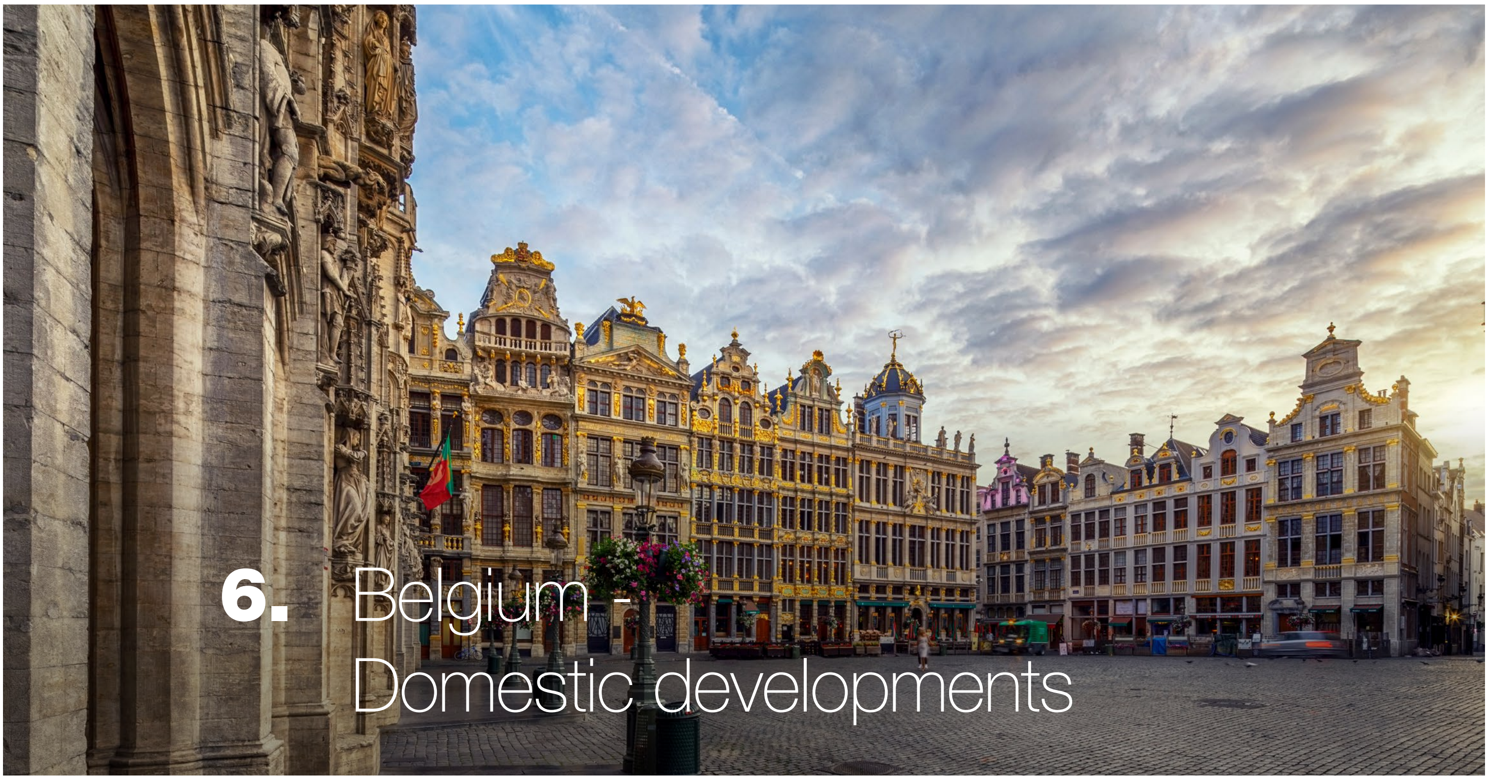

6. Belgium - Domestic developments

Increased expertise and means to audit complex structures

Based on a draft bill, Belgian companies may face a higher level of scrutiny from the Belgian Tax Authorities on more complex international transactions and investigation and assessments periods may be extended, amongst others, in case of international elements.

The number of disputes with the Belgian tax authorities ('BTA') on complex structures has significantly increased. The BTA have more dedicated teams and are developing more expertise and competence in complex matters. A draft bill has now been submitted to parliament that provides the BTA with additional means to conduct tax audits, such as by extending the investigation and assessment periods and by introducing the possibility for the tax authorities to impose, upon approval from the court, a penalty payment if the taxpayer or a third party obstructs a tax investigation. This draft bill is expected to be approved before year-end.

The most notable changes are those relating to the assessment periods. The three-year assessment period would be retained if the tax authorities want to amend a timely filed tax return. If a taxpayer either fails to file or files a late tax return, a new extended four-year assessment period is proposed.

By way of derogation, a six-year period is introduced in specific circumstances containing an international element, i.e. if:

(i) a local file or country-by-country report needs to be filed;
(ii) payments to tax havens need to be reported;
(iii) a foreign tax credit is applied;
(iv) exemptions or reductions are included in the withholding tax return based on a double tax treaty or EU directives; or
(v) information regarding the tax return was received from abroad that relates to reportable cross-border arrangements or to platform operators if the amount exceeds EUR 25,000.

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Finally, a 10-year period is foreseen for 'complex' tax returns (i.e. if legal constructions, hybrid mismatches or controlled foreign companies are involved) and in case of tax fraud. These new assessment periods will apply as of assessment year 2023 and only for the future.

Takeaways and tips
Belgian MNEs should be aware of the fact that they may face a higher level of scrutiny from the BTA on more complex international transactions, and that prolonged assessment periods are likely to apply as of assessment year 2023. It is therefore essential for MNEs to be aware of their tax risks and to have a system in place to manage these tax risks properly.

Linda Brosens

What are the trends in Transfer Pricing audits?

A further increase in the number of transfer pricing audits is expected together with more tailor-made audits.

During the last decade, the BTA have consistently ramped up their transfer pricing audit capacity and frequency. A new wave of transfer pricing audits was initiated at the start of 2022, accompanied by certain interesting changes to the transfer pricing cell's standard approach.

First, rather than sending the standardised questionnaire, the BTA now initiate the audit through a request to hold a pre-audit meeting. This had only been optional in the past. A pre-audit meeting allows the tax authorities to gain some preliminary insights into how the company operates within the group and how the transfer pricing policies are applied. Such a meeting is followed by a more customised questionnaire, which notably refers to information available to the BTA as included in the transfer pricing documentation, such as local and master files and country-by-country reports, which the taxpayer has already submitted. Asking targeted questions focusing on relevant specific topics, rather than issuing lengthy and wide-ranging questionnaires requiring significant resources to answer appropriately, is expected to increase the efficiency and effectiveness of the audits.

A second development concerns the announcement by the Belgian Minister of Finance regarding his ambition to double the capacity of the Belgian transfer pricing cell. In this respect, a series of experienced tax practitioners is being hired to strengthen the audit capacity and given proper training on various technical topics of interest. Further investments in improved data mining techniques are also being considered to select the taxpayers subject to audit. This all implies an expected further increase in the number of audits accompanied by a less settlement-minded attitude as already observed in the market.

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During such an audit, the BTA investigate a broad range of topics, and notably tend to focus on:

- the reconciliation between the transfer pricing policy and annual accounts;
- the reason for and origin of losses;
- the allocation of synergies with respect to procurement activities;
- the arm's length character of intragroup service fees, including the cost base in a cost-plus remuneration; and
- intragroup financial transactions.

Particular focus is given to the latter, the intragroup financial transactions. In this respect, the BTA carefully evaluate the applied interest rate to remunerate the financing and further tend to scrutinise the arm's length character of a company's intra-group debt level. The delineation of a purported loan for transfer pricing purposes and the arm's length debt level of a company is increasingly becoming part of the BTA's overall analysis. The BTA also look into the arm's length character of cash pool arrangements; in particular, the appropriate allocation of cash pool benefits and the reclassification of structural cash pool deposit or borrowing in a term loan.

Takeaways and tips

- Belgian MNEs can prepare for a transfer pricing audit by preparing solid supportive documentation for the arm's length character of intercompany transactions and proactively reviewing their transfer pricing policy to identify any risks and weaknesses.
- As regards financial transactions, attention should be given to compliance of the applicable policy with the latest OECD guidance, notably regarding accurate delineation, and to avoiding structural cash pool deposits by periodically monitoring outstanding positions.
- Should an MNE be selected for an audit, due consideration should be given to responding appropriately to the information requests. Careful preparation for the pre-audit meeting is essential as the meeting will have an impact on the entire audit process. Experience has shown that providing a clear overview of the facts and the relevant terms of the intercompany transactions from the start is beneficial to the efficient and smooth running of the audit and may enable the scope of the customised transfer pricing audit questionnaire to be narrowed down.
- A constructive attitude while keeping an eye on the legal boundaries of information requests and the burden of proof principles is the key to an effective audit process.

Aldo Engels

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Windfall taxes

Emergency measures against the surge in energy prices are proposed in Belgium for the electricity and oil sector which can best be interpreted as a form of a windfall tax.

The surge in energy prices and disruptions to energy supplies resulting from geopolitical tensions have urged both the EU and its Member States to take several actions and propose various measures, to help EU industries and citizens deal with the rise in energy prices. In October 2022, the Council of the European Union agreed on a package of temporary and extraordinary measures. These measures include a proposal to introduce a revenue cap to recover excess revenues from electricity generating companies with lower marginal costs (inframarginal technologies) set at EUR 180 per MWh.

In line with the aforementioned EU proposal, the Belgian Government Council approved on 28 October 2022 a proposal submitted by the Minister of Energy to introduce a revenue cap for inframarginal electricity generating companies with income above EUR 130 per MWh between 1 August 2022 and 30 June 2023. The excess revenue will be used to finance the grant of an energy discount for Belgian households at the end of 2022/start of 2023. It should be noted that the Belgian proposal goes further than the EU proposal by using a EUR 130 threshold.

On 28 October 2022, the Government Council approved also a second proposal submitted by the Minister of Energy that introduces a type of windfall tax for the oil sector. The windfall tax would take the form of a temporary solidarity contribution and would apply to the following companies:

- registered oil companies active in the refining sector which have refining capacity in Belgium; and
- registered oil companies that, in accordance with the Royal Decree of 5 February 2019, have been defined as primary participants for the year 2022 for diesel, gas, oil and petrol.

The amount of the contribution to be paid by the first group of companies would be set at EUR 6.90 per tonne of crude oil imported between 1 January 2022 and 31 December 2023. For the second group of companies, the amount would be set at EUR 7.80 per cubic metre of product released for consumption between 1 January 2022 and 31 December 2023. The contribution would be introduced for the years 2022 and 2023. Draft legislation to implement both proposals will first be submitted to the Council of State before it is submitted to the Belgian Parliament for discussion and approval.

Marc Dhaene

Nawel Benaisa

Cassandre Dhoore

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Increased expertise and means to audit complex structures

What are the trends in Transfer Pricing audits?

Windfall taxes

Can an employee/ director benefit from the special tax regime for foreign expatriates and researchers?

What budgetary measures may impact your business?

Will the envisaged tax reform impact your business?

Can an employee/director benefit from the special tax regime for foreign expatriates and researchers?

The new special tax regime for foreign expatriates and researchers can be an important tool in the current war for talent.

A new special tax regime entered into force on 1 January 2022 that applies on the one hand to inbound taxpayers (employees and directors) and on the other hand to inbound researchers (employees). The main conditions are the following:

- The inbound taxpayer or researcher must be (i) recruited abroad by a Belgian company, Belgian establishment of a foreign company or a non-profit organisation, or (ii) must be made available by a foreign company being part of a multinational group to a Belgian company, establishment, or non-profit organisation.

- During 60 months prior to the start date of their employment in Belgium, the inbound taxpayer or researcher may not have been a Belgian tax resident, may not have lived within 150 km of the Belgian border and may not have earned any taxable professional income as a non-resident.

- The inbound taxpayer must earn a minimum gross annual Belgian income of EUR 75,000. This condition does not apply to inbound researchers, who are subject to some other specific conditions.

Under the new regime, a lump sum payment meant as compensation for recurring expenses capped at 30% of the gross remuneration, up to an annual maximum of EUR 90,000, can be treated as tax-exempt costs proper to the employer. Specific expenses incurred by the employee such as relocation costs, initial settling-in costs during the first six months and tuition fees above this 30% threshold are also considered tax-exempt costs. These allowances are not subject to employer and employee social security contributions.

The application for the new regime must be filed within three months following the start date of employment and applies for an initial period of 5 years with a possible extension of 3 years upon request.

Expats that benefit from the 'old' Belgian expat regime are granted a transition period until 31 December 2023, if they did not opt in for application of the new regime.

Takeaways and tips
Employers should consider the new regime and its potential benefits when recruiting new employees, directors, and researchers in Belgium. It can be an important tool in the current war for talent!

Laurine Vanherck

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What budgetary measures may impact your business?

New budgetary measures include a temporary 'Belgian minimum tax'.

To deal with budget deficits, on 11 October 2022 the Belgian government announced various budgetary measures that may have a tax impact for MNEs. The most important ones can be summarised as follows. Please note that no official documents have been published.

- The existing minimum tax for multinational companies is introduced as Pillar Two placeholder. Under the existing rules, companies can carry forward tax losses indefinitely, but their use per taxable period is limited to EUR 1 million + 70% of the taxable result exceeding EUR 1 million. As a result, 30% of the taxable income exceeding EUR 1 million remains taxable. Under the new rules applicable as of 2023, the limit will be cut to 40%, implying that 60% of the taxable income exceeding EUR 1 million will be taxable at a rate of 25% resulting in a minimum tax of 15% (60% x 25%). The aim is to replace this minimum tax once Pillar Two is introduced.

- Although large companies could not benefit from a notional interest deduction in past years due to the negative notional interest rate, the incentive intended to boost equity investments will now be abolished entirely for large companies for accounting years closing after 30 December 2022. Companies can still use notional interest deductions carried forward from previous years. This measure is peculiar given the intention of the European Commission's DEBRA Proposal to address the debt-equity bias.

- The current lump sum system for a foreign tax credit on royalties will be capped at the actual foreign withholding tax applied.

Takeaways and tips

- Since companies with taxable income exceeding EUR 1 million will increasingly be limited in the use of tax losses carried forward as of 2023, companies may consider the possibility of anticipating taxable income into the 2022 fiscal year, for example by accelerating commercial transactions. The latter is of course subject to the implementation of the minimum tax and to specific anti-abuse provisions that would be introduced by the legislator.
- We also recommend that companies assess the impact of the minimum tax on deferred tax assets recognised under, IFRS accounting, for example.

Linda Brosens

Nicolas Lippens

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Will the envisaged tax reform impact your business?

First set of measures is being prepared as part of a wider (personal income) tax reform.

The Belgian Minister of Finance recently prepared a first set of measures as part of personal income tax reform. A second set of measures would follow at a later stage. To finance the reform, the following amendments are being proposed that are particularly relevant for businesses. Please note, though, that no political agreement has been reached yet and no official documents have been published.

- The dividend received deduction regime currently provides for a tax deduction but would be transformed into a real exemption.
- The 'DBI-BEVEK' regime would be abolished,
- The participation condition would be slightly amended. According to the current participation condition, the participation must amount to at least 10% of the distributing company's nominal share capital or, alternatively, have a historic acquisition price of at least EUR 2.5 million. Whereas the 10% threshold remains, the latter alternative participation condition would become subject to the condition that the shares are accounted for as financial fixed assets.
- The costs relating to the acquisition, holding and disposal of shares would no longer be tax deductible.
- The use of stock option plans would be restricted and at least part of the 'carried interest', i.e. the part exceeding the pro rata portion of the distribution or capital gain, would reportedly be qualified as taxable professional income in the hands of the person to which the scheme applies.

Takeaways and tips
Although no political agreement has been reached yet on the measures that are needed to finance the tax reform, it is recommended that MNEs keep abreast of further developments in this respect and assess their impact on their business.

Linda Brosens

Nicolas Lippens

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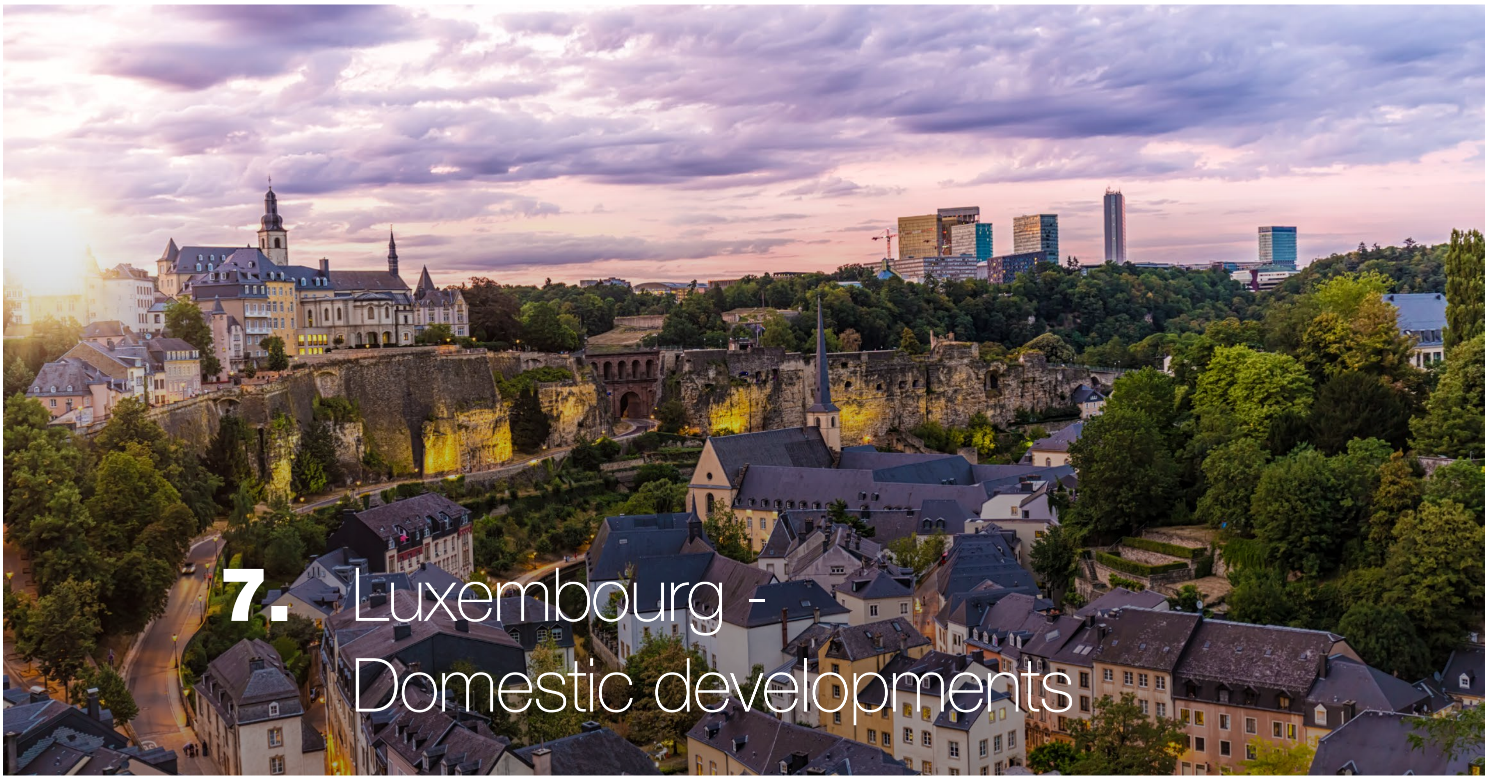

7. Luxembourg - Domestic developments

Luxembourg bond issuance for MNEs: current trends

People retention: what does Luxembourg offer?

Business reorganisations

Luxembourg bond issuance for MNEs: current trends

The Luxembourg debt market environment offers a diverse and innovative range of instruments, helping both investors and issuers to meet their current needs.

With a flexible yet friendly regulatory framework and suitable tax environment, Luxembourg has built a compelling reputation and became an international leader for debt capital markets, being an attractive country for debt issuances of all types.

The Luxembourg Stock Exchange has a long-standing history of pioneering in debt capital markets allowing for the listing of not only traditional debt instruments (e.g. high-yield bonds, asset-backed securities, convertible bonds), but also instruments such as sukuk and dim sum bonds. Moreover, since its launch of the first global green exchange platform (LGX) in 2016 Luxembourg has gained a solid track record in the field of green, social, sustainable and sustainability-linked bonds.

In addition to capital markets considerations, attention should be also paid to tax aspects. Determining the appropriate issuance vehicle together with assessing its transfer pricing profile and compliance obligations are the decisive actions needed to achieve an efficient structure.

Currently, the international bonds listed in Luxembourg represent 42% of total international bonds listed on EU markets. It has been especially attractive for European, Latin American and North American issuers.

MNEs seeking to access the international capital markets should definitely consider Luxembourg. To ensure a successful process, MNEs should:
(i) Assess the most suitable instrument;
(ii) Ensure proper legal and regulatory compliance upon issuance;
(iii) Assess the most suitable transfer pricing profile of the issuing vehicle; and
(iv) Ensure proper implementation and compliance with ongoing obligations.

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Willem Bon

Aline Nunes

People retention: what does Luxembourg offer?

Business enterprises are building strategies to retain their talented people with support of the Luxembourg tax system.

Business enterprises are building strategies to retain their talented people and the Luxembourg tax system supports these strategies.

In order to contribute to the retention of employees, the Luxembourg government introduced a favourable tax regime for profit-sharing bonuses (*Régime de la prime participative*) in 2021, which enables employees to share in the profits of the companies and, therefore, in the creation of value within Luxembourg companies. This tax regime should help in attracting new talent to Luxembourg, retaining them and increasing their commitment as they will participate in the growth of their companies.

Provided that certain conditions are met, the bonuses paid under the profit-sharing bonuses regime are characterised (i) as employment income exempt for 50% from Luxembourg income tax in the hands of the employees, and (ii) as operating expenses deductible from the corporate taxable basis in the hands of the employer.

Luxembourg employers have the possibility to make use of this tax regime in combination with commonly used employee retention plans such as phantom shares, stock option plans, restricted stock units, etc. In most of these cases, such employee retention plans are subject to a vesting period and Luxembourg taxes will only be due after the shares, options, units are vested in the hands of the employees. The fact that no Luxembourg upfront taxes will be due by the employees constitutes a major advantage for them and their employers who seek to retain their talented people.

The combination of the Luxembourg tax regime of profit-sharing bonuses and the commonly used employee retention plans should not result in any adverse social security consequences, since Luxembourg social security charges are computed up to the annual social security ceiling amounting to EUR 138,802.56 (for the year 2022), except for the dependence insurance contribution at a rate of 1.4% which is not subject to the annual social security ceiling.

Kheira Mebrek

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Business reorganisations

A transfer of a business or part thereof may often be implemented in a tax neutral way.

With many MNEs and fund managers having increased their headcount and operational activities in Luxembourg over recent years, groups that are seeking to reorganise their Luxembourg operations are increasingly being confronted with the relevant Luxembourg legal, regulatory and tax framework. Whether through cross-border or other migrations, conversions, mergers or demergers, changes to operational entities carry risks from a company law, labour law or tax law perspective.

From a tax perspective, the question arises whether the transfer of a specific part of a company should qualify as a transfer of a business (*entreprise*) or an autonomous part of it (*partie autonome d'entreprise*), as opposed to a simple transfer of assets. This qualification is relevant in order to determine the valuation rules applicable to the transfer. Although the concepts of 'business' and 'autonomous part of a business' are used in many provisions of Luxembourg income tax law, unfortunately, they are not clearly defined in the law.

A business can be defined as: (i) an independent activity, (ii) which has a lucrative intent, (iii) is exercised in a permanent manner, and (iv) constitutes a participation in economic life. Parliamentary documents on the concept of autonomous part of a business show that there must be both a business and an autonomous part of this business. In order to be autonomous, the part of a business must, to a certain extent, be independent and must form an entity by itself, without however the need for this entity to function by its own means.

The qualification of business has an impact on the valuation of the assets, as in the case of a business there could be a 'bundle' valuation, i.e. if the value of the business is higher than the sum of the going-concern values of each transferred asset, the difference would correspond to the value of intangible assets (i.e. goodwill).

A transfer of a business or part thereof may often be implemented in a tax neutral way. Should the qualification of transfer of assets prevail, individual assets would need to be valued at their fair market value.

Takeaways and tips

- Properly document business reasons surrounding the reorganisation;
- Monitor employment contracts and collective bargaining agreements;
- Choose the right valuation method applicable to the intragroup transfer.


Peter Adriaansen


Bastien Nowobilski

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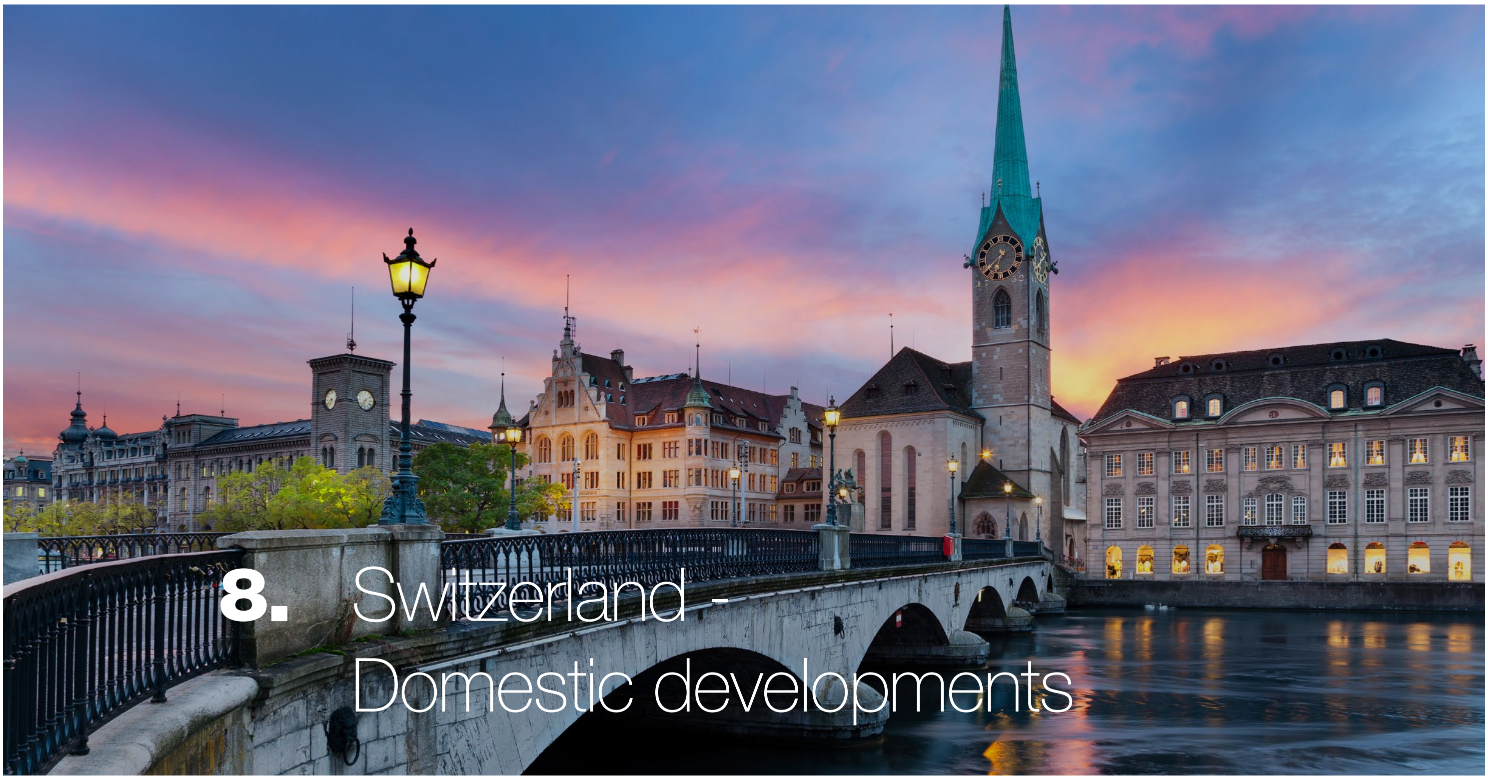

8. Switzerland - Domestic developments

Transfer pricing developments in audits and structuring

Transfer pricing has become a growing priority of tax authorities in Switzerland.

Transfer pricing has increasingly become a focus of the Swiss tax authorities in recent years. This is illustrated by the fact that various Swiss tax authorities now have more and increasingly specialised experts for transfer pricing matters. Furthermore, the Swiss Federal Tax Administration ('SFTA') now has its own transfer pricing team. This is particularly helpful for taxpayers as advance tax rulings on transfer pricing matters have become the standard.

Moreover, this development is also recognisable as tax audit announcements include a standard request to provide transfer pricing documentation. Although transfer pricing documentation with a master file and local file is not required by law in Switzerland, it is nevertheless good practice for Swiss MNEs to maintain up-to-date transfer pricing documentation. Additionally, advance documentation is preferable compared to documentation established prior to or in the context of an audit.

Swiss tax authorities strongly focus on the transactional net margin method ('TNMM') as their preferred method of transfer pricing to evaluate whether intra-group transactions are in line with the principle of dealing at arm's length. The reason for this is that TNMM, unlike cost-plus or resale price methods, compares net margins instead of gross margins. Due to the deductibility of tax expenses in Switzerland, a comparison of gross margins would not result in a full cost mark-up from a Swiss tax perspective. Even in the past, tax authorities typically requested a net margin approach by including tax expenses as part of the profit level indicator (despite labelling this approach as 'cost plus').

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Furthermore, it is observed that Swiss tax authorities are increasingly requesting benchmark reports that verify the compliance of margins, interest, or fee payments in international constellations with the principle of dealing at arm's length.

The updated OECD transfer pricing guidelines have also increased the scrutiny of financial transactions. Even though Switzerland avails itself of safe harbour rules for related party financing, tax authorities may recharacterise debt to equity and thus deny interest deductibility based upon OECD transfer pricing guidelines.

This also impacts the advance tax ruling practice in various cantons: cantonal tax authorities have become more cautious with respect to granting tax rulings for new structures, and sometimes require additional confirmation on transfer prices. This is because the cantons run the risk of having to repay taxes in the event of an international transfer pricing conflict. Such a tax repayment can no longer be considered in the national fiscal equalisation between the cantons after five years, and therefore leads to a genuine financial burden for the affected canton.

Fabian Sutter

Fabio Sonderegger

Withholding tax developments: challenges in connection with acquisitions

New Swiss Federal Supreme Court rulings backing the Swiss Federal Tax Administration's anti-abuse practice.

The Swiss Federal Tax Administration ('SFTA') has developed a very broad and dynamic anti-abuse practice when it comes to the right to refund of the 35% Swiss dividend withholding tax. Such practice comes into play in particular, but not only, in cases where participations in Swiss companies are transferred from a shareholder subject to non-refundable or not fully refundable withholding tax to a shareholder with a better, often full, refund position based on a tax treaty or on unilateral law.

The foregoing can be explained by the following example. The sole shareholder of a Swiss company is subject to 5% non-refundable withholding tax based on the Swiss-US tax treaty and transfers its shares to a new shareholder who can in principle claim full withholding tax relief based on unilateral Swiss law or a more favourable tax treaty. Consequently, part of or all pre-existing open and in some cases even hidden profit reserves of the Swiss company may be considered as 'tainted' and remain subject to 5% non-refundable withholding tax despite the new shareholder's general withholding tax relief entitlement. In other words, the new shareholder 'inherits' the less favourable refund position of its predecessor.

While traditionally the SFTA would apply the refund position of the previous shareholder on the 'tainted' reserves, the Swiss Federal Supreme Court ('SC') recently ruled that in case of abuse, no withholding tax relief whatsoever shall be possible, at least for these 'tainted' reserves. In our example, this would mean that the 'tainted' reserves would be subject to a 35% non-refundable withholding tax upon distribution.

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While the two SC-rulings related to constellations where the new shareholder claimed withholding tax relief under (i) the Agreement between the European Union and the Swiss Confederation on the automatic exchange of financial account information to improve international tax compliance ('EU-AEoI Treaty') and (ii) Swiss unilateral law, it remains to be seen whether the SFTA will apply the SC considerations on constellations where relief is claimed under an applicable tax treaty as well. There are indications that, except in cases where a refund claim is based on the EU-AEoI treaty, the SFTA will continue to apply its more favourable practice of taking into consideration a potentially lower treaty rate of the previous shareholder. Nevertheless, acquisitions, including intra-group transfers, of Swiss companies may come at significant cost and should therefore be carefully reviewed from a withholding tax perspective.

Selina Many

Cross-border employment and home office developments

Agreements with neighbouring countries about tax and social security rules originating from the COVID-19 pandemic period regarding working from home by cross-border commuters are increasingly being terminated.

Cross-border employees commuting to Switzerland are of utmost importance to Switzerland. For this reason, during the COVID-19 pandemic Switzerland concluded and extended various agreements in order to coordinate the taxation and social security rules for cross-border commuters.

From a tax perspective, Switzerland concluded agreements with Germany, France, Italy and Liechtenstein to address the fact that cross-border commuters may not be able to commute and may use their home office as their physical working place, which would affect their status under the applicable double tax treaty.

According to these agreements, working days spent by cross-border commuters in their country of residence should be counted as working days spent in their country of work. This legal fiction aims to ensure continuity in the way such cross-border commuters are taxed despite the lack of physical presence in the country of work.

The agreement with Liechtenstein ended in April 2022, the agreement with Germany ended in July 2022 and the agreement with France has been extended until the end of December 2022. The agreement with Italy remains applicable until further notice.

Moreover, in connection with home offices, the risk of a permanent establishment ('PE') in another Swiss canton or abroad arises from a Swiss corporate income and capital tax perspective. However, simply working from home does not generally constitute a PE, neither intercantonally nor internationally, as hurdles exist in this respect in terms of location, time and subject matter of home office activities. Nevertheless, if an employee regularly performs a substantial value-adding activity at home and the employer expressly orders the home office and/or does not provide a workstation, the tax consequences in Switzerland should be carefully examined.

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VAT taxation platforms

The same questions arise with respect to the applicable social security rules. According to the EU regulations on social security coordination No. 883/2004 and No. 987/2009 applicable between Switzerland and the EU/EFTA Member States, Switzerland has agreed with its neighbouring countries that the absence of a physical presence should not be taken into account and that the use of a home office should not lead to a change in social security subordination, even if its duration exceeds the 25% threshold set by the EU regulations. Switzerland has agreed to continue the flexible application of social security rules for cross-border commuters until 31 December 2022. Should these social security rules in the context of home office not be extended as of January 2023, the common rules of the EU regulations will again be applicable.

Tips

- Swiss employers should assess in a timely manner post-COVID-19 social security risks related to cross-border commuters working from home.
- From a tax perspective, Swiss employers should also carefully review their home office policies in order to ensure accurate salary withholding tax processes and avoid any intercantonal or foreign tax exposure due to such matters as the potential recognition of a PE in other Swiss cantons or abroad.

Livia Geissmann

Anaïs Näscher

VAT taxation platforms

Foreign mail order platforms will pay Swiss VAT soon.

For three years now, foreign mail order companies must pay Swiss value added tax ('VAT') if they make more than CHF 100,000 in sales annually with deliveries to Switzerland.

As only a few companies have registered, under a new bill the large domestic and foreign platforms will be obliged to pay VAT on their total turnover in Switzerland in the future. The platforms will then also have to pay VAT on the brokered turnover of other companies on their electronic platform. The platforms will be obliged to collect the VAT from their subcontractors and companies that only sell via platforms no longer have to register in Switzerland. However, the registration obligation will still apply if sales are made directly to Swiss consumers.

The bill also provides for a shifting procedure, open to all importers and not only to platforms. The shifting procedure represents a financial and administrative simplification for importing companies, as the VAT can be paid periodically instead of for each individual import. Moreover, there will be an obligation for platforms to provide information on companies that offer supplies or services on the platform.

If the platforms or the mail order companies do not comply with their VAT obligations, the Swiss government can in future order an import ban or have consignments destroyed.

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Both the Federal Council and the First Chamber of Parliament voted in favour of these amendments. The bill will now be discussed by the Second Chamber. The new rules are expected to come into force in January 2024 at the earliest.

Gilles Haudenschild

About Loyens & Loeff

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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 2022. 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 2023 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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