

# WTS ICT Service Line Newsletter

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## Argentina



### Suspension of the Argentine Mandatory Disclosure Framework

As of 30 August 2022, the Argentine Revenue Service ("ARS") decided to suspend the Mandatory Disclosure Framework ("MDF"), which was created by the agency by means of general resolution no. 4838/2020, enacted in October 2020. Indeed, general resolution no. 4838/2020 established a mandatory disclosure framework for domestic and international tax planning arrangements aimed at producing a tax advantage or at avoiding a reporting obligation. According to the ARS, this disclosure framework was based on international precedents, such as the UK *"Disclosure on tax avoidance schemes"*, or the US *"Office of tax shelter analysis"*, among others. The European Directive on Administrative Cooperation 6 was also considered, despite being uncited. However, the Argentine MDF has actually broadened the reporting scope to domestic planning, and it is not limited to 'aggressive' tax planning structures.

The decision of the ARS to suspend the MDF was prompted by a series of court decisions that ordered either the temporary suspension of the regime – in the context of a preliminary injunction, prior to final ruling – or even the abrogation of such a regime on the grounds of its unconstitutionality. Among these rulings, the decision of the La Plata Federal Court issued last on 22 April 2022, which was favourable to the Professional Council of Economic Science Professionals of the Province of Buenos Aires (i.e. CPAs board), is worth highlighting. According to this ruling, the MDF is unconstitutional because it violates the legality principle of the Argentine Constitution, as it places an authentic public burden on the tax advisors without a proper legislative framework. In the court's opinion, such a public burden would even compromise the professional-client privilege, which is actually protected by the law. Consequently, La Plata Federal Court considered that the MDF was enacted in the context of an unlawful legislative delegation of power to the ARS, and declared it void on constitutional grounds.

The La Plata Federal Court ruling was followed by other similar cases ruled upon likewise and, to date, the MDF is being litigated profusely by professional associations in all of the 24 Argentine jurisdictions. Under these circumstances, the ARS opted to suspend the MDF, first through general resolution no. 5254/2022, enacted on 30 August 2022, which suspended the regime for 60 days, until 31 October 2022; and then once again, through general resolution no. 5278/2022, enacted on 31 October 2022, which suspended the regime for another 60 days, until 2 January 2023.

The decision to twice suspend the MDF unveils that under the current judicial perspective, the ARS will face serious difficulties to enforce such a regime, and therefore, the future of the MDF, in its current version at least, remains uncertain.

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## Austria



### No carryforward of withholding taxes

In a recent case, the Austrian Fiscal Court had to decide whether withholding taxes that cannot be fully credited in the respective tax year can be carried forward to the following years.

An Austrian tax resident had been performing technical services in India, which were subject to an Indian withholding tax. The Austrian-Indian double tax treaty grants India the right to apply 10% withholding tax on technical services. As, however, the Austrian corporate income tax was substantially lower than the Indian withholding tax deducted in accordance with the treaty in all relevant years, the Austrian taxpayer was not able to fully credit the Indian withholding tax. As a consequence, the taxpayer applied to credit the Indian withholding tax in subsequent years.

The carryforward of withholding taxes to other years was denied by the Austrian tax authority and the Austrian Fiscal Court in the following. The court referred to preceding jurisprudence by the Austrian Supreme Administrative Court. Based on this case law, foreign withholding taxes must be credited in the year in which the corresponding income is recorded for tax purposes in Austria. According to the wording of the credit method in the respective double taxation treaties and the OECD Model Tax Convention, the credit must be applied to the taxes on the same income that was also subject to taxation in the source country. If the foreign tax were to be credited on Austrian tax in a subsequent year, such credit would no longer be applied to the same income but to other income. Moreover, to the extent that the legislator does not provide for a credit carryforward in domestic tax law, such a carryforward is not possible in Austria, according to the Supreme Administrative Court. So far, Austrian tax law only provides for a carryforward of withholding taxes for specific situations within Austrian CFC regulations and where the switch-over method from exemption to credit method is applied within the Austrian participation exemption regime.

Regarding the constitutional concerns raised, the Austrian Supreme Administrative Court rejected any concerns referring to a rejection decision by the Austrian Constitutional Court. In addition, it should be noted that, in the opinion of the Supreme Administrative Court, no necessity for the requested carryforward of withholding taxes can be derived even from European Union law, citing ECJ 10.2.2011, C-436/08 and C-437/08, *Haribo and Österreichische Salinen*.

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Even though the cited decision by the Austrian Supreme Administrative Court concerned various other Austrian double tax treaties, the Fiscal Court made clear that the opinion of the Supreme Administrative Court would also apply to the Indian treaty. The case once again shows that withholding taxes are not to be taken lightly. They might ruin a once profitable project as soon as they become a cost factor that has not been included in the calculation of the respective project price.

## China



### China has approved the Multilateral BEPS Convention

25 May 2022 saw China submit its instrument of approval for the "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (Multilateral BEPS Convention) to the OECD. The approval of the Multilateral BEPS Convention contains the list of reservations and notifications made by the Chinese government, which becomes effective from 1 September 2022.

#### Position of mainland China

According to the submitted instrument of approval, China has adopted two kinds of BEPS measures:

- 1) Minimum standards of BEPS measures (such as dual resident entities, principal purpose test for the prevention of treaty abuse, etc.);
- 2) Non-mandatory measures that China has already adopted in the double taxation agreements ("DTA") signed in recent years.

Below is the summary of China's position:

Convention Articles	China's Position
<i>Article 2 – Interpretation of terms</i>	<i>Adopted and applied to 100 DTAs concluded by China as of 25 May 2022</i>
<i>Article 3 – Transparent entities</i>	<i>Not adopted</i>
<i>Article 4 – Dual resident entities</i>	<i>Adopted</i>
<i>Article 5 – Application of methods for the elimination of double taxation</i>	<i>Not adopted</i>
<i>Article 6 – Purpose of a covered tax agreement</i>	<i>Adopted</i>
<i>Article 7 – Prevention of treaty abuse</i>	<i>Adopted partially (principal purpose test has been adopted)</i>
<i>Article 8 – Dividend transfer transactions</i>	<i>Adopted</i>
<i>Article 9 – Capital gains from alienation of shares or interests of entities deriving their value principally from immovable property</i>	<i>Not adopted</i>
<i>Article 10 – Anti-abuse rule for permanent establishments situated in third jurisdictions</i>	<i>Not adopted</i>
<i>Article 11 – Application of tax agreements to restrict a party's right to tax its own residents</i>	<i>Adopted</i>
<i>Article 12 – Artificial avoidance of permanent establishment status through commissionaire arrangements and similar strategies</i>	<i>Not adopted</i>
<i>Article 13 – Artificial avoidance of permanent establishment status through the specific activity exemptions</i>	<i>Not adopted</i>
<i>Article 14 – Splitting-up of contracts</i>	<i>Not adopted</i>

Article 15 – Definition of a person closely related to an enterprise	Not adopted
Article 16 – Mutual agreement procedure	Adopted (Article 16.1 has not been adopted.)
Article 17 – Corresponding adjustments	Adopted
PART VI. ARBITRATION (Article 18 to Article 26)	Not adopted

### Principal purpose test

China has adopted the principal purpose test articles stipulated in Article 7, namely the "Prevention of treaty abuse". The tax treaty benefit could be refused, if obtaining the tax treaty benefit was one of the principal purposes of any arrangement or transaction. It is therefore crucial for companies to check and review upfront whether an arrangement or transaction has reasonable commercial purpose and business substance.

### Avoidance of permanent establishment status

China has not adopted all the articles regarding the avoidance of permanent establishment status (Article 12 to Article 15). The Chinese tax authorities will continue to apply the DTA articles and domestic rulings (such as Guoshuifa [2010] No. 75) for the permanent establishment assessment.

### Effective date of the Multilateral BEPS Convention to double taxation agreements

The Multilateral BEPS Convention affects the DTAs depending, in terms of the latter, on when the tax treaty parties have enforced the Multilateral BEPS Convention. As of 30 June 2022, the enactment procedures for the Multilateral BEPS Convention have been completed for 47 DTAs out of 100 adopted DTAs.

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## Colombia



## Colombian tax reform bill 2022

On 8 August, the new Colombian government introduced a new tax reform bill before Congress. After a three-month period of debates, the new bill has been approved. Most of the measures will enter into force on 1 January 2023. We highlight some of the most important changes to the corporate tax regime.

### 1. Corporate income tax rate

The tax reform does not modify the **35% general corporate income tax rate**, it increases the capital gains rate from **10%** to **15%**. A surcharge applies to certain sectors, such as **non-renewable extractive industries** (up to 15%) and **hydroelectric power generation** (3%). The existing 3% surcharge on **financial entities** increases to 5%.

A 15% minimum effective tax rate has been established for national companies.

### 2. Dividend tax

The rate applicable to dividends paid by Colombian companies to foreign entities will rise from **10%** to **20%**, and the withholding tax applicable to dividend distributions to domestic companies will increase from **7.5%** to **10%**. These raises in dividend withholdings can be limited if a Double Tax Treaty ("DTT") applies.

### 3. Limitation of beneficial tax provisions

Among other provisions that increase the corporate income tax liability of corporations, the tax reform eliminates the tax credit on 50% of the local turnover tax ("ICA") paid and prohibits the deduction of royalties paid for the exploitation of non-renewable natural resources.

### 4. Significant Economic Presence ("SEP")

The SEP enables taxing foreign companies that **do not have a physical presence** in Colombia but (a) **market goods and services** by interacting deliberately and systematically with clients in Colombia or (b) render **digital services** to users in Colombia. Whenever a SEP is deemed to exist, such SEP is subject to income tax in Colombia to be collected through a withholding mechanism or by filing a special tax return. This regime will enter into force in 2024. The application of DTTs can potentially reduce the scope of SEPs.

### 5. Definition of Place of Effective Management ("POEM")

The rules to determine the existence of a POEM of a foreign company in Colombia have been expanded to consider the day-to-day activities in Colombia, rather than just the place where the key and decisive decisions are made. This new definition leaves room for double taxation based on residence conflicts that can be defined if a DTT applies.

### 6. Changes in the Free Trade Zone ("FTZ") regime

**Only the exports** performed by FTZ users will benefit from the preferential **20%** income tax rate. Other activities, including sales and services within Colombia, will be taxed at the general **35%** corporate income tax rate.

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## Germany



## Council of the EU reaches agreement on global minimum taxation (Pillar Two)

15 December 2022 saw the Council of the European Union reach its unanimous agreement on the "Council Directive on ensuring a global minimum level of taxation for multinational and large-scale domestic groups" in a written procedure. The unanimous agreement is necessary for the adoption of the directive on an EU level. Until recently, Hungary refused to grant consent and Poland again questioned its consent to the Directive. The formal adoption by the Council of the EU means that all 27 member states of the EU must implement the Pillar Two rules into domestic legislation during 2023 and apply the rules from 2024 onwards. The rules outlined in the Directive are in line with the OECD Model Rules on Pillar Two published in December 2021 and are only slightly amended to the EU legal framework.

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Before the adoption of the Council Directive, Germany has already begun to draft the national implementation law of Pillar Two. Thus, we expect the German draft implementation law to be published in the coming months.

## Poland



### Polish holding companies as of 2023

The regime of Polish holding companies (hereinafter: the "PHC") was first introduced into domestic legislation in 2022 as part of the extensive package of amendments to income tax acts (the so-called "Polish Deal"). As a result of the Polish CIT Act amendment, starting from 1 January 2023, the PHC regulations will be considerably improved.

The fundamental purpose to introduce PHC regulations was to increase the attractiveness of Poland as a location for setting up holding companies.

The nature of the preference is to exempt from CIT:

- › (1) the amount of dividends received by the PHC from its subsidiaries and
- › (2) the income earned by the PHC from the disposal of shares of subsidiaries – except for cases when shares are sold to a related company or the transaction regards a real estate company.

By the end of 2022, only 95% of dividends were exempt from CIT, whereas the remaining 5% were taxed at the standard 19% rate and could not be covered by the exemptions arising from the parent-subsidiary directive. As of 2023, a PHC may benefit from the exemption of the full amount of received dividends and there is no longer a requirement for the PHC to not participate in the parent-subsidiary directive exemptions.

In the amended legal framework, a PHC may be considered a limited liability company (sp. z ograniczoną odpowiedzialnością), a simple joint-stock company (prosta sp. akcyjna) or a joint-stock company (sp. akcyjna) that meets all the following conditions:

- a) It directly owns at least 10% of shares (stock) in equity of a subsidiary based on the title of ownership,
- b) It does not belong to a tax group,
- c) It is not tax-exempt under the SEZ (Special Economic Zone) regulations or the PIZ (Polish Investment Zone) regulations,
- d) It carries out a genuine business activity,
- e) Shares in that company are not held, directly or indirectly, by a person who is located or registered, or whose headquarters or management is located, in a country or territory:
  - › which is a tax haven (harmful tax competition), or
  - › which is listed by the European Council as an uncooperative tax jurisdiction, or
  - › with which the Republic of Poland has not ratified the relevant international agreement.

Furthermore, for a company to be a subsidiary of a PHC, the following conditions should be satisfied:

- a) At least 10% share capital of that company is directly owned by the PHC,
- b) The company does not hold shares or units in any investment funds or collective investment schemes, or interests in any partnerships, or interests with the right to payment as a beneficiary or founder of any foundation, trust or similar fiduciary structure or arrangement, or any similar interests.
- c) The company does not belong to a tax group.

To benefit from the PHC regime, the conditions set out in definitions of a PHC and a PHC's subsidiary ought to be fulfilled within an uninterrupted two-year period preceding the day of receipt of dividends or the disposal of shares.

As of 2023, the amended definition of a PHC's subsidiary no longer requires the subsidiary to not benefit from CIT exemption provided by SEZ or PIZ regulations.

Moreover, legislation has decided to extend the PHC regime to multi-level structures. Before the amendment, application of preference was excluded if the subsidiary held more than 5% of shares in equity of any another company.

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Bearing in mind the number and nature of the above legal conditions, the implementation of a PHC regime requires careful preparation.

## Singapore



### Tax treatment of ship pooling arrangements

Ship pooling arrangements have become more common as shipowners seek greater efficiencies in the deployment of their vessels. In advance ruling summary no. 15/2022, the Singapore tax authorities have clarified Singapore's tax treatment of cross-border ship pooling arrangements that are managed out of Singapore.

#### Background

Various foreign pool participants contributed their vessels to a shipping pool. These vessels sail between Singapore and other countries, and between places outside Singapore. Legal ownership of the vessels remains with the respective pool participants. The pool participants are beneficial owners of the pool's cash balances, i.e. income derived from the operation of their vessels.

A foreign pool management company ("company D") subcontracted the pool management services to two other related companies, a Singapore company ("company A") and another foreign company. Company A provides commercial management and administration services for the vessel pooling arrangement, including the management and administration of the flow of funds through the Singapore bank accounts of company D. Company A has employees in Singapore to perform the pool management and administration services. Those services of company A are compensated on an arm's length basis

The foreign pool participants' presence in Singapore is merely through their participation in the pool – they assume all risks and rewards incidental to the ownership of the vessels contributed/committed to the pool, but undertake no further activities with regard to the member vessels in Singapore.

#### Issues

1. Whether the pool profits (excluding interest income) remitted to the foreign pool participants from company D's Singapore bank account managed by company A are exempt from Singapore corporate income tax, including withholding tax; and

2. Whether the pool profits (excluding interest income) received by company A are exempt from income tax as qualifying shipping income under section 13A or 13E of the Income Tax Act 1947 ("ITA") where company A is a pool participant.

### **Rulings**

#### **Issue 1**

Although the foreign pool participants may have a permanent establishment in Singapore as a result of the activities/functions undertaken by company A in Singapore with regard to the pooling arrangement, there will be no further attribution of profits to such permanent establishment as long as company A has been remunerated at arm's length for its services. Withholding tax is not required on pool distributions (excluding interest income) made to the foreign pool participants. However, the tax authorities may request for Transfer Pricing documentation to demonstrate that company A has been remunerated with an arm's length fee.

#### **Issue 2**

For company A, pool distributions (excluding interest income) will be tax exempt, provided that the net income is a distribution out of qualifying income falling within the scope of section 13A or 13E of the ITA. Where applicable, company A must meet the conditions stipulated in section 13A or 13E.

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