ZEPOS & YANNOPOULOS

April 2021

International Tax Developments

The Greek angle

A. Ratification of the MLI by Greek Law 4768/2021 – a walk-through the provisions

B. OECD Updated guidance on tax treaties and the impact of the COVID-19 crisis | Greece's response

C. Guidelines for Transfer Pricing during the COVID-19 crisis

D. Court of Appeals Decisions on the taxation of online gaming operators in Greece; touching upon the concept of permanent establishment

Ratification of the MLI by Greek Law 4768/2021 – a walk-through the provisions

On 26 January 2021, Law 4768/2021 ratifying the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) was published in the Greek Government Gazette.

The MLI implements into the network of existing bilateral tax treaties the tax treaty-related measures against base erosion and profit shifting (BEPS) developed through the OECD/G20 BEPS project, without the need for bilateral re-negotiation. These measures aim to prevent **treaty abuse**, improve **dispute resolution**, prevent the artificial avoidance of **permanent establishment** status and neutralize the effects of **hybrid mismatch arrangements**.

Besides modifications to which a State may adhere per its policy, there are a number of provisions under the MLI which form part of certain **minimum standards** to which all jurisdictions have committed. These minimum standards relate to the prevention of treaty abuse (BEPS Action 6) and the improvement of dispute resolution (BEPS Action 14).

Greece has opted for the following changes brought forward by the MLI in the Double Tax Treaties (these changes shall apply only to the extent that the same will be also opted in by corresponding jurisdictions, which designated the relevant Treaties as "Covered Tax Agreements"):

Introduction of anti - treaty abuse rules

The MLI contains 6 articles to address treaty abuse. In this context, the Principal Purpose Test (PPT) is introduced in all treaties covered by the MLI, as a general measure against treaty abuse cases, including treaty-shopping situations, such as certain conduit financing arrangements that are not covered by specific anti-abuse rules. According to the PPT, if one of the principal purposes of transactions or arrangements is to obtain treaty benefits, these benefits would be denied unless it is established that granting these benefits would be in accordance with the object and purpose of the provisions of the treaty.

Dispute resolution mechanisms

Procedure to resolve differences in the interpretation of tax treaties, made more effective

Tax treaties provide a mechanism through which Contracting States may resolve differences or difficulties regarding the interpretation or application of tax treaties on a mutually-agreed basis (Mutual Administrative Procedure - MAP). Member jurisdictions have agreed through the work on BEPS Action 14 on a number of best practices in relation to the dispute resolution. The aim of the minimum standard MLI provisions on dispute resolution is to ensure that treaty obligations related to the MAP are fully implemented and in good faith, and that administrative processes promote the prevention and timely resolution of tax treaty-related disputes. In this context, the Greek Law implementing the MLI further details a number of measures adopting such best practices.

Introduction of the mandatory binding arbitration mechanism

The weakness of the MAP mechanism is that it does not require the parties to the treaty to resolve the dispute (but only to use their best efforts to do so). As a result, unresolved MAP procedures and at the same time potential 'freezing' of the domestic administrative court proceedings have ensued.

This led to the consideration for the introduction of the mandatory binding arbitration. Mandatory binding arbitration is a mechanism which, in defined circumstances, will oblige the parties to the treaty to submit unresolved issues in a MAP case to an independent and impartial decision maker – an arbitration panel. The decision reached by the arbitration panel will be binding on the parties to the treaty and thus will resolve the issues that prevented agreement in MAP cases.

Greece chose to apply Part VI introducing the mandatory binding arbitration mechanism, with a reservation however that the two-year period is replaced with a three-year period for the completion of the aforementioned procedure. Furthermore, Greece reserved its right to not initiate or terminate the above procedure in case a decision on this issue has been rendered by a court or administrative tribunal of either jurisdiction.

In addition, it is noted that Greece has opted only for independent opinion arbitration (where consideration of facts, appreciation of evidence and review of the legal position involved are expected from the arbitral panel before arriving at a reasoned decision), limiting the possibility of using the so-called "last best offer" or "baseball arbitration" (where both competent authorities are required to propose a solution to the issues and the arbitral panel is bound to choose one of the proposed resolutions as a solution to resolve the case).

In addition, Greece reserved its right to exclude from the scope of Part VI, i.e. the scope of the cases that shall be eligible for arbitration the following:

i. Cases in respect to which application has been filed under the Convention on the Elimination of Double Taxation in connection with the Adjustment of Profits of Associated Enterprises (90/436/EEC) –as amended- or any subsequent regulation.

ii. Cases involving the application of domestic anti-abuse rules.

iii. Cases concerning items of income or capital that are not taxed by a Contracting Jurisdiction because they are not included in the taxable base in that Contracting Jurisdiction or because they are subject to an exemption or zero tax rate provided under the domestic tax law of that Contracting Jurisdiction.

iv. Cases involving conduct for which the taxpayer or a person acting on behalf of the taxpayer has been found guilty by a court for tax fraud or other criminal offense.

It remains to be seen how the local tax authorities will adapt to the new dispute resolution mechanisms, considering also that until recently, the application of MAPs processes was rare and therefore the local tax authorities have not yet developed any consistent practice or view in this respect.

Capital gains from the alienation of shares or interests of entities deriving their value principally from immovable property

Greece has adhered to article 9, although reserved its right not to apply respective paragraph 1. Such article updates the special anti-abuse clause incorporated in specific Covered Tax Agreements in relation to the right to tax capital gains earned from the alienation of shares or interests of entities deriving their value principally from immovable property situated in one contracting state (property rich companies).

In specific, paragraph 4 of article 9 introduces a 365-day testing period for determining whether the shares derive more than 50% of their value directly or indirectly from immovable property and expands the scope of the provision to include the alienation of interests comparable to shares, such as interests in a partnership/trust.

What Greece has not adhered to

Equally important with what Greece had opted for remains what MLI provisions Greece has not adhered to, involving:

- the hybrid mismatch arrangements (Part II)
- the dividend transfer transactions (article 8)
- all provisions relevant to the permanent establishment status (article 10 and Part IV)
- the application of tax agreements to restrict a party's right to tax its own residents (Article 11).

The steps for implementation of the adopted provisions

Following the ratification of the MLI by virtue of Law 4768/21, Greece deposited on 30.3.2021 its instrument of ratification to the OECD. Therefore, the MLI will enter into force on 1.7.2021.

Following the entry into force, Greece has elected that the changes introduced through the MLI will have effect as to each covered agreement ("entry into effect") on taxable periods beginning on or after 1 January of the next year following the expiration of a period of six months after the latest of the two dates of the entry into force in the two contracting states. So if for example the MLI enters into force in both States on 1 July 2021, the changes shall apply in respect of taxes levied in the tax year starting 1 January 2022. If however the MLI enters into force in both States on 1 November 2021, the changes shall apply in respect of taxes levied in the tax year starting 1 January 2023.

When it comes to withholding taxes, the 6-month period does not apply. Therefore changes will have effect on taxes withheld in the calendar year which starts following the latest of the two dates of the entry into force. If for example the MLI enters into force in both States on 1 November 2021, the changes shall apply in respect of taxes withheld in the tax year starting 1 January 2022.

Upon the entry into effect of the MLI, the related covered provisions of the 57 double tax treaties between Greece and other jurisdictions will be modified accordingly, provided the same modifications have been opted in by the respective jurisdictions (Covered Tax Agreements) and the ratification procedures have been equally completed.

OECD Updated guidance on tax treaties and the impact of the COVID-19 crisis |Greece's response

On 21 January 2021, OECD issued updated guidance on the tax treaties and the impact of COVID-19, which reflects the general approach of jurisdictions and illustrates how some jurisdictions have addressed the impact of COVID-19 on the tax situations of employers and individuals.

In particular, the "Updated Guidance" deals with the application of the existing rules and the OECD Commentary on concerns related to:

1. the creation of permanent establishments (i.e. home office, dependent agent PE) and the PE qualification test relevant to construction sites;
2. changes in residence for entities and individuals and the application of tie-breaker rules; and
3. the taxation of income from employment.

Permanent establishment

As per the OECD guidance, Greece's Independent Authority for Public Revenue clarified with Decision E. 2113/2020 that:

- For the period 18 March-15 June 2020 it will not consider a non-resident entity to have a permanent establishment in Greece solely because an employee is present in Greece and performs their employment duties in Greece (i.e. their home) as a result of public health measures. The guidance follows the OECD interpretation that a **fixed place** cannot be of a purely temporary nature, but needs a degree of permanency, as well as that the employer did not require that the home be used for its business activities, but it is a result of government recommendations. For periods preceding 18 March 2020 and following 15 June 2020, it shall be assessed whether such restrictions were in place;
- For the period 18 March-15 June 2020 it will not consider an **agency permanent establishment** to have been created for a non-resident entity solely because an agent is concluding contracts in Greece (i.e. their home jurisdiction) on its behalf or is stranded in Greece, provided that such person did not habitually conclude contracts on behalf of the non-resident entity in Greece before the COVID-19 outbreak. For periods preceding 18 March 2020 and following 15 June 2020 it shall be assessed whether such restrictions were in place;
- A **construction site** on the other hand is not regarded as ceasing to exist when work is temporarily interrupted due to COVID-19 restrictions, but the time of such interruption is included in the calculation of time thresholds for construction PE.

Corporate residence

For the application of thetie-breaker rule based on the place of effective

management for the period 18 March-15 June 2020, the place of effective management of an entity will not be affected solely because the members of the team that make the key management and commercial decisions of an entity are temporarily located in a jurisdiction other than the one where the decisions are usually made, provided that such change is of temporary nature and due to exceptional circumstances. In any case, entities should maintain a record of facts and circumstances of the bona fide presence in a different jurisdiction as evidence that such presence resulted from COVID-19-related measures. For periods preceding 18 March 2020 and following 15 June 2020 it shall be assessed whether restrictions were in place.

Taxation of employment income

Payments to employees by their employers, despite restrictions to the exercise of their employment fall within the scope of Article 15 OECD Model and are attributable to the place where the employment used to be exercised before the COVID-19 outbreak.

For the application of tie-breaker rule based on the place of effective management for the period 18 March-15 June 2020, the place of effective management of an entity will not be affected solely because the members of the team that make the key management and commercial decisions of an entity are temporarily located in a jurisdiction other than the one where the decisions are usually made, provided that such change is of temporary nature and due to exceptional circumstances. In any case, entities should maintain a record of facts and circumstances of the bona fide presence in a different jurisdiction as evidence that such presence resulted from COVID-19-related measures. For periods preceding 18 March 2020 and following 15 June 2020 it shall be assessed whether restrictions were in place.

Guidelines for Transfer Pricing during the COVID-19 crisis

OECD Guidelines

On 18 December 2020, the OECD released "Guidance on the transfer pricing implications of the COVID-19 pandemic". The Guidance represents the consensus view of the 137 members of the Inclusive Framework on BEPS regarding the application of the arm's length principle and the OECD TP Guidelines to issues that may arise or be exacerbated due to the COVID-19 pandemic. The guidance is not intended to develop specialized guidance beyond what is currently addressed in the OECD TPG. It merely focuses on four priority areas, where it is considered that the practical challenges posed by COVID-19 are most significant.

The priority matters addressed are as follows:

i. It is acknowledged that the COVID-19 pandemic renders the performance of comparability analyses challenging. The Guidance underlines the need to demonstrate the effect of the pandemic on the transactions under review and provides for a range of sources of information that may be used in this respect. Data from other time periods (such

as average returns or financial information from the 2008/09 financial crisis) may not be relied upon as such. The OECD also provides for potential solutions for timing issues and information deficiencies and calls for flexibility and exercise of judgement.

ii. When considering the issue of losses and the allocation of COVID-19 specific costs, OECD emphasizes on the applicability of existing guidance on risk allocation. A general rule that "limited-risk" entities should or should not incur losses may not be established. Also, the accurately delineation of tested transactions will determine whether modifying intercompany agreements or invoking the force majeure clause can be considered to be in line with what unrelated parties under comparable circumstances would do. Finally, the Guidance recommends a three-step approach for allocating exceptional costs arising from COVID-19.

iii. The terms and conditions of government assistance programmes related to COVID-19 need to be considered when determining the potential impact of these programmes on tested transactions and when comparing their effects with those of other pre-existing assistance programmes. However, it would be contrary to the arm's length principle to assume that the mere receipt of government assistance would affect intra-group prices, without performing a careful comparability analysis. It is also highlighted that the receipt of government assistance may serve to reduce the negative impact of a risk, but should not be expected to shift the allocation of the risk. Finally, it is advisable that the receipt of government assistance is taken into account when searching for potential comparables.

iv. Taxpayers and tax authorities are encouraged to take constructive and collaborative approaches when it comes to advance pricing agreements ("APAs"). Especially for APAs under negotiation that are intended to cover FY2020, a flexible and collaborative approach to determine how to take into account the current economic conditions is warranted for all parties involved. The change in economic conditions due to the pandemic may be considered -on the basis of a case-by-case analysis- as a breach of a critical assumption of an existing APA.

Greece's guidelines

On 10 March 2021, the Greek tax administration issued a much anticipated guidance in in an effort to address transfer-pricing related issues arising or exacerbated due to the COVID-19 pandemic. Circular E.2054/2021provides useful clarifications in relation to four key areas of concern, i.e. (i) the comparability analysis, (ii) the losses and allocation of COVID-19 specific costs, (iii) government assistance programmes; and (iv) advance pricing agreements.

As a general principle, the Greek tax administration are called to accept a pragmatic documentation approach involving separate testing periods for the duration of the pandemic or for the period when certain material effects of the pandemic were most evident, if sufficient justification is provided in this respect. Among the points raised in the guidance, reference is made to the possibility to include loss-making companies in a set of comparables, as well as to substantiate that losses in "limited-risk" entities may satisfy the arm's length principle in light of the risks undertaken by such entities.

Finally, the Greek tax administration clarifies to some extent the instances under which existing APAs should be revisited, cancelled or revoked, in view of the impact of the pandemic in the critical assumptions agreed upon. Taxpayers may also seek a revision of APA requests under negotiation, and may even agree on a short period APA covering the period affected by the COVID-19 pandemic and a separate APA covering the post-COVID period.

All matters addressed or arising in the context of the circular, which follows to a great extent the relevant guidance provided by the OECD in December 2020, are to be interpreted in light of the OECD Transfer Pricing Guidelines and such December guidance.

Court of Appeals Decisions on the taxation of online gaming operators in Greece; touching upon the concept of permanent establishment

The Athens Administrative Court of Appeal, with its decisions No. 145/2021 and 146/2021, accepted the recourses of an online gaming operator established in the United Kingdom that was subject to the transitional tax regime ("interim regime") of article 50 par. 12 of Law 4002/2011 ("the Gaming Law") regarding the annulment of the assessment acts for income tax and the participation of the Greek State in the gross profits from the provision of online gaming services to players in Greece in the years 2012-2014. With these decisions, the Athens Administrative Court of Appeal validated the recourses of an EU online gaming operator contesting the taxation and the obligation to keep books and records during the interim regime.

Highlights of the decisions

For foreign online gaming operators

These decisions are landmark for the 24 EU online gaming operators that were adhered to the Interim Regime in order to be allowed to offer online gaming services to customers in the Greek market and were as a condition subjected to income taxation and Greek State's participation in their gross gaming profits since 2011 despite they did not maintain an actual or permanent establishment in Greece. The decisions reaffirmed the operators' argumentation that the Interim Regime was merely a formal obligation and could not lead to the taxation of their profits in Greece, insofar as they did not maintain an actual or permanent establishment in Greece under the applicable Double Tax Treaties between Greece and their state of establishment. It remains to be seen whether the Supreme Court will validate this view.

For permanent establishment assessments in general

These decisions have also shed light on the approach of the Greek State regarding the permanent establishment concept in the context of digital operations.

In specific, the Greek State alleged in its opinion to the Court that the online provision of betting and gambling services to Greek players through websites (domain names) in the Greek territory, in conjunction with the reporting as a permanent establishment of the address of a legal representative in Greece, makes Greece the crucial place for the creation of profits and their taxation and not a place for a simple display of its services, by analogous application of article III of the Greece UK Double Tax Treaty.

Further and foremost, the State argued that in order to interpret the permanent establishment concept, the basic principles of EU law and the OECD Model Tax Convention, as formulated in the recommendations in order to counter base erosion and profit shifting (BEPS), must be adopted. The State's approach was that national and Double Tax Treaty provisions defining the permanent establishment concept have, in view of the rapid growth of online business, lost their relevance. In this context, considering these recommendations, the State alleged that the interpretation of this concept must take into account the emerging trend in the European Union for the taxation of profits where the economic activity that generates profits takes place.

The above could serve as an indication of what could be expected by the Greek Tax Administration in the context of tax audits relating to permanent establishment assessments, despite also the fact that Greece reserved its right to not implement in its Double Tax Treaties the MLI provisions on the permanent establishment concept in specific.

For further information please contact

Maria Zoupa
Partner

m.zoupa@zeya.com

Ioanna Tapeinou
Senior Associate

i.tapeinou@zeya.com

Elina Belouli
Senior Associate

e.belouli@zeya.com

Filenia Andreadi
Associate

f.andreadi@zeya.com

Established in 1893, Zepos & Yannopoulos is one of the leading and largest Law firms in Greece providing comprehensive legal and tax services to companies conducting business in Greece.

280, Kifissias Ave., 152 32
Halandri, Athens, Greece
Tel.: (+30) 210 69 67 000
Fax: (+30) 210 69 94 640

www.zeya.com
subscribe
LinkedIn