The Panel

Mariana Eguiarte-Morett
Sanchez Devanny,
Mexico City

Ailish Finnerty
Arthur Cox,
Dublin

Joshua Odintz
Holland & Knight,
Washington DC

Ryan Rabinovitch
Fasken,
Montreal

Pieternel Verhoeven-van den Brink
NautaDutilh,
Amsterdam

Agenda

A. Introduction: Different ways of looking at tax transparency

B. What do we mean by tax transparency?

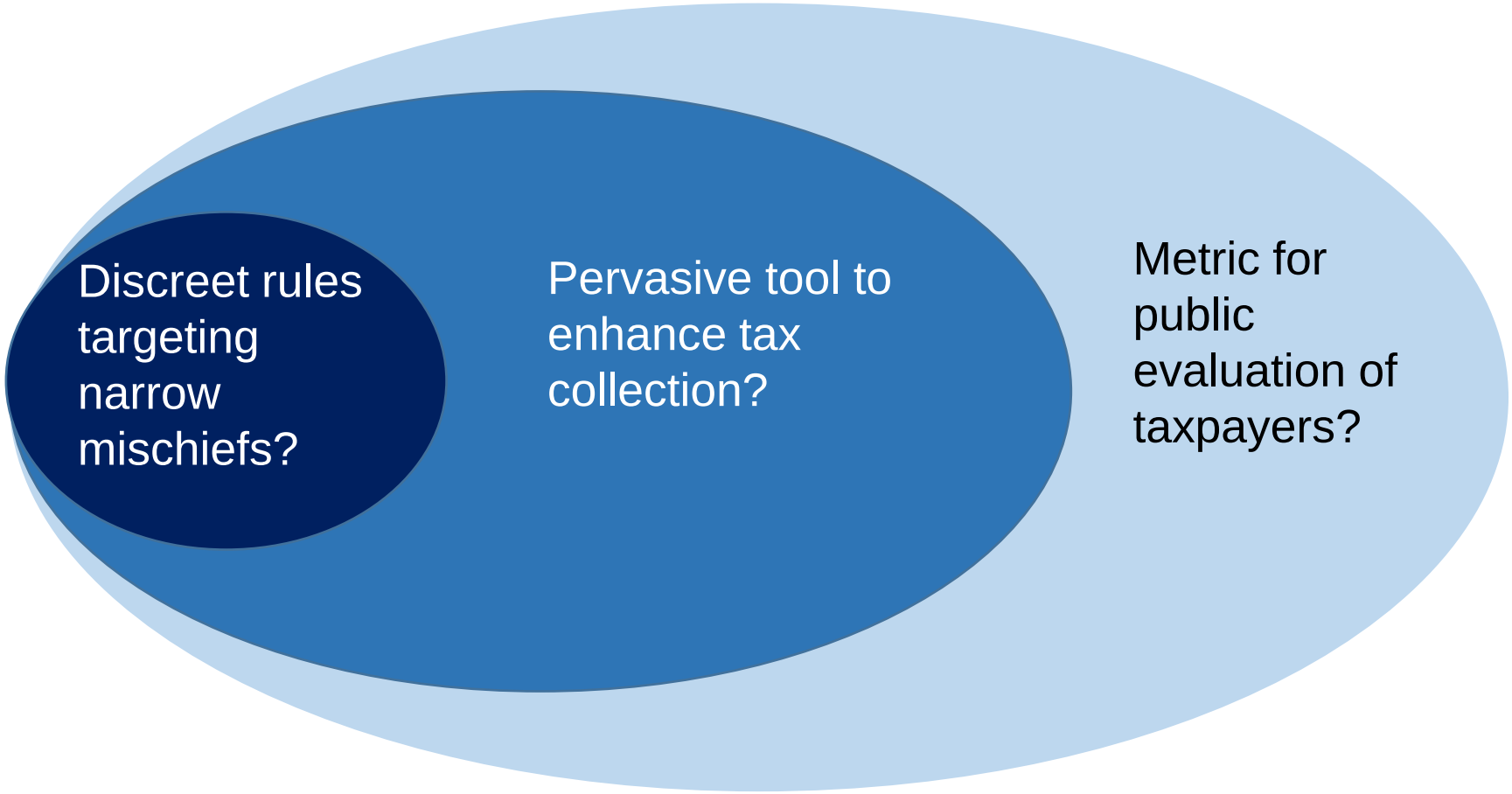
C. Identifying beneficial ownership

D. Country-by-country reporting

E. Mandatory disclosure regime

F. Q&A on trends influences

Introduction: Different ways of looking at tax transparency



A. What do we mean by tax transparency?

OECD standards

- Originally, relatively targeted focus:
  - *"Tax transparency is about putting an end to bank secrecy and tax evasion through global tax co-operation."*
  - CRS, MDR, CARF
- Increasingly wider purpose: CbCR

Legal requirements

- Some jurisdictions view as a wider tool:
  - Additional EU requirements (Public CbCR, ATAD etc.)
- But diverging approaches globally

Voluntary disclosure?

- ESG voluntary standards
- Stakeholder pressures
- Audience beyond tax authorities

B. Identifying beneficial owners: US CTA

WHY WAS IT ENACTED?

THE PROBLEM

- *Beneficial ownership information ("**BOI**") is identifying information about the individuals who directly or indirectly own or control a company*
- *Lack of US BOI reporting requirements made the US the jurisdiction of choice to establish shell companies to hide ultimate beneficial owners*
- *This weakened US efforts to combat the flow of illicit money into the US*

THE GOAL

To combat the proliferation of anonymous shell companies that facilitated the flow and sheltering of illicit money into the US

THE REMEDY

BOI reporting to counter money laundering, terrorist financing, corruption, tax fraud and other illicit activity so as to protect national security, intelligence and law enforcement interests

B. Identifying beneficial owners: US - CTA

CTA IN A "NUTSHELL"

- **Federal legislation:**
  - First ever national BOI legislation
  - Applicable to states | territories | possessions
    - Note: US defined as broader than continental US
- **Who Reports:** Entities that are "reporting companies"
- **What is Reported**: Information about Reporting Company, Beneficial Owners & Company Applicants
- **To Whom:** Financial Crimes Enforcement Network ("FinCen")
  - FinCEN will maintain centralized, secure, data base
- **Disclosure:** Non-public
  - Only to selected government agencies (domestic and foreign) & financial institutions ("FI") for customer due diligence ("CDD") and FI regulators
- **Penalties:** Civil & criminal

- **Reporting Companies:**
  - Pre 2024 companies
  - Newly-formed in 2024 and forward
  - Domestic
  - Foreign (that register w/state to do business)
- **Exclusions and Exemptions:**
  - Out of scope arrangements/entities
  - 23 Entity Exemptions
  - 5 Beneficial Owner Exclusions
- **Effective Date: January 1, 2024**

Reporting Guidance described herein promulgated by FinCEN in Final Regulations published in September 2022, supplemented by subsequent FINCEN administrative guidance

B. Identifying beneficial owners: US - CTA

WHAT WILL IT DO?

The Corporate Transparency Act will require certain entities, such as corporations, limited liability companies and other similar entities, to report identifying information about the individuals who directly or indirectly own or control a company, unless the entity is out of scope or an exemption to reporting were to apply

B. Identifying beneficial owners: Mexico - UBO

- As of January 1st, 2022, legal entities, settlor, trustees, and beneficiaries regarding Mexican trusts, and other engagement parties concerning contracts, must comply with the obligations to identify, gather, and maintain, as part of their accounting records, the reliable, complete, and updated information of its ultimate beneficial owner. Additionally, public notaries or any other person involved within the formation or execution of agreements related to the incorporation of legal entities or in the execution of Mexican trusts are also obliged to identify the UBOs and verify their identity.
- This regulation was implemented as a response of the G20 call that invited to refer to the Financial Action Task Force (FATF) on the Global Forum on Transparency and Exchange of Information for Tax Purposes.
- The non-compliance of this obligation/rule may lead to economic fines (up to USD$100k aprox.) or inability to contract with the government, among others.

- UBO are defined as the individual or group of individuals that:
  - Directly or indirectly receives benefits of his or her participation in a legal entity or trust; or ultimately, exercises the rights of use, enjoyment or disposal of an asset or service.
  - Directly or indirectly has control of a legal entity, trust, or legal vehicle.
- It is considered that an individual has control when, through the ownership of shares or titles, by contract or any other legal act, can:
  - Impose, directly or indirectly, decisions in the shareholders' meetings (or equivalent bodies) or appoint or dismiss most of the directors (or their equivalents).
  - Maintain ownership of the rights that allow them, directly or indirectly, to exercise the vote of more than 15% of the capital stock (or equivalent).
  - Manage, directly or indirectly, the administration, strategy, or main policies of the legal entity.

B. Identifying beneficial owners: EU / the Netherlands / Ireland

Europe

- A central register for beneficial owners was first included in the fourth EU Anti-Money Laundering Directive (Directive (EU) 2015/849) which entered into force on 26 June 2017.
- Corporate and other legal entities incorporated in a Member State, and trustees of any trust governed under Member State laws are required to provide information about their UBOs.
- *Beneficial owner:* any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted.
- The CJEU ruled on 22-11-2022 (ECLI:EU:C:2022:912) that making information on beneficial ownership available to the general public, with no requirement for a legitimate interest, constitutes an unjustified interference with the right to respect for family life and the right to the protection of personal data

The Netherlands

- The CJEU ruling resulted in the Dutch emergency Act which procures that only institutions responsible for the prevention of money laundering and those with a legitimate interest can have access to the UBO register. The register is no longer available to the general public.
- Discussions are ongoing regarding '*anonymity structures'* (structures intended to conceal information on personal(/family) wealth from the public) in the Netherlands.

Ireland

- Similarly in Ireland, a beneficial ownership register must be maintained by affected entities but access to view the register is restricted, in accordance with the CJEU ruling. State Bodies with responsibility for the prevention of money laundering have unrestricted access – this includes the Tax Authority who also may share it with the Tax Authority of any other member state. Others required to conduct customer AML due diligence (e.g. tax advisers, financial institutions, accountants, auditors etc) have restricted access.

B. Identifying beneficial owners: Canada – New public transparency registers

- Since June 13, 2019, every private corporations governed by the *Canada Business Corporations Act* (the "**CBCA**") must maintain and review at least annually their registers of "individuals with significant control" ("**ISC Registers**"). These include:
  - Individuals who are registered or beneficial holders of a significant number of shares of the corporation;
  - Individuals who have direct or indirect control or direction over a significant number of shares of the corporation; and
  - Individuals who have any direct or indirect influence that, if exercised, would result in control in fact of the corporation.
- As of January 22, 2024, every private corporation governed by the CBCA will be required to file (annually, within 15 days after each update of a corporation's ISC Register or on the occurrence of certain corporate events such as incorporation, amalgamation or continuance) the information contained in its ISC Register with Corporations Canada.
- A new publicly searchable Federal Register will be maintained (expected to be available in early 2024).
- It will contain the following information regarding an individual with significant control over a private corporations governed by the CBCA:
  - Their full legal name;
  - Their address for service, if it has been provided to the corporation;
  - Their residential address, if their address for service has not been provided to the corporation;
  - Dates when the individual became or ceased to be an individual with significant control; and
  - A description of how they are an individual with significant control, including, as applicable, a description of their interests and rights in respect of shares of the corporation.
- In addition to these new obligations imposed by the federal government, most of Canadian jurisdictions (apart from Alberta, Yukon, the Northwest Territories and Nunavut) have adopted legislation requiring transparency registers.
- The scope of the disclosure and transparency obligations imposed by provincial jurisdictions vary.

C. Country-by-country reporting: EU

The EU Public CbCR Directive

- The final EU Directive on public country-by-country reporting (Directive (EU) 2021/2101) has been published in December 2021 and applies, at the latest, to financial years starting on or after 22 June 2024.
- As a result, qualifying groups or undertakings will be required to publicly disclose a report containing income tax information.
- The information to be published shall consist of:
  - A brief description of activities;
  - Number of employees;
  - Net turnover;
  - Profit or loss before tax;
  - Tax accrued and paid; and
  - The amount of accumulated earnings.
- This information must be presented separately for each Member State and jurisdiction included in the EU list of non-cooperative jurisdictions but can otherwise be aggregated.

Scope

- The legislation applies to qualifying groups or undertakings, which are groups or undertaking where:
  - the *ultimate parent* is established in the EU; or
  - the group has *medium-sized or large subsidiaries or branches* in the EU (i.e. at least two of the following criteria are met on the balance sheet date: (a) balance sheet total of EUR 4,000,000; (b) net turnover of EUR 8,000,000; and (c) average number of employees during the financial year of 50).
- The Public CbCR-rules apply if the group or undertaking has a total consolidated revenue of at least EUR 750 million for two consecutive financial years, and will no longer apply if the revenue falls below this threshold for two consecutive years.

C. Country-by-country reporting: EU

EU Public CbCR Directive compared to OECD BEPS Action 13

- Goal of EU Public CbCR: to enable public scrutiny on MNEs' tax positions and promote fair tax competition.
- The EU Public CbCR Directive largely corresponds to BEPS Action 13, although there are some differences, such as:
  - The EU uses a reference period of two consecutive years, the OECD only uses a reference period of one year, meaning that EU Public CbCR obligations could apply to a year to which the OECD obligations do not and vice versa;
  - The EU allows information related to jurisdictions other than Member States or non-cooperative jurisdictions to be aggregated;
  - Stated capital and tangible assets to not need to be disclosed under EU rules.
- The EU Public CbCR Directive refers to the reporting instructions of OECD CbCR with regard to the information to be included in the report.
- *Safeguard clause*: specific information can be temporarily omitted from the public report for a maximum of 5 years.

Commentary

- Appropriate measure for non-publicly traded companies?
- Scope of information provided excessive?
- Proportionate?
- Exemption for commercially sensitive information is welcome.

C. Country-by-country reporting: Mexico

- According to the OECD [*"2017/2018 and the 2018/2019 peer reviews"*]: Mexico has fully implemented the BEPS Action 13 (CbC reporting) minimum standard.

First reporting fiscal year	Consolidated group revenue threshold	Filing deadline	Local filing required	Surrogate parent entity filing permitted
Commencing on or after 1 January 2016	MXN$12 billion	12 months following the end of the reporting fiscal year	Yes	Yes

C. Country-by-country reporting: Canada

- Since the 2018/2019 OECD *peer review*, Canada has fully implemented the BEPS Action 13 minimum standard.

First reporting fiscal year	Consolidated group revenue threshold	Filing deadline	Local filing required	Surrogate parent entity filing permitted
Commencing on or after 1 January 2016	EUR 750 million	12 months following the end of the reporting fiscal year	Yes	Yes

D. Mandatory disclosure regime: EU/the Netherlands

DAC6

- EU DAC6 has been implemented in the Netherlands in 2021 (with retro-active effect until 25 June 2018). Cross-border arrangements that meet one of the “hallmarks” must be reported.

- As an intermediary, you are responsible for reporting such arrangement. No reporting obligations exists if (i) another intermediary has already reported the arrangement and has provided you with a reference number, or (ii) you have legal professional privilege.

- Ruling of the ECJ of 8 December 2022: attorneys-at-law are no longer required to notify other intermediaries in case of the existence of a reportable cross-border arrangement due to their legal professional privilege.

D. Mandatory disclosure regime: EU

DAC7

- DAC extended in 2021 – reporting obligations on platform operators re certain sellers, incl automatic exchange of information. Aim – address tax challenges of platform economy
- Applies to platforms that allow sellers be connected with customers for the provision, for consideration, of
  - Sale of goods
  - Rental of real estate
  - Provision of personal services
  - Rental of mode of transport
- Platform operator must register with Tax Authority, whether EU or non-EU based and must collect and report information on their sellers inc. consideration paid, no of transactions, accounts into which payments made, etc.
- Tax Authority must exchange the reported information to the European Commission's Central Directory – this will commence in Feb 2024

D. Mandatory disclosure regime: EU

- OECD Model Reporting Rules for Digital Platform Operators (DPI) will allow exchange of similar information with non EU partner jurisdictions.
- OECD Crypto Asset Reporting Framework (CARF) and amended Common Reporting Standard (CRS) were agreed in 2022 requiring Crypto Asset Service Providers (CASPs) to provide details of all relevant crypto asset transactions by their users.
- A new Directive (DAC8) entered into force on 13 November 2023 and will come into effect for EU member states from 1 January 2026. It will require EU and non EU based CASPs to report all relevant crypto asset transactions where they have reportable users in the EU.

D. Mandatory disclosure regime: Ireland

- Ireland had mandatory reporting legislation for many years before DAC6, acting as back-stop to GAAR and similar anti avoidance measures.
- Purpose of mandatory reporting regimes is to provide tax authorities with an early warning system.
- Closely linked to operation of GAAR and protective notification regimes related to GAARs but GAAR has a much higher burden of proof on a Tax Authority.
- Query proportionality of measures introduced at EU level – compliance costs increasing for taxpayers but with the creation of data of questionable value to a Tax Authority.

D. Mandatory disclosure regime: US

US APPROACH: A LONG HISTORY

- IRS Form 8886 (taxpayer), IRS Form 8918 (material advisor)
- Transactions subject to reporting:
  - Listed transactions https://www.irs.gov/businesses/corporations/listed-transactions
  - Confidential transactions
  - Transactions of interest
  - Loss transactions
  - Transactions with contractual protections
- Who is required to report? Taxpayer, material advisor
- Consequences for failure to report? PENALTIES

D. Mandatory disclosure regime: Mexico

- As part of the Tax Reform of 2020 (effective as of 2021) MDR, applicable to both, taxpayers and tax advisors, where introduced within the Mexican legislation. Under the Mexican MDR's tax advisors must disclose "generalized" and "customized" (or "personalized") reportable transactions.
- In broad terms, reportable transactions/arrangements shall be deemed to be any that generates or may generate a tax benefit (i.e., reduction, elimination or temporary deferral of a taxes through deductions, exemptions, non-recognition of gain or income, adjustments or no adjustments of the taxable base, tax credits, the re-characterization of a payment or activity and a change of tax regime, among others.), either directly or indirectly. Mexican legislation provides a list of what should be understood as reportable transactions.
- A threshold of an aggregated tax benefit of more than MXN$100 million has been set. A thoroughly analysis must be conducted aimed to determine the application of the threshold.
- Transaction must be disclosed no later than 30 business days after they have been made available to the taxpayers or when the first step or legal act of the transaction plan is performed, whichever comes first.
- Tax advisors must file an informative return annually in February. The return shall include the names or corporate names, as well as tax identification numbers of taxpayers that received tax advice in connection with reportable structures.
- Non-compliance by the taxpayers may lead to: ***(i)*** loss of the tax benefits over a tax audit; and ***(ii)*** economic penalties ranging from 50 percent to 75 percent of the tax benefit. For its part, non-compliance by the tax advisors may lead to a penalty of MXN$20 million per reportable transaction not disclosed.

D. Mandatory disclosure regime: Canada

Since June 22, 2023, new disclosure rules with respect to Notifiable and Reportable Transactions are in effect in Canada:

A. Reportable transactions

- The mandatory disclosure rules in respect of reportable transactions apply when two legislated criteria are met:
  1. It can reasonably be concluded that **one of the main purposes** of entering into a transaction or series of transactions **is to obtain a tax benefit**; and
  2. A transaction or series of transactions has **at least one** of three generic hallmarks: (i) contingent fee arrangements, (ii) confidential protection or (iii) contractual protection.
- A taxpayer who enters into a reportable transaction is required to report the transaction to the Canada Revenue Agency (the "**CRA**") within 90 days of the earlier of:
  - The day the taxpayer (or the person who entered into the transaction for the benefit of the taxpayer) becomes contractually obligated to enter into the transaction; and
  - The day the taxpayer (or the person who entered into the transaction for the benefit of the taxpayer) enters into the transaction.
- "Promoters" and "advisors" (including lawyers) are required to disclose a reportable transaction.
- *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2023 BCSC 2068: injunction suspending application of rules to lawyers until constitutionally of the new rules can be ruled upon.
- Rules apply with respect to reportable transactions entered into after royal assent, *i.e.*, after June 21, 2023.

D. Mandatory disclosure regime: Canada (cont.)

B. Notifiable transactions

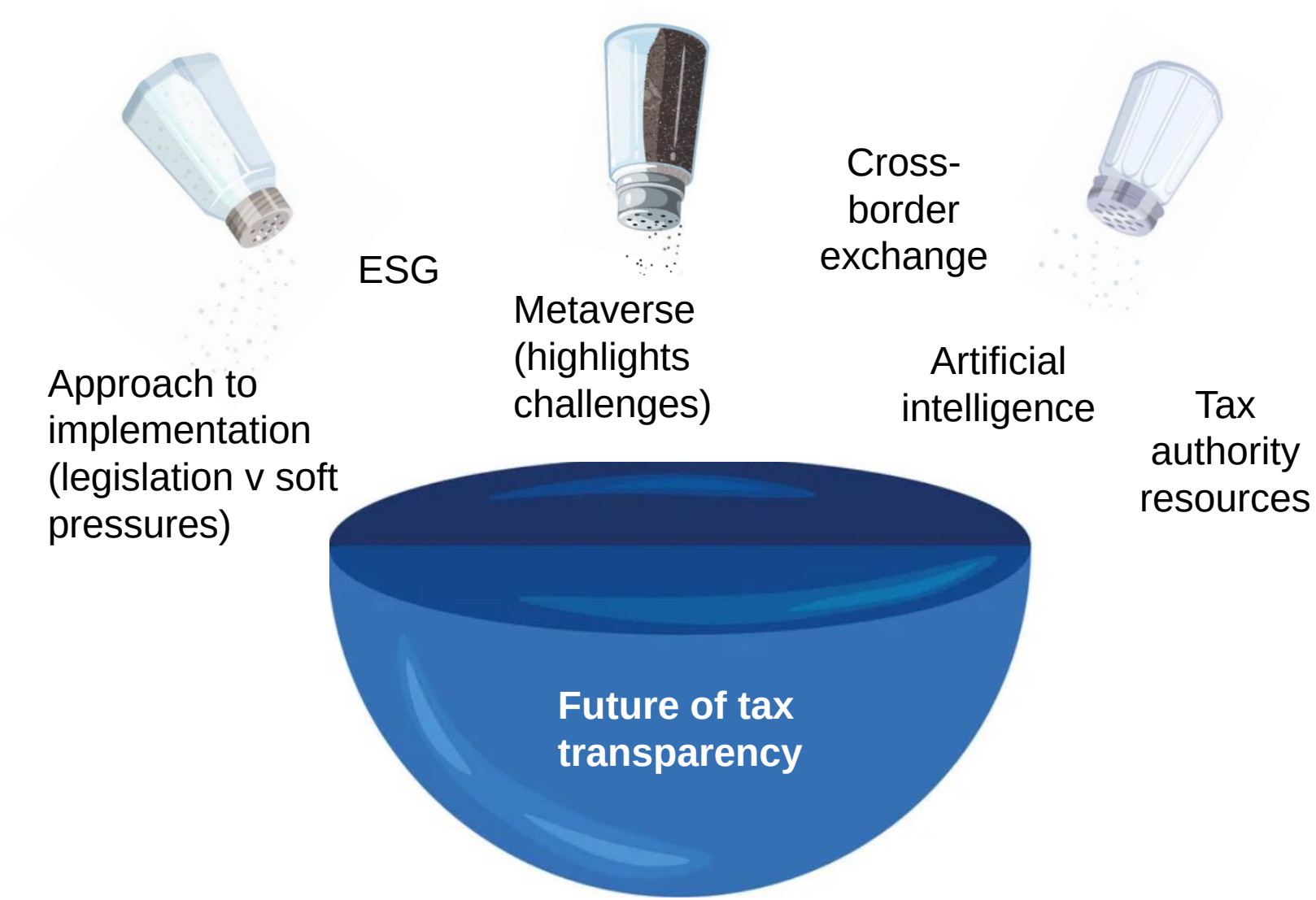
- The amended notifiable transaction rules apply to:
  1. Designated transactions: Transactions that the CRA finds abusive, and transactions identified as transactions of interest (designation is to be made with the concurrence of the Minister of Finance of Canada).
  2. A transaction or series of transactions that is the same as, or substantially similar to, a designated transaction or series of transactions. According to the Technical Notes, the phrase "substantially similar" is to be interpreted broadly in favour of disclosure, such that the purpose of the obligation to report is not frustrated by slight variations in facts, tax consequences, or tax strategy.
- The effective date of designation of the notifiable transaction will be the date of posting on the CRA website.
- As of January 4, 2023, the list of notifiable transactions posted on the CRA website is as follows:
  - Straddle loss creation transactions using a partnership;
  - Avoidance of deemed disposal of trust property (21-year rule);
  - Manipulation of bankrupt status to reduce a forgiven amount in respect of a commercial obligation;
  - Reliance on purpose tests in s. 256.1 to avoid deemed "acquisition of control" upon acquiring a 75% economic interest in a corporation; and
  - Back-to-back loan arrangements designed to circumvent Canadian thin capitalization rules.

D. Mandatory disclosure regime: Canada (cont.)

C. Reportable uncertain tax treatments ("RUTT")

- RUTT rules require specified corporate taxpayers to report particular uncertain tax treatments (tax treatment used or planned to be used in an entity's Canadian income tax filings for which there is uncertainty over whether the tax treatment will be accepted as being in accordance with tax law) to the CRA.
- A reporting corporation would generally be required to report an uncertain tax treatment in respect of a taxation year where the following conditions are met:
  1. The corporation is required to file a Canadian return of income for the taxation year. That is, the corporation is a resident of Canada or is a non-resident corporation with a taxable presence in Canada;
  2. The corporation has at least $50 million in assets at the end of the financial year that coincides with the taxation year. This threshold would apply to each individual corporation;
  3. The corporation, or a consolidated group of which the corporation is a member, has audited financial statements prepared in accordance with International Financial Reporting Standards or other country-specific Generally Accepted Accounting Principles ("**GAAP**") relevant for domestic public companies (for example, U.S. GAAP); and,
  4. Uncertainty is reflected in those audited financial statements (for example, the entity concluded it is not probable that the taxation authority will accept an uncertain tax treatment and thus, as described by the International Financial Reporting Standards Interpretations Committee, it is probable that the entity will receive or pay amounts relating to the uncertain tax treatment).
- Uncertain tax treatments are required to be reported at the same time that the reporting corporation's Canadian income tax return is due.

E. Q&A on emerging trends / influences



E. AI trends: Mexico

- In the past year, Mexican Tax Authority is starting to use AI to analyze and compare the information collected from the taxpayers aimed to detect possible discrepancies and to conduct non-binding tax audit procedures.

Data from invoice system ***vs*** Data filed within the Tax Return

- Non-binding tax audits procedures aimed to invite the taxpayer to self-correct before initiating a formal tax audit procedure
  - E-mails
  - Invitation letters.
  - *"Oficio de Vigilancia profunda"*

Pros ***vs*** Cons

The Moderator

Sandy Bhogal
Partner
Gibson Dunn,
London
+44 20 7071 4266
sbhogal@gibsondunn.com

Sandy Bhogal is a partner in the London office of Gibson, Dunn & Crutcher and a Co-Chair of the firm's Tax Practice Group.

Mr. Bhogal experience ranges from general corporate tax advice to transactional advice on matters involving M&A, corporate finance & capital markets, investment funds, structured and asset finance, insurance and real estate. He also has significant experience with corporate tax planning and transfer pricing, as well as with advising on the development of domestic and cross border tax efficient structures. He also assists clients with tax authority enquiries, wider tax risk management and multi-lateral tax controversies.

Mr. Bhogal is listed as a leading tax adviser in *Chambers* and *Legal 500*. He is also listed in the *World Tax Leaders Guides for Tax Controversy* and ranked in the *Who's Who Legal* editions of *Thought Leaders* in *Corporate Tax*.

The Panel

Mariana Eguiarte-Morett
Partner, Mexico City
Sanchez Devanny
www.sanchezdevanny.com
T: (+52 55) 5029-8500 x.8523
meguiarte@sanchezdevanny.com

Mariana is the Managing Partner for the firm's Mexico City Office. She has almost 20 years of legal experience and is admitted to law practice both in Mexico and in the State of New York, USA. Her practice is primarily focused on two fronts.

The first is advising national and multinational companies in domestic and international tax issues (inbound and outbound), including mergers and acquisitions, corporate restructurings, leveraged financing and project financing, tax aspects of compliance and diligence processes, along with interpretation and application of treaties. She has also developed a niche practice in consumption taxes, focusing on Value Added Tax and Special Goods and Services Tax.

The second, which is closely related with her tax advisory capacities described on the first front, comprises the assistance in dealing with the tax authorities (i) in the negotiation of complex tax rulings and agreements for clients to optimize and secure their tax treatment in Mexico, including international tax and transfer pricing issues (such as APAs and BAPAs), along with assisting in complex administrative procedures to obtain tax authorizations and refunds of taxes; and (ii) in tax audits and investigations aimed at eliminating or minimizing tax exposure of clients subject to audit procedures by the authorities.

Mariana has advised national and multinational clients in diverse sectors including real estate, energy, hospitality, automotive, retail, and air transportation.

The Panel

Ailish Finnerty
Partner
Arthur Cox LLP
Dublin
www.arthurcox.com
+353 1 920 1207
Ailish.Finnerty@arthurcox.com

Ailish Finnerty is a partner in the Irish law firm, Arthur Cox. Ailish specializes in corporate tax with a particular focus on tax planning for international clients doing business in and through Ireland. She acts for a broad range of domestic and international clients including financial institutions, MNCs, private equity houses and hedge funds. She advises on matters involving capital markets, investment funds and all forms of structured finance, M&A, restructurings, reorganisations and disposals. She also assists clients with tax authority enquiries and all manner of tax controversies.

Ailish is listed as a leading tax adviser in *Chambers* and *Legal 500*. She is also listed in the *Who's Who Legal* for her work in Corporate Tax.

The Panel

Joshua Odintz
Partner
Holland & Knight,
Washington DC
+1 202.469.5207
Joshua.Odintz@hklaw.com

Joshua D. Odintz is a tax attorney in Holland & Knight's Washington, D.C., office. Mr. Odintz focuses on tax policy, tax controversy and cross border tax planning. He also advises clients on domestic and international tax controversy matters at all phases, from audit and administrative appeals through litigation.

Mr. Odintz also has experience handling cases involving methods of accounting, transfer pricing, Section 199, research credit, tax accounting, privilege and work product, among others.
Mr. Odintz represents clients before the U.S. Department of the Treasury, Internal Revenue Service (IRS), U.S. Congress and the Organisation for Economic Co-operation and Development (OECD). He assists clients in seeking legislative and regulatory changes to tax laws, as well as monitoring key legislative and regulatory developments. He has successfully worked with clients to obtain changes in U.S. tax reform bills, Section 385 regulations of the Internal Revenue Code (debt/equity rules) and Foreign Account Tax Compliance Act (FATCA) regulations.

In addition, Mr. Odintz focuses on withholding tax issues, FATCA and the OECD's Common Reporting Standard (CRS). He advises domestic and foreign entities on FATCA and CRS issues, including the FATCA and CRS status of entities, reporting, documentation and FATCA withholding.
Furthermore, Mr. Odintz has extensive experience representing clients under investigation by the Congress, including the Permanent Subcommittee on Investigations (PSI). He assists clients during all phases of investigation, including responding to information and document requests, witness interviews and hearings.

Mr. Odintz is a frequent speaker at the International Fiscal Association (IFA), Tax Executives Institute (TEI), American Bar Association (ABA), the University of Chicago Tax Conference and the D.C. Bar Association.

The Panel

Ryan Rabinovitch
Partner
Fasken, Martineau DuMoulin LLP
800 Victoria Square, Suite 3500,
Montréal , Québec, Canada
H3C 0B4
+1 514 397 7422
rrabinovitch@fasken.com

Ryan Rabinovitch is a partner and Co-leader of Fasken's Montreal Tax group. Ryan's practice deals with all aspects of corporate tax planning. He has developed a particular expertise regarding cross-border taxation, M&A, private equity investments, fund formation and renewable energy.

Over the years, Ryan has held a variety of positions in the legal profession, from which he has gained broad expertise. He worked as a comparative law clerk for Mr. Aharon Barak, then the President of the Supreme Court of Israel, and served as law clerk to the Honourable Louise Arbour, then a justice of the Supreme Court of Canada.

Ryan is a membership officer for the Taxes Committee of the IBA.

The Panel

Pieternel Verhoeven-van den Brink
Partner
NautaDutilh,
Amsterdam
T: +31 20 71 71 668
M: +31 6 15 28 30 20
pieternel.vandenbrink@nautadutilh.com

Pieternel Verhoeven-van den Brink is a lawyer who specialises in tax law, advising Dutch and international clients on a number of areas such as corporate restructurings, financing transactions, share/bond issues and mergers and acquisitions.

In addition, Pieternel lectures at the University of Amsterdam.

Pieternel joined NautaDutilh in December 2015 and was named partner in 2020. In 2018 Pieternel was seconded to the NautaDutilh New York office.

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