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# Global Tax Alert

## The Latest on BEPS and Beyond

April 2020

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### EY Tax News Update: Global Edition

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### Highlights

As society adapts to the far-reaching measures adopted by our countries to fight the COVID-19 pandemic, and as we hope for a softening of the very strict measures that have kept us in our homes, changed our social lives and have joined us to the screens of our laptops in video conferences and endless email exchanges for work, governments and international organizations continue efforts to soften the economic blow, including through tax measures. Given the large number of measures undertaken, it is challenging to keep track of the COVID-19 related measures by individual governments and of the policy guidance issued by international organizations focused on best practices. For that reason, EY has developed the COVID-19 tracker, which you can find [here](#) on the EY website and which provides a worldwide overview of the measures taken. The tracker is updated on a daily basis.

With the developments unfolding on a daily basis, we are also starting to see the different phases through which the tax policy approaches in relation to the COVID-19 crisis will likely move. While the first phase, where we are now in, is about urgent responses, the next phases will be about recovery and growth. And thus, also about how governments can generate income to pay for the measures they have taken. In the communique following their meeting on 15 April, which was dedicated to the COVID-19 crisis, the Finance Ministers and Central Bank Governors of the G20 commented on the need to continue

to tackle the global challenges, notably those related to addressing the tax challenges arising from the digitalization of the economy and enhancing access to opportunities. Moreover, the OECD says in the report it prepared for this meeting: “In a post-crisis environment, it is likely that addressing the tax challenges of the digitalisation of the economy and ensuring that MNEs pay a minimum level of tax (Pillar 2) will become more prominent.” and also “While many businesses are facing unprecedented difficulties during the crisis, some may see profits rise.” ... “Companies that are able to continue, and possibly even expand, their operations during the crisis as well as those that are able to return to normal production quicker or adapt faster may earn economic rents” ... “Governments could focus on incentivising investment while strengthening the taxation of economic rents and boosting resilience.”

With that, the tax policy environment is adapting to the new COVID-19 reality. However, it is clear that also in that reality, the Inclusive Framework on BEPS project on addressing the tax challenges of the digitalization of the economy will continue to take center stage, as it - according to the OECD - will become even more prominent when looking at recovery and growth in a post-COVID-19 environment.

## OECD

On 15 April 2020, the G20 Finance Ministers and Central Bank Governors held a virtual meeting. At the end of the meeting, they issued a [communiqué](#) where they highlighted that their urgent collective priority is to overcome the COVID-19 pandemic and its intertwined health, social and economic impacts. According to the communiqué, the G20 Finance Ministers and Central Bank Governors recognize that immediate and exceptional measures have already been taken, domestically and internationally, to address the COVID-19 pandemic and its impacts. They emphasized that these efforts must continue and that they commit to use all available policy tools to support the global economy, boost confidence, maintain financial stability and prevent deep and prolonged economic effects. They also expressed their commitment to continue to tackle the global challenges, notably those related to addressing the tax challenges arising from the digitalization of the economy and enhancing access to opportunities. In light of this, the G20 Finance Ministers and Central Bank Governors developed an Action Plan in response to COVID-19 which is attached as annex in the communiqué. This Action Plan sets out the key principles and commitments to specific actions to drive forward

international economic cooperation through the COVID-19 crisis and to plan for a robust and sustained global economic recovery.

Also on 15 April, in response to the request by the Saudi G20 Presidency, the OECD presented during the virtual meeting of G20 Finance Ministers and Central Bank Governors a report named “Tax and Fiscal Policy in Response to the Coronavirus Crisis” (the [report](#)). The report takes stock of the emergency tax and fiscal policy measures introduced by countries worldwide and discusses how tax and fiscal policy can cushion the impact of continued containment and mitigation policies and subsequently support economic recovery. The report finds that governments have taken decisive action to contain and mitigate the spread of the virus and to limit the adverse impacts on their citizens and their economies. However, further and coordinated action to preserve economic capacity and protect the most vulnerable is needed. The report finds that specific support will be necessary for developing countries, including through international coordination, financial support and adaptation of tax rules that benefit all countries. According to the report, all options should be explored, including revamping old tools, introducing new ones, and bolstering ongoing efforts to address the international tax challenges posed by the digitalization of the economy. In a post-crisis environment, it is likely that addressing the tax challenges of the digitalization of the economy and ensuring that multinational enterprises (MNEs) pay a minimum level of tax (Pillar 2) will become more prominent. The report finds that the increased use of digital services and the need to collect more revenues could provide new impetus to efforts to reach agreement on Pillar 1 issues internationally.

The OECD released, on 15 April, the [public comments](#) received on the draft Model Rules for Reporting for Platform Operators with respect to Sellers in the Sharing and Gig Economy. The OECD received 19 contributions totaling 100 pages.

On 9 April 2020, the OECD released the second batch of Stage 2 peer review reports relating to the outcome of the peer monitoring of the implementation by Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden (the batch 2 jurisdictions) of the BEPS minimum standard on dispute resolution under Action 14 of the BEPS project. Stage 2 focuses on monitoring the follow-up of any recommendations that resulted from the batch 2 jurisdictions’ Stage 1 peer review reports that were released on 15 December 2017.

The outcome of the Stage 1 peer review process for the batch 2 jurisdictions was that overall, the seven jurisdictions met most of the elements of the Action 14 minimum standard with respect to dispute resolution. Where deficiencies were identified, the Stage 2 monitoring showed that the jurisdictions have worked to address them. The Stage 2 reports for the batch 2 jurisdictions conclude that the assessed jurisdictions have addressed almost all or some of the identified deficiencies.

See EY Global Tax Alert, [OECD releases second batch of Stage 2 peer review reports on dispute resolution](#), dated 14 April 2020.

On 7 April 2020, the OECD Forum on Tax Administration (FTA), in collaboration with the Intra-European Organisation of Tax Administrations and the Inter-American Center of Tax Administrations, published a reference document on critical business continuity considerations for tax administrations in the context of the COVID-19 pandemic (the [report](#)). The report provides an overview of business continuity measures that tax administrations may wish to consider in the context of the current pandemic, taking into account examples and considerations provided by tax administrations in response to a survey sent by the three organizations to their members. The purpose of the report is to assist tax administrations in their own consideration of possible domestic measures. According to the report, the objectives of business continuity plans in a pandemic will include the following: (i) maintaining the safety of staff and taxpayers; (ii) continuous provision of critical services to taxpayers and government over a prolonged period; (iii) clear and timely decision-making processes in a rapidly changing environment and uncertain future states; and (iv) clear and timely communication with taxpayers and staff. Tax administrations and other stakeholders are invited to provide comments on this document, including suggestions for additional considerations which might be taken into account and any links to publicly available business continuity plans by emailing the OECD Secretariat at [FTA@oecd.org](mailto:FTA@oecd.org). It is intended that a revised version of this document will be produced in due course.

On 6 April 2020, the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) published eight new peer review reports related to Barbados, Brunei Darussalam, Liberia, Macau, Peru, Seychelles, Switzerland and Tunisia, assessing on a second round the compliance with the international standard on transparency and exchange of information on request. The first round of assessment was undertaken during the 2010-16 timeframe.

These reports evaluate jurisdictions against the updated standard which requires beneficial ownership information of all relevant legal entities and arrangements, in line with the definition used by the Financial Action Task Force Recommendations.

The assessment results in one of four distinct overall ratings (a rating is allocated to a jurisdiction once it has undergone a full peer review): (i) compliant; (ii) largely compliant; (iii) partially compliant; or (iv) non-compliant. Three jurisdictions - Brunei Darussalam, Macau and Switzerland - received an overall rating of "Largely Compliant" for this second round of peer reviews. The overall rating of Barbados and the Seychelles was downgraded from "Largely Compliant" to "Partially Compliant." Three jurisdictions - Liberia, Peru and Tunisia - were undergoing their first full peer reviews as only their legal framework had been reviewed so far in the first round. The resulting reports rated Liberia as "Partially Compliant" while Peru and Tunisia both obtained a "Largely Compliant" rating.

On 3 April 2020, the OECD published on its website an *OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis* (the [guidance](#)).

Governments around the globe are taking increasingly stringent containment measures to slow the spread of the COVID-19 virus. As a result of these measures, many cross-border workers are unable to physically perform their duties in their country of employment. This unusual situation raises tax issues that could affect how the right to tax is divided between countries, which is governed by international tax treaty rules that delineate taxing rights.

At the request of concerned countries, the OECD Secretariat has issued guidance on these issues based on an analysis of the international tax treaty rules. The guidance deals with issues related to:

- (i) Creation of permanent establishments
- (ii) Residence status of companies (based on place of effective management)
- (iii) Treatment of cross-border workers
- (iv) Residence status of workers

In the guidance, the OECD encourages countries to work together to alleviate the unplanned tax implications and potential new burdens arising due to effects of the COVID-19 crisis.

See EY Global Tax Alert, [OECD Secretariat issues guidance on impact of the COVID-19 crisis on treaty-related issues](#), dated 10 April 2020.

On 24 March 2020, the OECD released the second peer review report (the [Report](#)) relating to the compliance by members of the Inclusive Framework on BEPS with the minimum standard on BEPS Action 6 for prevention of treaty abuse. The Report includes information available as of 30 June 2019 (the cut-off date) and covers 129 jurisdictions that were members of the Inclusive Framework by the cut-off date.

Overall, the Report concludes that the majority of the Inclusive Framework members have begun to translate their commitment to prevent treaty shopping into actions and are now in the process of modifying their treaty networks. According to the Report, the peer review results show the efficiency of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI) in implementing the treaty-related BEPS measures. The Report also notes that the MLI is by far the preferred tool of the Inclusive Framework members for implementing the BEPS Action 6 minimum standard. By the cut-off date, 91 jurisdictions had some double tax agreements that either were already compliant with the minimum standard or were subject to a complying instrument (i.e., the MLI or a protocol/treaty). Once the complying instrument takes effect, the agreements that are subject to it will come into compliance with the minimum standard.

The minimum standard on treaty shopping requires jurisdictions to include two components in their tax agreements: (i) an express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance; and (ii) one of three methods to address treaty shopping. The Report indicates that, of the three alternative methods, the vast majority of the jurisdictions have chosen to implement a Principal Purpose Test.

See EY Global Tax Alert, [OECD releases second annual peer review report on BEPS Action 6 relating to prevention of treaty abuse](#), dated 27 March 2020.

On 16-18 March 2020, the Automatic Exchange of Information Peer Review Group (APRG) held its first virtual meeting to discuss key issues in ensuring that jurisdictions are putting in place what is required to deliver an effective Automatic Exchange of Financial Account Information (AEOI) as well as how the recent developments in relation to COVID-19 might impact expectations. The APRG was recently established by the Global Forum on Transparency

and Exchange of Information for Tax Purposes to take forward its work on ensuring the effective implementation of the [Standard for AEOI](#). The APRG is now comprised of 34 Global Forum members. The meeting resulted in substantial progress being made to establish the framework to finalize the first round of peer reviews in relation to the AEOI Standard, both with respect to the legal assessments conducted over recent years and the effectiveness in practice reviews that are due to commence shortly, as well as to enhance the Global Forum's work on ensuring the information exchanged is kept confidential. This framework will be further developed by the APRG in the coming months.

On 11 March 2020, San Marino deposited its instrument of ratification, acceptance or approval of MLI. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, San Marino confirmed its MLI positions and it added the treaty with United Arab Emirates to its list of Covered Tax Agreements (CTAs). The MLI will enter into force for San Marino on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit of its instrument of ratification, i.e., on 1 July 2020.

In March 2020, the Platform for Collaboration on Tax (PTC) - a joint initiative of the International Monetary Fund, OECD, United Nations, and the World Bank Group - launched a [new integrated website](#) that provides information on how low- and middle-income countries can strengthen tax systems and mobilize the domestic revenue they need to address some of their urgent development challenges - including the COVID-19 pandemic. The new offers the latest information on the tax-related activities of the four organizations, toolkits, publications, and practical guidance on tax issues, including latest tax knowledge resources related to COVID-19 response.

## European Union

On 2 April 2020, the Court of Justice of the European Union (CJEU) issued its preliminary ruling in the case *GVC Services (Bulgaria) EOOD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' - Sofia* ([Case C-458/18](#)). The case considered the application of the European Union (EU) Parent-Subsidiary Directive (PSD) (Council Directive 2011/96/EU) to Gibraltar companies.

In its judgment, the CJEU held that companies incorporated in Gibraltar and subject to Gibraltar's corporation tax should not be considered as covered by the EU PSD. Accordingly,

EU Member States are not required to extend the dividend withholding tax exemption to Gibraltar parent companies, based on the provisions of the directive.

See EY Global Tax Alert, [CJEU rules on application of Parent-Subsidiary Directive to Gibraltar](#), dated 9 April 2020.

On 23 March 2020, the Economic and Financial Affairs Council (ECOFIN) held a teleconference where they discussed the impact of the COVID-19 crisis. Ministers discussed the flexibility of the Stability and Growth Pact and agreed with the assessment of the Commission that the conditions for the use of the general escape clause of the EU fiscal framework have been fulfilled. The use of the clause will ensure the needed flexibility to take all necessary measures for supporting the health and civil protection systems and to protect the economies of the Member States. Ministers also exchanged views on the economic impact of the COVID-19 crisis and the various measures adopted both at national and European level to address it. The European Commission presented an assessment of the situation and its recent measures, including its temporary framework for State aid measures.

On 19 March 2020, the European Commission adopted a new State aid [Temporary Framework](#) to support the economy in the context of the coronavirus outbreak. The State aid Temporary Framework enables Member States to use the full flexibility foreseen under State aid rules to support the economy, while limiting negative consequences to the level playing field in the Single Market. On 3 April, the Commission [amended](#) the State aid Temporary Framework to enable Member States to accelerate the research, testing and production of coronavirus relevant products, to protect jobs and to further support the economy in the context of the coronavirus outbreak. Since its adoption, the Commission has approved under the State aid Temporary Framework a number of schemes aimed at supporting the economy of the Member States and the United Kingdom in the context of the COVID-19 outbreak. The full list can be accessed [here](#).

## African Tax Administration Forum

On 8 April 2020, the African Tax Administration Forum (ATAF) published a Suggested COVID-19 Measures for Revenue Authorities guide (the [report](#)). The report provides general suggestions on what African tax jurisdictions can consider in their development of measures to protect the health of their staff and taxpayers during the COVID-19 crisis. The report mentions that Revenue Authorities should

adopt measures that are applicable in their jurisdictions with considerations given to the peculiarities of their tax system, political and economic environment. In the context of tax measures, the report suggests among others, temporary reduction of the tax rates, extension of filing deadlines, suspension of penalties and interest, and value-added tax exemption or zero rating for essential goods. Some African jurisdictions, such as Kenya, Nigeria, Mauritius and South Africa have already taken some of these actions and according to the report it is expected that more jurisdictions will follow as the COVID-19 crises evolves.

## France

In October 2019, the French Tax Code (FTC) was supplemented with Articles 1649 AD to 1649 AH, implementing the EU Directive 2018/822 of 25 May 2018 on the mandatory disclosure and automatic exchange of cross-border tax arrangements (referred to as DAC6 or the Directive).

On 9 March 2020, the French Tax Authorities (FTA) published official detailed draft guidance (the official tax guidelines or draft guidance) regarding the interpretation of the French Mandatory Disclosure Rules (MDR). The draft guidance is subject to public consultation until 30 April 2020 but may be relied upon until the final guidance is issued. The draft guidance provides some clarity on the definitions of the terms of the Directive and sets out how the FTA anticipate the reporting process to operate. It also provides some details regarding the information to be reported, although more details are expected to be provided in a decree that will be published shortly.

Additional draft guidance, dedicated to hallmarks, will be published at a later stage, which will also be subject to a public consultation.

See EY Global Tax alert, [France publishes official tax guidelines on Mandatory Disclosure Rules](#), dated 17 March 2020.

## Germany

On 9 April 2020, the OECD released the Stage 2 peer review report of Germany relating to the outcome of the peer monitoring of the implementation of the BEPS minimum standard under Action 14 on improving tax dispute resolution mechanisms. Stage 2 focuses on monitoring the follow-up of any recommendations resulting from Germany's stage 1 peer review report.

Overall, the report concludes that Germany addressed almost all the shortcomings identified in its Stage 1 peer review report.

See EY Global Tax Alert, [OECD releases Germany Stage 2 peer review report on implementation of Action 14 minimum standard](#), dated 15 April 2020.

## Hong Kong

In March 2020, Hong Kong's Inland Revenue Department (IRD) issued a revised practice note (Revised DIPN 39) which indicates that a non-Hong Kong resident enterprise which maintains only a server in Hong Kong, without the involvement of human activities in Hong Kong, is now exposed to tax in Hong Kong. This change in position appears to be a result of the recent change to the definition of "permanent establishment" (PE) in the Inland Revenue Ordinance and to a change in the IRD's application of the source principles to this situation.

Revised DIPN 39 outlines that a non-Hong Kong resident corporation, which has no employees or office in Hong Kong and only has a datacenter or server "at its disposal" in Hong Kong, would be subject to tax in Hong Kong. The IRD's position is that certain profits must be apportioned and attributed to such a server PE. However, a website of a non-Hong Kong resident enterprise which is hosted on a server located in Hong Kong that is owned by a third-party internet service provider may not give rise to a tax exposure. This is because, under such a hosting arrangement, the server may not be regarded as being "at the disposal" of the enterprise.

See EY Global Tax Alert, [Hong Kong Tax Authority indicates a server in Hong Kong may constitute a permanent establishment](#), dated 10 April 2020.

## India

On 27 March 2020, India's Union Budget for tax year 2020-21 was enacted (*Finance Act 2020*). Among others, the *Finance Act 2020* includes the following key amendments: (i) abolishing the levy of dividend distribution tax on Indian companies distributing dividends and replacing it with taxation of dividends in the hands of the shareholders (i.e., as per domestic law or double tax treaty whichever is more beneficial); (ii) extending the scope of Equalization Levy to nonresident "e-commerce operators" from "e-commerce supply or services" to Indian residents and certain nonresidents; (iii) extending the applicability of the

5% withholding tax rate on interest paid by Indian companies on certain eligible loans and debt instruments borrowed until 30 June 2023; (iv) imposing a 1% withholding tax on payments made by an e-commerce operator to resident e-commerce participants for the sale of goods or provision of services facilitated through its digital or electronic facility or platform, effective 1 October 2020; (v) deferring, until 1 April 2021, the application of domestic rules that would tax companies with a "significant economic presence" in India; and (vi) broadening the definition of royalties to include income from the sale, distribution or exhibition of cinematographic films.

See EY Global Tax Alert, [India enacts 2020-21 Union Budget](#), dated 8 April 2020.

## Japan

On 27 March 2020, Japan's 2020 tax reform bill (the Bill) was enacted following passage of the Bill by the Japanese Diet. The Bill generally follows the tax reform outline (the Outline) announced by Japan's coalition leading parties in December 2019. The amendments generally apply to taxable years beginning on or after 1 April 2020 unless otherwise specified.

In light of the Government's increasing scrutiny on aggressive international tax planning, the Bill includes an anti-avoidance measure for dividends and capital losses. Under the new measure, a parent company's tax basis in the shares of a subsidiary will be reduced if the parent company receives dividends from the subsidiary exceeding 10% of the tax basis of the subsidiary, by the amount of the dividends that are subject to the domestic or foreign dividend received deduction (DRD). It is thought that this anti-avoidance measure was proposed to address tax losses created by a parent company, by way of the payment of a dividend from a subsidiary to a parent prior to the transfer of the subsidiary (where the dividend is subject to the DRD). Certain exemptions are available.

Although the Bill does not contain any specific measures associated with the recent BEPS development, under the introductory section of the Outline, the Government confirmed their proactive participation on the on-going OECD discussion to support economic growth and globalization of the businesses.

See EY Global Tax Alert, [Japan enacts 2020 tax reform bill](#), dated 30 March 2020.

## Luxembourg

On 9 April 2020, the OECD released the Stage 2 peer review report of Luxembourg relating to the outcome of the peer monitoring of the implementation of the BEPS minimum standard under Action 14 on improving tax dispute resolution mechanisms. Stage 2 focuses on monitoring the follow-up of any recommendations resulting from Luxembourg's Stage 1 peer review report. Luxembourg requested that the OECD also provide feedback concerning their adoption of the Action 14 best practices, and therefore, in addition to the peer review report, the OECD has released an accompanying document addressing the implementation of best practices.

The outcome of the Stage 1 peer review process was that overall Luxembourg met most of the elements of the Action 14 minimum standard. Where deficiencies were identified, Luxembourg worked to address them, which has been monitored in Stage 2 of the process. In this respect, Luxembourg has addressed almost all identified deficiencies.

See EY Global Tax Alert, [OECD releases Luxembourg Stage 2 peer review report on implementation of Action 14 minimum standard](#), dated 15 April 2020.

On 31 March 2020, a draft law was submitted to the Luxembourg Parliament aimed at disallowing, under certain circumstances, the deduction of interest and royalties paid or owed by Luxembourg corporate taxpayers to associated enterprises that are corporations established in a country listed on the EU list of non-cooperative jurisdictions for tax purposes (the EU List).

This constitutes a first step by Luxembourg to implement legislative defensive measures in taxation vis-à-vis the listed jurisdictions in line with the guidance provided by the EU Code of Conduct Group for Business Taxation (COCG) in its progress report which was endorsed by ECOFIN on 5 December 2019. The new provisions are expected to apply as from 1 January 2021. The key highlights are as follows:

- ▶ The draft law provides for a specific definition of the concepts of "interest" and "royalties" for the application of the measure which are largely aligned to the EU Interest and Royalties Directive and the OECD Model Tax Convention.
- ▶ A safe harbor rule is provided in cases where the taxpayer proves that the interest or royalties are incurred (or paid) in the context of a transaction entered into for valid economic reasons which reflect the economic reality.

- ▶ The draft law also sets forth the criteria for drawing-up the initial version of the EU List and for updating it subsequently to take account of the fact that this list is constantly evolving.
- ▶ Finally, the comments to the draft law highlight that the reporting requirements, as per Circular L.G. - A n°64, in relation to transactions of Luxembourg companies with related enterprises located in jurisdictions that are included in Annex I of the EU List will continue to apply.

See EY Global Tax alert, [Luxembourg limits deduction of certain payments made to countries on the EU list of non-cooperative jurisdictions](#), dated 1 April 2020.

On 21 March 2020, the Luxembourg Parliament approved the draft law implementing the EU Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive).

Under DAC6, taxpayers and intermediaries are required to report cross-border reportable arrangements from 1 July 2020. However, reports will retrospectively cover arrangements where the first step is implemented between 25 June 2018 and 1 July 2020 (the transitional period). The deadline for the first reporting for the transitional period is 31 August 2020.

The final Luxembourg MDR legislation is broadly aligned to the requirements of the Directive.

The Luxembourg final legislation (the Law) is mostly in line with the draft legislation published in August 2019, except for the provisions which concern the reporting exemption based on legal professional privilege. These amendments have been made to address the formal oppositions that were raised by the Luxembourg State Council.

The Law will be effective from 1 July 2020.

See EY Global Tax alert, [Luxembourg passes Law to implement Mandatory Disclosure Rules](#), dated 24 March 2020.

## Oman

On 31 March 2020, Oman ratified the MLI by way of Royal Decree 43/2020. Oman submitted its provisional MLI positions at the time of signature, listing its reservations and notifications as well as the CTAs it wishes to be covered by the MLI (currently 34 CTAs). The instrument of ratification still needs to be deposited before the MLI will enter into

force with respect to its CTAs. A definitive list of reservations and notifications will also need to be provided upon the depositing the instrument of ratification.

## Russia

On 2 March 2020, the Ministry of Finance (MoF) issued "Guidance Letter no. 03-03-06/1/7868" (the Guidance) regarding the transfer pricing (TP) methods to be used to determine the charges on intra-group services provided to a Russian company by another member of an MNE group.

The MoF explained that the expenses may be deducted for corporate income tax purposes if they are economically justified, documented and are incurred for carrying out business activities aimed at income generation.

In reference to paragraphs 7.6 and 7.19 of the OECD - Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2017), the Guidance establishes that, under the arm's-length principle, the question whether an intra-group service has been rendered when an activity is performed for one or more group members by another group member should depend on whether the activity provides a respective group member with economic or commercial value to enhance or maintain its business position. This can be determined by considering whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by an independent enterprise.

Once it is determined that an intra-group service has been rendered, it is necessary to determine whether the amount of the charge is in accordance with the arm's-length principle and whether a direct method or an indirect method may be applied.

## South Africa

On 26 February 2020, South Africa's Minister of Finance, Tito Mboweni, delivered his 2020 Budget Review (the Budget). Among others, the Budget includes proposals for strengthening the existing interest limitations rules which will limit the net interest deduction to 30% of tax EBITDA (earnings before interest tax depreciation and amortization) for years of assessment commencing on or after 1 January 2021.

See EY Global Tax Alert, [South Africa's Minister of Finance delivers 2020 Budget Review](#), dated 28 February 2020.

On the same date, the National Treasury released a draft discussion document on the proposed rules for public consultation until 17 April 2020. Interested parties were able to submit their written comments on the draft discussion paper to [hayley.reynolds@treasury.gov.za](mailto:hayley.reynolds@treasury.gov.za). Among others, the Government proposes the following in the discussion document: (i) the interest limitation rules would apply to total net interest expense and equivalent payments; (ii) the rules would apply to all entities operating in South Africa that are part of a foreign or South African multinational group; (iii) if a taxpayer is not able to fully deduct an interest expense in a year of assessment, the excess amount may be carried forward up to five years; (iv) a *de minimis* rule would be included between ZAR2 million and ZAR5 million; (v) transitional measures will be considered for third-party loans; and (vi) the interest limitation rules should apply to net interest expense that has already passed the arm's-length test according to transfer pricing rules.

## Ukraine

On 29 January 2020, the Ministry of Digital Transformation released a document for public consultation that proposes to introduce an Intellectual Property Box (IP Box) regime for companies that derive income from the use of IP rights in line with the BEPS Action 5 minimum standard. This regime will allow companies to deduct an amount up to 80% of their gross IP income from their taxable basis. The residual 20% will be taxable at a rate of 18% (i.e., the statutory corporate income tax rate).

The IP Box regime will apply to companies that are performing research and development activities in Ukraine where the income is received from the use of IP (i.e., from the use of patents, industrial designs, utility models, software, and trade secrets).

## United States

The United States (US) Internal Revenue Service (IRS) Advance Pricing and Mutual Agreement (APMA) Program issued the 21st annual Advance Pricing Agreement (APA) report (the Report) on 25 March 2020, in Announcement 2020-2. The Report provides a discussion of the APMA Program, including its activities and structure for calendar year 2019, and gives useful insights into its operation.



The number of APA filings decreased, with taxpayers filing 121 APA requests in 2019 compared to 203 in 2018. This decrease is not surprising given that APMA substantially increased the user fees charged to companies applying for an APA starting after 2018. The total number of APAs concluded increased from 107 to 120 and the median amount of time to finalize an APA slightly decreased from 40.2 months to 38.8 months.

See EY Global Tax Alert, [US IRS issues annual APA report for 2019](#), dated 9 April 2020.

In final regulations ([TD 9896](#)), the IRS and the Treasury Department have implemented hybrid mismatch rules under Internal Revenue Code Sections 267A and 245A(e) and rules for dual consolidated losses (DCLs) and entity classifications (the "Final Regulations"). Sections 267A and 245A(e) were enacted under the *Tax Cuts and Jobs Act* (TCJA) and are aimed at certain hybrid arrangements, with Section 267A denying deductions for certain hybrid arrangements and Section 245A(e) denying a dividends-received deduction for certain hybrid dividends.

In accompanying proposed regulations ([REG-106013-19](#)), the IRS and the Treasury Department provide guidance on hybrid deduction accounts (HDAs) under Section 245A(e), conduit-financing rules involving equity interests, and the treatment of certain payments under the Global Intangible Low-Taxed Income (GILTI) provisions (the Proposed Regulations).

The Final Regulations generally adopt with some changes the proposed regulations under Sections 267A and 245A(e), and the DCL rules issued in December 2018 (the 2018 Proposed Regulations). The Final Regulations under Section 267 are generally effective for tax years ending on or after 20 December 2018. The Final Regulations under Section 245A(e) apply to distributions made after 31 December 2017, provided those distributions occur during tax years ending on or after 20 December 2018. For both Sections 267A and 245A(e), taxpayers may either apply the Final Regulations or the 2018 Proposed Regulations to earlier periods but must apply either set of regulations in their entirety. The Final Regulations under both Sections also have special effective dates for certain rules.

The Proposed Regulations would expand the conduit financing regulations under Treas. Reg. 1.881-3 to treat certain instruments characterized as equity for US tax purposes, but as debt for foreign law purposes, as a financing transaction that can result in a conduit financing arrangement. The Proposed Regulations would apply to payments made on or after the date that final regulations are published.

See EY Tax Alert, [Final and proposed regulations on hybrid mismatches, DCLs and conduit financing provide more certainty but some surprises](#), dated 13 April 2020.

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