12 March 2018

Global Tax Alert

The Latest on BEPS – 12 March 2018

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OECD

On 12 March 2018, the OECD released the third batch of peer review reports relating to the implementation by the Czech Republic, Demark, Finland, Korea, Norway, Poland, Singapore, and Spain of the BEPS Minimum Standards on Action 14 on improving tax dispute resolution mechanisms. Denmark, Poland and Singapore also requested that the OECD provide feedback concerning their adoption of the Action 14 best practices, and therefore, the OECD has also released three accompanying best practices reports.

Overall the reports conclude that these jurisdictions meet most of the elements of the Action 14 Minimum Standards. In the next stage of the peer review process, each jurisdiction's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored.

Also, on the same day the OECD announced that it is now gathering input on the implementation of the BEPS Action 14 Minimum Standards in the fifth batch of jurisdictions (Estonia, Greece, Hungary, Iceland, Romania, Slovak Republic, Slovenia and Turkey) and has invited taxpayers to submit their input related to their experiences in these jurisdictions, via an electronic questionnaire, by 9 April 2018.

On 6 March 2018, Anguilla joined the BEPS Inclusive Framework bringing to 113 the total Members in the framework. As a new BEPS Member, Anguilla committed to comply with the BEPS Minimum Standards, which are contained in Action 5 (countering harmful tax practices), Action 6 (preventing treaty abuse), Action 13 (transfer pricing documentation) and Action 14 (enhancing dispute resolution). Anguilla will also participate on an equal footing with the rest of BEPS members on the remaining standard setting under the BEPS project, as well as the review and monitoring of the implementation of the BEPS package.

Building a better working world

European Union

On 21 February 2018, the European Union's (EU's) Committee on Economic and Monetary Affairs (ECON) presented and approved two proposals for measures embracing digital presence on the Common Consolidated Corporate Tax Base (CCCTB) and Common Corporate Tax Base (CCTB). The proposals include benchmarks to determine whether a firm has a "digital presence" within an EU Member State which might make it liable for tax even if it does not have a fixed place of business in that country. However, it should be noted that this ECON agreement is a mere political agreement which has no binding power on direct tax matters. The ECON also urged the EU Commission to monitor technical standards for the number of users, digital contracts and the volume of digital content collected which a company exploits for data-mining purposes. Taxable profits would then be allocated to each Member State where the firm operates according to a sharing formula based on sales, assets, and labor, as well as their use of personal data. A single set of tax rules would apply in all Member States and firms would be accountable to a single tax administration (a one-stop shop).

On 19 December 2017, the EU Presidency released a state of play document containing the Presidency's compromise proposal on public Country-by-Country (CbC) reporting to take stock of the work undertaken with the help of delegations at the working party level during the meetings on 20 September, 11 October and 14 November 2017. The released document includes changes to the Commission Proposal of 12 April 2016 and to the Presidency's compromise text of 22 June 2017. (For further background information, see EY Global Tax Alert, *European Parliament votes in favor of public Country-by-Country reporting in first reading*, dated 7 July 2017).

The compromise proposal introduces sub-reporting requirements for entities within the group if the sum of their revenues as reflected on their financial statements exceeds €750 million for each of the last two consecutive financial years. Furthermore, in certain cases where it is seriously prejudicial to the commercial position of an undertaking, the compromise proposal gives the right to undertakings to defer disclosing certain information for up to four years, provided they clearly disclose the deferral and provide a reasoned explanation for it in the report.

Australia

On 7 March 2018, Australia's Treasurer released a revised Exposure Draft, Treasury Laws Amendment (OECD Hybrid Mismatch Rules) Bill 2018 (the Revised Exposure Draft), for public consultation. The Bill will implement the OECD's October 2015 Report on BEPS Action 2 – Countering the effects of Hybrid Mismatch Arrangements.

The Revised Exposure Draft contains certain measures announced but not included in the first exposure draft which was released on 24 November 2017, namely the additional Australian integrity rules and branch hybrid mismatch rules. Consultation on the Revised Exposure Draft will close on 4 April 2018.

See EY Global Tax Alert, *Australia releases revised exposure draft on hybrid mismatch tax rules including integrity and branch measures for public consultation*, dated 8 March 2018.

On 7 February 2018, the Australian Taxation Office (ATO) released for public consultation a draft practical compliance guideline PCG 2018/D2 (the draft PCG) relating to aspects of Australia's Diverted Profits Tax (DPT). The due date for submission on the draft PCG closed on 9 March 2018.

The draft PCG is important for multinational businesses as it is intended to:

- Assist taxpayer actions depending on how the ATO will perceive the DPT risk of the arrangement, including the ATO "products" available to potentially provide further certainty.
- Outline likely ATO actions based on ATO assessment of DPT risk.
- Explain the ATO approach to the DPT sufficient economic substance (SES) test, with 10 scenarios to illustrate SES higher risk and lower risk outcomes.

The draft PCG is not a complete guide to the DPT and compliance aspects. It is intended to complement the following ATO publications, which were both released on 18 December 2017:

- Draft Law Companion Guide (LCG 2017/D7) to the DPT, which was open for consultation through to 16 February 2018
- Practice Statement (PSLA 2017/2) which outlines the internal ATO processes for proposing and raising DPT assessments

See EY Global Tax Alert, *Australian Taxation Office releases draft practical compliance guide on diverted profits tax*, dated 7 February 2018.

Colombia

On 16 January 2018, Colombia's Ministry of Finance and Public Credit released Form 120, which is a specific transfer pricing documentation form. Among other things, Form 120 contains a section wherein Colombia constituent entities can notify the Colombia tax authority about the identity and country of residence of the reporting entity of the multinational enterprise (MNE) group for CbC purposes. Form 120 is due in September, depending on the last digit of the Taxpayer Identification Number.

See EY Global Tax Alert, *Colombia releases transfer pricing information statement for tax year 2017*, dated 9 February 2018.

Hong Kong

On 5 March 2018, the Hong Kong Inland Revenue Department launched the CbC Reporting Portal (the Portal) to facilitate CbC reporting. The Portal enables Hong Kong constituent entities to submit notifications, filing of reports and related communications. Hong Kong Ultimate Parent Entities (UPEs) of MNE groups subject to CbC reporting can now voluntarily file CbC reports for reporting fiscal years 2016 and 2017 (i.e., accounting periods beginning between 1 January 2016 and 31 December 2017) via the Portal.

Italy

On 21 February 2018, the Italian Ministry of Economy and Finance launched a public consultation on the implementation of new domestic transfer pricing measures. As part of the consultation, the following draft documents (TP Package) were issued:

- Draft of the Ministerial Decree (the Draft Decree) based on the revised wording of Art. 110, Par. 7, of Presidential Decree n. 917 of 1986 (TUIR), as amended by Art. 59 of the Law Decree n. 50/2017 to clarify certain transfer pricing issues that may give rise to controversial interpretation in the context of a tax audit, including the definition of ownership required to be considered "associated enterprises," a guidance to define comparability based on the five comparability criteria provided by the OECD Transfer Pricing Guidelines, criteria to identify the transfer pricing methods available and selection of the most appropriate method, the possibility to analyze different transactions jointly (e.g., portfolio approach) and the definition of the arm's-length range.
- Draft of the Commissioner of Revenue Agency Paper (the Draft Paper) provided for by Art. 31-quater of Presidential Decree n. 600 of 1973 regarding the newly introduced procedure allowing Italian taxpayers to obtain a unilateral downward adjustment on their taxable income as a result of a transfer pricing adjustment made by foreign tax authorities as opposed to initiating the ordinary mutual agreement procedure (MAP). The main purpose of the Draft Paper is to eliminate the double taxation arising from a foreign transfer pricing adjustment provided that this is final in its quantification and consistent with the arm's-length principle.
- An Italian translation of the relevant sections of the 2017 OECD's Transfer Pricing Guidelines.

Until 21 March 2018, the Italian business community can provide comments on the TP package before the final documents are issued.

See EY Global Tax Alert, *Italy launches public consultation regarding implementation measures for transfer pricing provisions*, dated 2 March 2018.

Japan

On 23 February 2018, the Japanese tax authorities published modifications to the Commissioner's Directive on the Operation of Transfer Pricing (the publication is dated 16 February 2018 on the Japanese tax authorities' website). Pursuant to the suggestion of an elective, simplified approach for low value-adding services by BEPS Actions 8-10 final report and the relevant update on the Transfer Pricing Guidelines, the updated Directive includes a simplified 5% mark-up approach for low value-adding services. The Directive clarifies situations where the simplified approach can be used. For example, the Directive states that, in the course of providing low value-adding services, intangibles must not be used, significant risk must not be assumed and the services must not be research and development, manufacturing, sales, logistics, marketing, finance, insurance or mining/processing of natural resources, etc. The updated Directive also clarifies the scope of intra-group services and procedures for Advance Pricing Agreements.

Mauritius

On 19 February 2018, the Mauritian Minister of Finance and Economic Development issued the Income Tax (Country-by-Country Reporting) Regulations (The CbCR Regulations). The

CbCR Regulations apply to MNE groups that have consolidated group revenue of €750 million or more that have two or more enterprises that are tax residents in different jurisdictions. The CbCR Regulations are effective for Reporting Fiscal Years of MNE groups beginning on or after 1 July 2018 and require Mauritian tax resident UPEs to submit a CbC report no later than 12 months after the end of the Reporting Fiscal Year. Additionally, the CbCR Regulations include a secondary CbCR filing obligation which require a Mauritian tax resident entity that is not the UPE of the MNE group to file a CbC report because the UPE is resident in a jurisdiction that: (1) does not require the filing of CbC reports, (2) does not have Qualifying Competent Authority Agreement (QCAA) with Mauritius, or (3) has a systemic failure. The secondary CbCR filing obligation would not apply where a surrogate parent entity (SPE) files a CbC report in a jurisdiction that has CbCR rules, a QCAA with Mauritius, and the constituent entity in Mauritius has made the relevant notification. Any constituent entity that is tax resident in Mauritius is required to give written notice to the Mauritius Revenue Authority of whether it is a UPE/SPE or the identity and tax residence of the Reporting Entity by no later than 12 months from the end of the Reporting Fiscal Year. Failure to comply with the CbCR Regulations shall on conviction entail a fine not exceeding MUR5,000 and imprisonment for a term not exceeding six months.

Netherlands

On 23 February 2018, following last year's Policy Paper published by the Dutch Government, outlining its envisaged policies for the next four years, the Dutch Ministry of Finance, released its fiscal policy agenda (the Agenda). The Agenda elaborates on the various tax changes that were already announced in the Policy Paper, and the timing thereof.

Two top priorities of the Agenda are to ensure that the Netherlands continues to offer a competitive tax investment climate for companies, while it also seeks to implement certain anti-tax avoidance measures in line with the OECD and EU recommendations, which includes the Anti-Tax Avoidance Directive (ATAD) and the EU blacklist for non-cooperative countries. As such, some of the key items included in the Agenda are:

- The Agenda confirms that the current standard Dutch corporate income tax rate will be reduced from 25% to 24% in 2019, to 22.5% in 2020 and to 21% as from 2021 (while the reduced rate for profits up to an amount of €200,000 will gradually decrease to 16%).
- Pursuant to the Agenda, the Dutch dividend withholding tax will be abolished as of 1 January 2020. At the same time a conditional dividend withholding tax will be introduced that only applies to dividend distributions to related companies tax resident in a jurisdiction with a low tax rate, or a jurisdiction listed on the EU blacklist for non-cooperative countries. As anticipated, the Agenda confirms that the earnings stripping rule of the ATAD will be implemented as from 1 January 2019.
- Controlled foreign company (CFC) rules, which will be implemented as from 1 January 2019. The Netherlands effectively is opting for Option B of the ATAD, which it views as already imbedded into the current rules, while Option A will only become applicable to a limited number of specific cases.
- Anti-hybrid rules, which are aimed to be implemented as of 1 January 2020. Because of the technical complexity of the legislation and wide variety of hybrid mismatches, the Dutch Government considers an internet consultation necessary. Moreover, according to the Agenda, the Netherlands aims to include an anti-hybrid rule in all its bilateral tax treaties.
- According to the Agenda, the Dutch Government intends that conditional withholding taxes on interest and royalty payments will be introduced as of 1 January 2021. The proposed withholding tax only applies to intercompany payments to companies that are tax resident in a jurisdiction with a low tax rate, or a jurisdiction listed on the EU blacklist for non-cooperative countries.

See EY Global Tax Alert, *Dutch Government releases fiscal policy agenda*, dated 26 February 2018.

Russia

On 13 February 2018, Russia's Ministry of Finance published a draft regulation which proposes a new mechanism for the administration of cross-border e-commerce relating to goods. This draft regulation introduces the concept of "authorized operator of the import (export) of goods for private consumption though cross-border electronic e-commerce." To qualify as an authorized operator certain criteria described in the draft regulation must be met. The authorized operator concept will provide the Russian tax and customs authorities with electronic data on Russian customers and goods purchased from foreign e-commerce vendors and it will remit customs duty on behalf of such customers.

A pilot project is proposed to be launched to test this new regulation during the period of 15 May 2018 to 31 December 2018 during which the selected authorized operators will be the Russian Postal Service and largest express carriers.

Singapore

On 22 February 2018, the Income Tax (Transfer Pricing Documentation) Rules 2018 (TPD Rules) were published in the *Singapore Government Gazette*. The TPD Rules are effective from 23 February 2018 and apply for the basis period for the Year of Assessment (YA) 2019 and every subsequent YA (i.e., financial year 2018 and onwards).

In addition, on 23 February 2018, the Inland Revenue Authority of Singapore (IRAS) released the fifth edition of the Singapore transfer pricing guidelines (2018 Singapore TP Guidelines). The changes include incorporating the newly effective TPD Rules into the guidelines and providing examples and explanations on some of the aspects of the TPD Rules. The 2018 Singapore TP Guidelines also provide enhanced guidance on comparability analysis and transactional profit split method. Of particular note, Section 6 (relating to TPD) of the 2018 Singapore TP Guidelines has been completely rewritten to reflect the new mandatory requirement for TPD, and a new Section 15 (relating to surcharge and penalty) has been introduced to provide guidance on the new transfer pricing surcharge and penalties for non-compliance with TPD requirements. While the TPD Rules provide certain exemptions that relieve taxpayers from having to prepare TPD, taxpayers should nonetheless review their related-party transactions to ensure compliance with the arm's-length principle, as the new surcharge on transfer pricing adjustments will still apply notwithstanding that the taxpayer may have been exempted from having to prepare Singapore TPD. Taxpayers should also take into account the TPD Rules and the Singapore specific content requirements when preparing their TPD, as taxpayers may be subject to penalties in the event of non-compliance with the TPD Rules.

Slovenia

On 23 February 2018, the President of Slovenia signed a law ratifying the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). The MLI was published in the *Official Gazette* on 26 February and will become effective 15 days after being published in the *Official Gazette* (i.e., on 13 March 2018). Once the domestic ratification process has been completed, Slovenia would need to deposit its instrument of ratification, approval or acceptance of the MLI before the OECD and confirm its MLI position.

Sweden

On 26 February 2018, the Ministry of Finance launched a public consultation with respect to the Swedish CFC legislation. Certain changes will need to be made in order to align the current CFC regime with the EU ATAD. For that purpose, the Ministry issued a memorandum, with proposals to strengthen the CFC rules. One of the main changes that is currently being contemplated is that more countries are excluded from the "white list."

The public consultation ends on 18 April 2018. It is currently being envisaged that the proposal will enter into force on 1 January 2019.

United Kingdom

On 1 March 2018, the *Taxation (International and Other Provisions) Act 2010 Transfer Pricing Guidelines Designation Order 2018* was laid before the House of Commons, and will enter into force on 23 March 2018. The Order updates the definition of "the transfer pricing guidelines" in the UK's legislation by designating the new 2017 version (which was updated in light of BEPS Actions 8-10) in place of the version referred to in section 164(4)(a) of the *Taxation (International and Other Provisions) Act 2010*.

These UK transfer pricing rules operate by comparing the actual provision made or imposed as between two persons with the arm's-length provision which would have been made as between independent parties (section 147 of the *Taxation (International and Other Provisions) Act 2010*).

This Order has effect in relation to provision made or imposed at any time:

- For corporation tax purposes, for accounting periods beginning on or after 1 April 2018
- For income tax purposes, for the tax year 2018-19 and subsequent tax years

A Tax Information and Impact Note covering this instrument will be published on the website at https://www.gov.uk/government/collections/tax-information-and-impact-notes-tiins.

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