The Latest on BEPS – 7 May 2018

EY OECD BEPS project

Stay up-to-date on the OECD's project on Base Erosion and Profit Shifting with EY's online site containing a comprehensive collection of resources, including news, Alerts and EY's BEPS developments tracker.

Copy into your web browser:

http://www.ey.com/beps

EY Global Tax Alert Library

Access both online and pdf versions of all EY Global Tax Alerts.

Copy into your web browser:

www.ey.com/taxalerts

European Union

On 27-28 April 2018, the finance and economic affairs Ministers of the European Union (EU) Member States discussed the European Commission's (the Commission) proposals for the taxation of the digital economy and fighting tax fraud through enhanced cooperation between tax administrations at their informal Economic and Financial Affairs Council (ECOFIN) meeting in Sofia, Bulgaria.

In the press conference following the discussions, the necessity for direct engagement with global partners and for alignment with the OECD's work was raised by Commissioner Moscovici. He also noted that progress made by the EU can potentially support the work being undertaken by the OECD to arrive at a global solution even before 2019.

The Bulgarian Presidency of the Council of the EU scheduled a number of technical working meetings, starting on 2 May 2018, to discuss the proposals ahead of the next European Council meeting in June.

On 20 April 2018, the Council of the European Union published a presidency note which suggests that Member States perform a study to assess the budgetary impact of the Council Directive on a Common Corporate Tax Base (CCTB) based on a set of predefined parameters. The aim of the presidency note is solely the evaluation of the impact of the CCTB proposal, as amended, on national tax revenues. Member States have the right to choose whether to run an evaluation on their national tax revenues based on different/complementary scenarios or not to run the evaluation at all, but it is recommended that those Member States that will run the evaluation do it, as a minimum, based on the hypotheses set out in the presidency note. Key provisions that should

EY
Building a better working world

be assessed are, among others: (i) whether the scope of €750 million is maintained or not (Article 2.1.c); (ii) whether the qualifying subsidiary should have a right to exercise more than 50% of the voting rights (Article 3.1.a); (iii) a number of definitions (Article 4); (iv) elements of the tax base (Article 7); (v) exempt revenue (Article 8.d); (vi) other deductible and non-deductible items (Article 10 and 12 a-b-d); and (vii) individually depreciable assets (Article 33). The evaluation will take place throughout 2018 by Member States with technical assistance from the European Commission services.

Canada

On 13 April 2018, the Government of Canada made available on its website the annual report (the Report) issued by the Canada Revenue Agency (CRA) on its Mutual Agreement Procedure (MAP) Program. This Report describes the purpose, history, and current state of the MAP program. The publication of this Report was delayed to align with the publication of the MAP statistics by the OECD, and it covers the period from 1 January 2016 to 31 December 2016.

According to the Report, the CRA had 260 MAP cases on 1 January 2016, while during 2016, the CRA accepted 124 new MAP cases and closed 160 MAP cases. The majority of the 160 cases closed (72%) resulted in full relief from double taxation after discussions with other competent authorities. The average time to complete a negotiable MAP case was 20.87 months.

Furthermore, the Report references other recent developments in Canada with respect to MAP. The OECD MAP peer review report which was released in September 2017 concluded that, overall, Canada meets most of the elements of the Action 14 minimum standard. Where deficiencies were noted, the CRA is working to address them. In the next stage of the peer review process, Canada's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored.

Cote d'Ivoire

On 19 February 2018, the *2018 Finance Act* that introduced Country-by-Country (CbC) Reporting (CbCR) was published. The CbCR rules apply to multinational enterprise (MNE) groups that have consolidated group revenue of €750 million or more that have enterprises that are tax residents in Côte d'Ivoire. The *2018 Finance Act* requires affected tax resident ultimate parent entities (UPEs) to submit a CbC report no later than 12 months after the end of the Reporting Fiscal Year. Failure to comply with the CbCR rules is punishable by a fine of XOF5 million (approx. €7,500). The effective date of the filing of CbC reports is pending confirmation from the revenue authorities; relevant details will be published in subsequent updates.

Cyprus-Luxembourg

On 17 April 2018, Luxembourg ratified a new income tax treaty (the Treaty) with Cyprus. The Treaty contains a number of treaty-based recommendations from the BEPS project contained in Action 6 (preventing the granting of treaty benefits inappropriate circumstances), and Action 14 (making dispute resolution mechanisms more effective).

The Treaty contains, for example, the new preamble language that clarifies that the tax treaty is not intended to be used to generate double non-taxation or reduced taxation through tax evasion and avoidance. It also contains a Principal Purpose Test (PPT) with the discretionary relief provision. Moreover, the Treaty enables taxpayers to present a case for MAP to the competent authorities of either Contracting State, and any unresolved issues arising from the case shall be submitted to arbitration if the person so requests.

Both Cyprus and Luxemburg have signed the Multilateral Instrument (MLI) and this Treaty is not included as a Covered Tax Agreement (CTA) on their preliminary positions. For the MLI provisions to have effect on this new Treaty, both jurisdictions would need to include it first in their respective list of CTAs, indicating whether the Treaty falls within the scope of any of the reservations made by that respective jurisdiction.

Luxembourg

On 17 April 2018, a bill on the new intellectual property (IP) regime was published in the *Official Gazette*. The adopted law is compliant with the OECD's new nexus approach. The text of the Law corresponds to the wording of the draft law as introduced before the Parliament with one amendment on the definition of eligible expenses. The new wording clarifies that expenditures incurred by a permanent establishment (PE) located in a State party to the Agreement on the European Economic Area (EEA Agreement) qualify as eligible expenses, subject to all the other conditions being met, only insofar as the said expenditures are allocated to the taxpayer (i.e., to the head-office) pursuant to the double taxation

treaty concluded with the country of location of the PE and are directly connected to the constitution, the development or the improvement of a qualifying IP asset.

In line with the final report on BEPS Action 5, the above amendment aims to ensure that the same IP asset is not allocated to both the head office and the foreign PE.

Some of the main aspects of the new regime include the following:

- The revised IP regime is introduced in the Income Tax Law through a new article 50ter which provides for an 80% tax exemption of the net income derived from qualifying IP, leading to an effective rate of 5.202% for 2018
- As it was already the case under the old regime, qualifying IP assets are exempt from net wealth tax
- Under the "nexus approach," the application of an IP regime should be dependent on the level of research and development (R&D) activities carried out by the taxpayer itself
- The list of eligible assets is wider than under the previous regime (e.g., various forms of medicinal product rights are now included) but market-related IP such as trademarks are no longer eligible

The provisions of this new IP regime are applicable as from fiscal year 2018 (retroactive as from 1 January 2018). The provisions of the existing Luxembourg IP regime introduced by the law of 21 December 2007 will co-exist with the new IP regime until 30 June 2021 (termination date of the existing IP regime based on the 2016 Budget law). Luxembourg taxpayers benefitting from the existing Luxembourg IP regime may choose to apply the new IP regime. If this election is made, the new IP regime will apply to all their IP assets with the exception of IP assets which would not qualify for the application of the new IP regime. The latter would still benefit from the provisions of the existing Luxembourg IP regime until 30 June 2021.

See EY Global Tax Alert, *Luxembourg Parliament adopts new IP regime*, dated 26 April 2018.

Malta

On 27 April 2018, Legal Notice 142 of 2018, which ratifies the BEPS MLI in Malta, was published in the *Official Gazette* No. 19,984. Malta now needs to deposit its instrument of ratification, approval or acceptance of the MLI with the OECD and confirm its MLI positions. The MLI will enter into force 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 the instrument of ratification by Malta.

Montenegro

On 13 April 2018, the Montenegrin Ministry of Finance published a press release, according to which Montenegro has expressed its intent to sign the MLI in order to implement the tax-treaty related minimum standards of the BEPS package.

Serbia

On 19 April 2018, Serbia ratified the MLI. The ratification law was published in *Official Gazette* – International Treaties No. 3/2018 of 23 April 2018. Serbia needs to deposit its instrument of ratification with the OECD and confirm its MLI positions. The MLI will enter into force 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 the instrument of ratification by Serbia.

Slovakia

On 28 March 2018, the Slovak tax administration issued guidance regarding the taxation of nonresidents that perform regular intermediation of accommodation and transport services within the Slovak Republic through digital platforms.

Based on the amended definition of PE effective from 1 January 2018, nonresident operators of digital platforms who repeatedly facilitate the conclusion of contracts for providing transportation and accommodation services are deemed to carry out the activities through a fixed place of business in the Slovak Republic. The guidance clarifies that they are obliged to register a PE in the Slovak Republic by the end of the month following the month when these repeated activities are carried out. These rules apply irrespective of whether there is a tax treaty concluded between the Slovak Republic and the country of residence of the foreign operators. Furthermore, the guidance mentions that in cases of failure to register such PE, the Slovak Republic taxpayers, who use such digital platforms to sell their transport or accommodation services, must act as withholding tax agents by withholding income tax from the commission fees paid to the nonresident operators of the digital platforms. The withholding income tax rate is

35%, if the payment is made to a person who is registered in a jurisdiction not included in the white list issued by the Ministry of Finance, while for the jurisdictions from white list countries is 19%. However, it is not clear yet whether and how this withholding tax will be applied in the context of double tax treaties. The tax withheld must be paid to the state budget by the 15th day of the month following the month in which the payment was made. The guidance is applicable from the date of its issuance.

On 26 February 2018, the Slovak Ministry of Finance issued Guidance No. MF/020525/2017-724 (the Guidance) regarding the MAP applicable under tax treaties and the EU Arbitration Convention. The Guidance clarifies, among others, that the Ministry of Finance is the competent authority responsible for the MAP, while the taxpayer does not participate directly in the negotiations between the competent authorities. The Guidance further explains that the agreement reached under the MAP will be implemented by the tax authorities, irrespective of the time limits provided by national laws. Changes resulting from the OECD MLI with respect to the articles regarding MAP in the relevant tax treaties concluded by the Slovak Republic will be communicated separately by the Ministry of Foreign Affairs and published in the Collection of Laws.

Slovakia is included in the fifth batch of countries for review under BEPS Action 14 (*Making Dispute Resolutions More Effective*) which is currently underway. For the peer review, taxpayers were invited to complete a questionnaire and submit their input related to their experiences in Slovakia and the rest jurisdictions included in the fifth batch by 9 April 2018.

Sweden

On 15 March 2018, the Swedish Government submitted a bill to the Swedish Parliament for approval of the MLI, along with the Government's positions regarding Sweden's choices and reservations. The Parliament's approval is required in order for Sweden to ratify the MLI. The MLI will enter into force 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 the instrument of ratification of the MLI with the OECD.

From a Swedish perspective, however, it is necessary to also amend the laws which have implemented tax treaties into Swedish domestic law, in order for the provisions to become applicable in Sweden. The bill that was submitted to Parliament on 15 March 2018 does not contain any proposed changes to these laws as not all of the relevant jurisdictions have ratified the Convention yet. Instead, the Swedish Government intends to come back to the Parliament regarding the necessary changes concurrently as the relevant jurisdictions ratify the Convention. It is therefore not possible to provide a date for the entry into force of the MLI's provisions in Sweden.

See EY Global Tax Alert, *Swedish Government acts to approve BEPS MLI*, dated 19 April 2018.

United States

On 26 April 2018, the Internal Revenue Service released a Memorandum of Understanding (MOU) between the Competent Authorities of the United States (US) and Indonesia that includes an announcement of the temporary suspension of Indonesian secondary CbCR filing obligations for constituent entities of US multinational groups resident in Indonesia for fiscal years commencing on or after 1 January 2016. Pursuant to the law of Indonesia, if a Competent Authority Agreement (CAA) between the US and Indonesia for the exchange of CbC reports is not operative by 30 April 2018, local filing obligations could be imposed on constituent entities resident in Indonesia with respect to fiscal years commencing on or after 1 January 2016. Notwithstanding such law, until a CAA becomes operative, the MOU provides that the Competent Authority of Indonesia does not intend to impose local filing with respect to such constituent entities. The MOU states that the two Competent Authorities are in the process of concluding a CAA and will endeavor to make the CAA operative no later than 31 May 2018.

For additional information with respect to this Alert, please contact the following:

Ernst & Young LLP, International Tax Services, Washington, DC
- Arlene Fitzpatrick arlene.fitzpatrick@ey.com

Ernst & Young LLP, Global Tax Desk Network, New York
- Gerrit Groen gerrit.groen@ey.com
- Jose A. (Jano) Bustos joseantonio.bustos@ey.com
- David Corredor-Velásquez david.corredorvelasquez@ey.com

Ernst & Young Belastingadviseurs LLP, Amsterdam
- Konstantina Tsilimigka konstantina.tsilimigka@nl.ey.com

EY | Assurance | Tax | Transactions | Advisory

About EY

EY is a global leader in assurance, tax, transAction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

© 2018 EYGM Limited.
All Rights Reserved.

EYG no. 02725-181Gbl

1508-1600216 NY
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, or other professional advice. Please refer to your advisors for specific advice.

ey.com