4 June 2018

Global Tax Alert

The Latest on BEPS - 4 June 2018

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OECD

On 23 May 2018, the OECD released the first annual peer review report (the Report) relating to the compliance by members of the Inclusive Framework on BEPS of the minimum standard on Action 13 (*Transfer Pricing Documentation and Country-by-Country Reporting*) with a focus on the domestic legal and administrative framework. The Report also comments on certain aspects relating to the exchange of information framework as well as the confidentiality and appropriate use of Country-by-Country (CbC) reports.

The Report contains the review of 95 jurisdictions which provided legislation or information pertaining to the implementation of CbC reporting (Country-by-Country reporting or CbCR), with individual sections for each jurisdiction. This report will be followed by two additional annual reports on peer reviews performed in 2018 and in 2019, which will focus on different aspects of the key areas under review, i.e., the exchange of information framework, and the confidentiality and appropriate use of CbC reports respectively.

See EY Global Tax Alert, *OECD releases first annual peer review report (Phase 1) on Action 13,* dated 25 May 2018.

On 16 May 2018, the OECD updated the list of signatories of the Multilateral Competent Authority Agreement on the exchange of CbC reports (CbC MCAA). According to this latest update, Romania was added on the list of the signatories with its signing date on 19 December 2018. The total number of jurisdictions that have joined the CbC MCAA is now 69.

Building a better working world

European Union

On 25 May 2018, the Council of the European Union (the Council and the EU, respectively) formally adopted the Directive amending Directive 2011/16/EU with respect to the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (the Directive). The content of the adopted Directive corresponds to that agreed by the Economic and Financial Affairs Council of the European Union (ECOFIN) on 13 March 2018.

The scope of the cross-border arrangements to be reported is relatively broad and may lead to extensive reporting obligations by both intermediaries and – mainly corporate, but also individual – taxpayers. Reporting obligations for cross-border arrangements are triggered by certain hallmarks (or characteristics). These hallmarks target a relatively wide range of cross-border arrangements.

Cross-border reportable arrangements where the first step of implementation is taken after the entry into force of the Directive, which is expected to take place in four to six weeks, will have to be reported. The first reports, however, are not due until 31 August 2020 and are to be exchanged by 31 October 2020.

See EY Global Tax Alert, *EU Council adopts Directive on new mandatory transparency rules for intermediaries and taxpayers*, dated 29 May 2018.

On 25 May 2018, two jurisdictions were removed from the EU's list of non-cooperative jurisdictions for tax purposes during the ECOFIN meeting. Bahamas and Saint Kitts and Nevis have been moved from Annex I to Annex II of the Council conclusions and will remain subject to close monitoring. The finance and economic affairs Ministers of the EU Member States agreed that a de-listing was justified in the light of an expert assessment of the commitments made by these jurisdictions to address deficiencies identified by the EU. The decision leaves 7 jurisdictions on the list of non-cooperative jurisdictions out of 17 announced initially on 5 December 2017. These are American Samoa, Guam, Namibia, Palau, Samoa, Trinidad and Tobago and the US Virgin Islands.

United Nations

On 17 May 2018, the text of the 2017 United Nations (UN) Model Double Taxation Convention between developed and developing countries (2017 UN MTC) became available.

The 2017 UN MTC incorporates the treaty-based recommendations from the BEPS project contained in Action 2 (neutralizing the effects of hybrid mismatch arrangements), Action 6 (preventing the granting of treaty benefits under inappropriate circumstances), and Action 7 (preventing the artificial avoidance of permanent establishment status). The main differences from the previous version of the UN MTC are, among others, the introduction of a new preamble emphasizing that treaties should not create opportunities for tax avoidance or evasion, a modified version of Article 4 that includes a new tie-breaker rule for determining the treaty residence of dual-resident persons, a modified version of Article 5 to prevent the avoidance of permanent establishment status, and a new Article 29 that contains provisions relating to entitlement to treaty benefits through a limitation on benefits rule, a third state permanent establishment rule and a general anti-abuse rule. The text of the 2017 UN MTC is available at the UN website.

In May, the UN released the *Handbook on selected issues for taxation of the extractive industries by developing Countries* (the Handbook), with the aim to provide clearer guidance on the policy and administrative aspects of applying taxes to enterprises, including multinational enterprises (MNEs) acting in the extractive industries and other local and international companies accessory to the business. The objective of the Handbook is to focus on specific areas of interest for developing countries while it covers, among others topics, tax treaty, permanent establishment, transfer pricing and value added taxation issues. The Handbook clarifies that it is only intended to provide guidance, and to the extent of any inconsistency between this Handbook and the UN MTC, the latter prevails.

Australia

On 24 May 2018, Australia introduced Treasury Laws Amendment (Tax Integrity and Other Measures No.2) Bill 2018 (the Bill). The Bill contains the hybrid mismatch measures previously included in the draft law released during November 2017 and March 2018. In comparison to the March 2018 draft law, there have not been substantive changes and by and large, the changes implemented merely fine tune the mechanics of the law. However, there has been a material change to the integrity measures contained within the hybrid mismatch rules – the below two paragraphs provide an overview of this change.

The stated purpose of the integrity measures is to prevent MNE groups from being able to enter into arrangements designed to circumvent the hybrid mismatch rules using interposed conduit type entities that pay effectively no tax to invest into Australia, as an alternative to investing directly into Australia via traditional hybrid instruments or entities. Broadly, the integrity measure will apply where Australia makes a deductible interest (or equivalent) payment to an entity in a jurisdiction interposed between Australia and the ultimate parent jurisdiction.

In the March 2018 draft law, for the rule to apply, the entity in the interposed jurisdiction was required to be subject to a tax rate of 10% or less. Under the Bill, this test has been slightly changed to require that the payment is subject to foreign income tax in one or more foreign countries and the highest rate at which the payment is subject to foreign tax is 10% or less. Previously the law had a carve-out where it was not reasonable to conclude that the scheme was designed to produce an Australian deduction and a 10% or less foreign tax rate. Under the Bill, the "design test" has been replaced with a "principal purpose" test. It is now a condition for the integrity rule to apply that the scheme was entered into for a principal purpose of, or for more than one principal purpose that includes obtaining an Australian deduction and enabling foreign tax to be imposed on the payment at a rate of 10% or less. In considering the application of the principal purpose test, the Bill specifically requires regard to be given to the source of funds provided by the interposed foreign entity to Australia and whether the interposed foreign entity engages in substantial commercial activities in carrying on a banking, financial or other similar business.

The hybrid mismatch rules will apply to income years starting on or after 1 January 2019. Consistent with the March 2018 draft law, there is no grandfathering of existing arrangements. However, the imported mismatch provisions, which are aimed at stopping arrangements that seek to avoid the application of the hybrid mismatch rules by interposing one or more entities between the hybrid mismatch and a country that has hybrid mismatch rules, are delayed by one year to apply to assessments for income years starting on or after 1 January 2020.

It is anticipated that the law will be enacted in late June 2018.

The Australian Taxation Office has informally indicated that it will be releasing guidance on the application of Part IVA (Australia's general anti-avoidance measures) in the context of the hybrid mismatch rules and restructuring arrangements. This guidance is expected to be released in June 2018.

See EY Global Tax Alert, *Australia introduces bill on hybrid mismatch tax rules into Parliament*, dated 24 May 2018.

Finland

On 30 April 2018, the Finnish tax administration made updates to its guidance on CbCR and transfer pricing documentation formalities. The updated guidance is applicable from 1 May 2018 onwards. With respect to the CbC reporting, the main update concerns reporting penalties. According to the Guidance, if the CbCR notification or the CbC report have not been submitted by the statutory deadlines or if incorrect or significantly incomplete information has been submitted, a penalty varying from €150 to €25,000 could be imposed. The tax authorities will use moderation in imposing the penalties during the first years when the CbCR requirements are applicable.

Regarding the transfer pricing documentation, the tax authorities published updated guidance regarding tax penalties which can be imposed in different situations related to the submission of transfer pricing documentation. Under the Finnish provisions there is no annual transfer pricing documentation filing obligation, and the transfer pricing documentation should be provided to the tax authorities only upon separate request. The earliest the tax authorities can request transfer pricing documentation to be delivered is six months after the end of the financial year.

The maximum penalties concerning negligence in relation to submission of transfer pricing documentation may amount up to €25,000. The approximate amount of penalties, based on the view of the tax administration as detailed in the guidance, should be applicable to certain situations as follows: (i) €1,000 to €5,000 if the transfer pricing documentation or additional information supplementing the transfer documentation are submitted after the deadlines imposed by the tax authorities; (ii) €5,000 to €10,000 if the requested documentation or the additional information supplementing the documentation contain significant deficiencies or errors or if the requested additional information is not submitted at all; and (iii) €10,000 to €25,000 if no documentation or significant additional information supplementing documentation are submitted at all.

On 10 April 2018, a law aligning the Finnish CbCR provisions with the EU Directive on Exchange of Information was published in the *Official Gazette*. The Parliament passed the bill in order to amend the relevant provisions of the *Act on Assessment Procedure* in order to reflect the wording of the Council Directive (EU) 2016/881 of 25 May 2016 on administrative cooperation in respect of taxation relating to mandatory automatic exchange of information.

The Directive was already transposed into domestic law (in force as from 1 January 2017). Therefore, the change in wording will not entail changes in the content of the law but has been undertaken in order to avoid possible confusion in interpretation. The new provisions will come into force on 12 April 2018 and shall apply to data to be disclosed for accounting periods beginning on or after 1 January 2016.

Italy

On 16 May 2018, Italy's Ministry of Economy and Finance launched a public consultation on the two proposals for new Directives of taxation of the digital economy released by the European Commission (EC). The EC's proposals focus on a two-phased approach: an interim solution, referred to as the Digital Services Tax and a longer term Council Directive laying down rules relating to the corporate taxation of a significant digital presence. The consultation is directed to the following groups of interested parties: 1) Professional business association, 2) Professional, 3) Research Center/ University, 4) Individuals. In particular, these interested parties are requested to provide comments on each of the documents proposed in the consultation. This public consultation does not bind the administration. The public consultation runs until 22 June 2018.

Japan

On 18 May 2018, the Japanese Diet (Japanese legislature) passed the bill for the multilateral instrument (MLI). This means that Japan completed the domestic process to ratify the MLI. The next step is for Japan to deposit its instrument of ratification, acceptance or approval of the MLI. The MLI will enter into force for Japan on the first day of the month following the expiration of a period of three calendar months beginning on the date of deposit of the fifth instrument of ratification, acceptance or approval.

Romania

On 25 May 2018, certain amendments to the Tax Code Norms were published in the *Official Gazette*. The amendments contain, among others, measures for the implementation of the EU Anti-Tax Avoidance Directive (ATAD), specifically regarding the deductibility of exceeding borrowing costs.

The following measures are applicable from 1 January 2018: (i) deductibility limitation of interest and of other economic equivalent costs rules under the 10% EBITDA (earnings before interest, taxes, depreciation and amortization) interest deduction limitation rule. The net interest charges and other economic equivalent costs can be deducted up to €200,000 while the exceeding part is deductible up to 10% EBITDA. Furthermore, companies will be able to carry forward interest disallowed under the 10% EBITDA; (ii) rules on controlled foreign corporations (CFCs) under which non-distributed income of the CFC entity or the income of the permanent establishment will be taxed at the level of the Romanian entity, if certain tests are not passed – option A was implemented by Romania (only certain types of income are considered); (iii) exit taxation rules: a tax regime for the transfer of assets, of tax residence and/or economic activity carried out through a permanent establishment in relation to which Romania no longer has the right to tax, is regulated; and (iv) general anti-avoidance rules.

Singapore

It was announced last year on 20 February 2017 that a new Intellectual Property Development Incentive (IDI) would be introduced, in conjunction with the removal of Intellectual Property income (IP income carve-out) from the scope of the Pioneer Certificate-Services (PC-S) and Development and Expansion Incentive (DEI) for new incentive awards approved on or after 1 July 2018. Grandfathering of such income until 30 June 2021 is available for existing incentive recipients.

On 4 May 2018, the legislation on the IP income carve-out from Singapore's existing incentive regimes was published, after extensive consultations with companies, tax advisors as well as the OECD. While the legislation on the IDI itself has not yet been released, it is important for companies to start assessing the impact arising from the above IP income carve-out provisions, which are effective from 1 July 2018, and determine if clarifications from the relevant authorities may be required.

In addition, on 9 May 2018, the Inclusive Framework on BEPS released a confirmation that the review of Singapore's IDI has been found to be not harmful, subject to final adoption of the new legislation (yet to be publicly released).

Slovenia

On 7 May 2018, the Ministry of Finance of the Republic of Slovenia released clarifications on the mutual agreement procedure (MAP) laid down in the MAP provision of Slovenia's tax treaty network. The clarification provides detail in the following areas: (i) general information on MAP; (ii) rules on filing a MAP request; (iii) description of the MAP; (iv) MAP technical steps; and (v) implementation of the MAP agreement.

United Kingdom

On 23 May 2018, the United Kingdom (UK) ratified the MLI, by way of the Double Taxation Relief (Base Erosion and Profit Shifting) Order 2018. Before the MLI can enter force for the UK it needs to deposit its instrument of ratification before the OECD and confirm its final positions. The MLI provisions will come into effect for a treaty specified as covered by both parties by reference to the later of the dates on which the MLI comes into force for both. The UK is expected to include 121 tax treaties in its list of Covered Tax Agreements under Article 2 of its Reservations and Notifications, based upon the Government's current draft of its final positions.

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EYG no. 03383-181Gbl

1508-1600216 NY
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