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# Global Tax Alert

# The Latest on BEPS – 29 June 2018

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## OECD

On 27 June 2018, three additional jurisdictions (Kazakhstan, Peru and the United Arab Emirates (UAE)) signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (BEPS) (the MLI) during a third signing ceremony which took place in Lima, Peru, in conjunction with the fifth plenary session of the Inclusive Framework on BEPS. At the time of signature, the three signatories submitted a list of their tax treaties in force that they would like to designate as Covered Tax Agreements (CTAs), i.e., treaties to be amended through the MLI. Based on the current overall positions, it is expected that over 1,300 tax treaties will be modified based on matching of the specific provisions that jurisdictions wish to add or change within the CTAs nominated by signatories. The three new signatories listed a total of 175 tax treaties.

Together with the list of CTAs, signatories also submitted a preliminary list of their reservations and notifications in relation to the CTAs (MLI positions) in respect of the various provisions of the MLI. The definitive MLI positions for each jurisdiction will be provided upon the deposit of its instrument of ratification, acceptance or approval of the MLI. As part of the options contained in the MLI, jurisdictions may opt into mandatory binding arbitration, an element of BEPS Action 14 on dispute resolution. None of the three jurisdictions that signed the MLI at this session opted in for mandatory binding arbitration.

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Furthermore, Estonia expressed its intent to sign the MLI on 29 June 2018, and the OECD announced that New Zealand and Sweden have deposited their instruments of ratification of the MLI, becoming the seventh and eighth jurisdiction to do so – after Austria, the Isle of Man, Jersey, Poland, Serbia, and Slovenia. Sweden confirmed its MLI positions without making any changes, and New Zealand also confirmed its positions but it added a new CTA (Fiji) and updated some of its notifications. The MLI will enter into force, for New Zealand and Sweden, 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 instrument of ratification, i.e., for New Zealand and Sweden the MLI will enter into force on 1 October 2018.

See EY Global Tax Alert, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS: new signatories and additional deposits of ratification*, dated 28 June 2018.

On 21 June 2018, the OECD released the final report on the revised guidance on the application of the transactional profit split method (the Report). The Report, which has been published as part of BEPS Action 10, clarifies and expands the guidance on the transactional profit split method. It provides the text of the revised guidance on the application of this method, which is to replace section C, part III of Chapter II of the OECD Transfer Pricing Guidelines (OECD TPG). The Report also builds on the work performed and comments received on the discussion drafts that were issued on 4 July 2016 and 22 June 2017.

See EY Global Tax Alert, *OECD releases final revised guidance on application of transactional profit split method*, dated 27 June 2018.

Also on 21 June 2018, the OECD released final guidance for tax administrations on the application of the approach to hard-to-value intangibles (the Final Guidance). The Final Guidance has been incorporated into the OECD TPG, as an annex to Chapter VI. The hard-to-value-intangibles (HTVI) approach is stipulated in the final report on transfer pricing under BEPS Actions 8-10 and has been formally incorporated into the OECD TPG. The Final Guidance aims at reaching a common understanding and practice among tax administrations on how to apply adjustments resulting from the application of the HTVI approach, and is intended to improve consistency and reduce the risk of economic double taxation.

See EY Global Tax alert, *OECD releases guidance for tax administrations on application of approach to hard-to-value intangibles*, dated 27 June 2018.

## France-Germany

On 19 June 2018, France and Germany agreed on a common and supportive position (the *Meseberg Declaration*) on the European Commission's proposal for a directive establishing a Common Corporate Tax Base (CCTB).

The European Commission proposed in October 2016 the re-launch of the idea of a Common Consolidated Corporate Tax Base (CCCTB) throughout a two-step process, consisting of two legislative proposals for a directive establishing a CCTB (the CCTB Directive) as well as a directive for establishing a CCCTB (the CCCTB Directive). In the *Meseberg Declaration*, France and Germany state their strong support towards both proposals to foster tax harmonization in Europe. Both states confirm that they are deeply committed to swiftly adopting the CCTB Directive, and they also support further alignments of the Directive with the Anti-Tax Avoidance Directive (ATAD) in respect to certain measures such as general anti-abuse rules, hybrid mismatches and exit taxation. The joint declaration sends a strong political signal towards the other European Union (EU) Member States to support the final agreement on the directives in due course.

See EY Global Tax Alert, *France and Germany publish common position paper on Common Corporate Tax Base*, dated 21 June 2018.

## Ireland

On 14 June 2018, the Irish Revenue published a manual on the entry into force of Council Directive 2018/822 of 25 May 2018 (amending Directive 2011/16/EU) with regard to the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC6). The published manual provides guidance regarding the scope and content of DAC6, information on the timing for the reporting obligations and advice to intermediaries and taxpayers that DAC6 came into force on 25 June 2018. The Irish Revenue will be assessing the consequences of DAC6 and may issue further guidance as appropriate.

## Luxembourg

On 20 June 2018, the draft law implementing the EU ATAD was introduced in the Luxembourg Parliament. The proposal includes the following rules: (i) a new provision will be introduced that limits interest deductibility for interest expenses exceeding interest income (exceeding borrowing cost) to 30% of the taxpayer's taxable earnings before interest, tax, depreciation and amortization (EBITDA). The EBITDA-based limit will not apply if exceeding borrowing costs do not exceed €3 million. Standalone entities and financial undertakings are excluded from the scope of interest limitation; (ii) controlled foreign company (CFC) rules will be introduced, according to which the non-distributed income of low-taxed CFCs arising from "non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage" (approach B) must be included in the tax base of the Luxembourg taxpayer in the year in which the income is derived, if the Luxembourg taxpayer carries on the "significant people functions" in relation to assets owned and/or risks undertaken by the CFC. Any income inclusion will have to be based on the arm's-length principle as defined in Luxembourg law; (iii) the Draft Law contains hybrid mismatch rules that apply to hybrid mismatches resulting from financial instruments or entities between associated enterprises that are treated differently in two or more EU Member States. These rules will only be applicable for a limited period of time and will then be replaced by more detailed rules that will also extend to hybrid mismatches with third, i.e., non-EU, countries by 31 December 2019. The anti-hybrid rules in relation to non-EU countries (ATAD 2) will only be proposed and enacted next year, with effect from 1 January 2020. Provisions should be replaced upon implementation of ATAD2; (iv) the existing exit taxation rules will be extended to also include the transfer of separate assets. Also, the current unlimited deferral of the payment of exit tax is abolished and replaced by a payment in equal installments over a maximum period of five years. Deferrals granted for accounting years ending before 1 January 2020 are not affected by the new provisions; and (v) the existing general anti-abuse rule (GAAR) will be revised to better reflect the content of the ATAD GAAR. Once approved by the Luxembourg Parliament, the provisions of the draft law should apply to tax years starting on or after 1 January 2019, except for the provisions regarding exit taxation that will apply as from 1 January 2020.

See Global Tax Alert, *Luxembourg publishes draft law implementing EU Anti-Tax Avoidance Directive*, dated 20 June 2018.

On 15 June 2018, the Luxembourg Council of Government adopted the draft law ratifying the MLI, which was signed on 7 June 2017. The Minister of Finance reconfirmed that all the 81 double taxation treaties concluded by Luxembourg that are currently in force are designated as CTAs, i.e., to be amended through the MLI. No further information was provided on the definitive MLI positions that Luxembourg will take, but it is likely that the MLI positions taken at the time of the signature will be maintained. Once the domestic ratification process has been completed, Luxembourg would need 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 for Luxembourg on the first day of the month following the expiration of a period of three calendar months beginning on the date of deposit of such instrument.

See EY Global Tax Alert, *Luxembourg Government adopts draft laws implementing EU Anti-Tax Avoidance Directive and Multilateral Instrument*, dated 18 June 2018.

## Peru

On 21 June 2018, the President of Peru authorized the Minister of Economy and Finance to sign the MLI in order to implement the tax-treaty related minimum standards of the BEPS package. Peru became a member of the Inclusive Framework on BEPS on 7 December 2016 and hosted the fifth plenary meeting of the Inclusive Framework on 25-28 June 2018 in Lima, Peru.

See EY Global Tax Alert, *Peruvian Government grants power to sign the BEPS Multilateral Instrument*, dated 25 June 2018.

## Sweden

On 14 June 2018, the Swedish Government adopted a bill regarding important changes in the corporate taxation area. There are no substantial changes from the earlier bill to the adopted law. The new rules will come into effect 1 January 2019 and will apply for the first time to fiscal years beginning after 31 December 2018.

See EY Global Tax Alerts, *Sweden enacts major corporate income tax changes*, dated 21 June 2018, *Sweden proposes draft bill with major corporate income tax changes*, dated 26 March 2018 and *New Swedish corporate income tax rules have IFRS implications for Q2 accounts*, dated 26 June 2018.

## Switzerland

On 18 June 2018, the Swiss Federal Tax Administration (FTA) issued a press release with information on the first exchange of Country-by-Country reports based on BEPS Action 13. According to the press release, the FTA will exchange 109 reports with 35 other jurisdictions by the end of June 2018. This first exchange for the 2016 tax period is on a voluntary basis at the respective company's request, while the submission of reports will be mandatory from the 2018 tax period onwards.

## Thailand

On 19 June 2018, the Thai Cabinet approved an amendment of the tax incentive criteria for the International Headquarters (IHQs) seemingly in response to BEPS Action 5. The amendment limits types of qualified royalty income to only those that are for the result of technological research and development activities performed in Thailand, regardless of whether the research and development activities are performed by the IHQs or other parties engaged by the IHQs. Details of other conditions and tax incentives would be unchanged by this amendment. This has yet to become effective as it is subject to further legislative processes.

See EY Global Tax Alert, *Thailand amends tax incentives for International Headquarters regime*, dated 21 June 2018.

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