

## The Latest on BEPS - 16 July 2018

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### 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](#).

### OECD

On 3 July 2018, the OECD released the first public [discussion draft on the transfer pricing aspects of financial transactions](#) (the Discussion Draft). The Discussion Draft, published as follow up work in relation to BEPS Actions 8-10, aims to clarify the application of the principles included in the 2017 edition of [OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations](#), covering the accurate delineation of financial transactions and addressing specific issues related to the pricing of financial transactions such as treasury function, intra-group loans, credit ratings, cash pooling, hedging, guarantees, and captive insurance. Interested parties are invited by the OECD to send their comments on the Discussion Draft and to respond to the specific questions by 7 September 2018.

See EY Global Tax Alert, [OECD releases first discussion draft on transfer pricing aspects of financial transactions](#), dated 6 July 2018.

On 29 June 2018, Estonia signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the MLI). At the time of signature, Estonia submitted a list of its tax treaties in force that they would like to designate as Covered Tax Agreements (CTAs), i.e., treaties to be amended through the MLI. Together with the list of CTAs, Estonia also submitted a preliminary list of its reservations and notifications in relation to the CTAs (MLI positions) in respect of the various provisions of the MLI. The definitive MLI positions for Estonia 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. Estonia did not opt in for mandatory binding arbitration.

Furthermore, the OECD announced that the United Kingdom (UK) has deposited its instrument of ratification of the MLI, becoming the ninth jurisdiction to do so – after Austria, the Isle of Man, Jersey, New Zealand, Poland, Serbia, Slovenia and Sweden. The UK confirmed its MLI positions but pursuant to article 6(4) it reserved the right for article 6(1) not to apply to three CTAs (Belarus, Ukraine, and Uzbekistan) that already contain preamble language describing the intent of the Contracting Jurisdictions to eliminate double taxation without creating opportunities for non-taxation or reduced taxation. Also, the UK added two new CTAs (Kyrgyzstan and the United Arab Emirates), and updated some of its notifications. The MLI will enter into force, for the UK, 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., on 1 October 2018.

## Australia

On 21 June 2018, the Australian Taxation Office (ATO) released the draft Practical Compliance Guide (PCG 2018/D4 or PCG) which provides guidance on the application of Part IVA (Australia's general anti-avoidance measures) in the context of the hybrid mismatch rules and restructuring arrangements.

The draft PCG is intended to assist taxpayers in managing their compliance risk in circumstances where their intention is to eliminate hybrid outcomes. It does so by outlining restructuring that the ATO considers to be of "low risk" and to which the ATO would not seek to apply Part IVA of ITAA 1936.

As an overall observation, PCG 2018/D4 does little more than provide support for the existing assumption that "vanilla" restructures (for example, merely replacing a hybrid instrument with an ordinary loan with the same counterparty) should not attract the focus of the ATO. However, for taxpayers that have any element of additional complexity to their restructuring, the PCG provides limited practical reference points and therefore the restructuring is likely to require substantive analysis to properly assess the Part IVA risk.

The measures will become effective from the date of enactment of the hybrid mismatch rules and apply to restructuring arrangements entered into before and after that date. The use and application of this draft or finalized Guideline will be under continuous review over the next three years. Submissions are due on 20 July 2018.

See EY Global Tax Alert, [Australia issues draft tax guidance on restructures of hybrid mismatch arrangements and the impact of tax avoidance rules](#), dated 21 June 2018.

## Greece

On 15 June 2018, the Greek Public Revenue Authority published a [circular](#) which lists the jurisdictions with which Greece intends to implement the Multilateral Competent Authority Agreement on the exchange of Country-by-Country (CbC) Reports (CbC MCAA). The first exchange of reports is expected during 2018, with respect to reporting fiscal year 2016. Accordingly, Greece intends to exchange CbC reports under the CbC MCAA with 15 jurisdictions, namely Australia, Brazil, Canada, Colombia, Guernsey, India, Indonesia, Japan, Jersey, Korea, Mexico, New Zealand, Norway, Pakistan and South Africa. Greece also intends to exchange under the CbC MCAA with four other jurisdictions (Liechtenstein, Russia, Singapore and Switzerland), which will exchange CbC reports voluntarily as well as with two jurisdictions (Bermuda and Cayman Islands) that are included on the list of non-reciprocal jurisdictions, i.e., jurisdictions that will exchange but will not receive CbC reports. The circular does not include European (EU) Member States; EU Member States will exchange reports under the Council Directive 2016/881/EU on the automatic exchange of CbC reports.

## India

On 27 June 2018, India released Instruction 2/2018 (the Guidance) governing the appropriate use of CbC reports and outlining a process to monitor, control and review such appropriate use. The Guidance is largely based on the OECD BEPS Action 13 report and the OECD guidance of September 2017 on appropriate use, which provides that the information contained in a CbC report can be used only for high level transfer pricing risk assessment, the assessment of other BEPS-related risks, and, where appropriate, for economic and statistical analysis. CbC reports cannot be used as a substitute for a detailed transfer pricing analysis of individual transactions and prices based on a complete functional analysis and comparability analysis. The Guidance also sets out confidentiality norms to be followed by the tax officials while using CbC report information.

See EY Global Tax Alert, [Indian Tax Administration releases guidance on appropriate use of Country-by-Country reports](#), dated 10 July 2018.

## Lithuania

On 14 June 2018, Lithuania ratified the MLI by way of Law No. XIII-1271, as published in the *Official Gazette* on 26 June 2018. This means that Lithuania has completed the domestic process to ratify the MLI. The next step is for Lithuania to deposit its instrument of ratification, acceptance or approval of the MLI. The MLI will enter into force for Lithuania 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 with the OECD.

## New Zealand

On 27 June 2018, the *Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018* received Royal assent and it came into force on 1 July 2018. For the most part the law has been introduced as originally proposed. Among others, the law introduced the following: (i) a permanent establishment anti-avoidance rule, (ii) a novel restricted transfer pricing rules for inbound related party debt pricing (essentially “capping” the New Zealand interest rate based on parent credit rating), (iii) new hybrid and branch mismatch rules, (iv) changes to thin capitalization rules, lowering the debt capacity of many groups, (v) provisions strengthening transfer pricing rules, including specifically codifying the OECD guidelines, and (vi) provisions extending Inland Revenue information gathering powers. New Zealand Revenue Minister Stuart Nash says the BEPS legislation is only a first step and has asked Inland Revenue to continue working closely with international agencies like the OECD and G20 to consider whether any further measures are warranted.

See EY Global Tax Alert, [New Zealand enacts legislation to counter BEPS](#), dated 11 July 2018.

## Nigeria

On 8 January 2018, the 2018 Income tax CbC Reporting (CbCR) Regulations were published in the *Official Gazette* of Nigeria.

All Nigerian tax resident entities that are ultimate parent entities (UPEs) of a multinational enterprise (MNE) group with annual consolidated group revenue equal to or exceeding NGN160 billion (€750 million approximately) have to prepare a CbC report for financial years starting on or after 1 January

2018. Unless a surrogate parent entity (SPE) is appointed, any other entity of the group that is resident in Nigeria will have to prepare and submit the CbC report to the Federal Inland Revenue Service (FIRS) if the UPE is not resident in Nigeria and any of the following conditions are met: (i) it is not obliged to file a CbC report in its country of residence; (ii) there is not a sufficient and qualifying exchange of information instrument between Nigeria and that jurisdiction in place; or (iii) the jurisdiction has been notified regarding a systematic failure to exchange the information. The 2018 Regulations require affected tax resident 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 NGN10 million (USD\$27,700 approximately) in the first instance and NGN1 million (USD\$2,800 approximately) for every month in which the default continues. A Nigerian group entity of an MNE group is required to notify the FIRS if it is a UPE or an SPE by the last day of the reporting fiscal year. Moreover, every Nigerian resident constituent entity that is not a UPE or an SPE, is required to notify the tax authorities about the identity and tax residence of the entity filing the CbC report by the last day of the reporting fiscal year.

See EY Global Tax Alert, [Nigeria releases Country-by-Country Reporting regulations](#), dated 26 June 2018.

## Peru

On 29 June 2018, the Peruvian tax authorities (SUNAT) issued Ruling N° 163-2018/SUNAT, requiring taxpayers to electronically submit the Master File and CbC report on an annual basis. The due date for filing the first Master File and CbC report for the fiscal year 2017 is in November 2018 and from the fiscal year 2018 onwards the submission deadline is in October of the following year. The exact filing date for each taxpayer depends on an official schedule based on the taxpayer's identification number. The Ruling is generally in line with the three-tiered approach of Action 13 of the OECD BEPS project.

## Serbia - San Marino

On 16 April 2018, San Marino and Serbia signed a new income tax treaty (the Treaty) which contains a number of 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 inappropriate circumstances), and Action 7 (preventing the artificial avoidance of permanent establishment status).

The Treaty contains, for example, a preamble which clarifies that the tax treaty is not intended to be used to generate double non-taxation or reduced taxation through tax evasion. In cases where a person other than an individual is resident in both San Marino and Serbia (i.e., a dual resident entity), both competent authorities shall endeavor to determine by mutual agreement the Contracting State of which the person shall be deemed to be a resident. Furthermore, the Treaty contains a Principal Purpose Test and the permanent establishment (PE) recommendations included in the BEPS project, including an anti-fragmentation clause, the expanded definition of agency PE, the splitting-up of contracts and making all the specific activities exceptions subject to the preparatory or auxiliary requirement.

Both San Marino and Serbia have signed the MLI prior to signing this Treaty. 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.

## South Africa

On 6 April 2018, the South African Revenue Service (SARS) published a statement providing its position and a list of frequently asked questions on the tax treatment of cryptocurrencies. The statement follows an announcement in the February 2018 budget speech in which the Finance Minister noted that the emergence of cryptocurrencies is a major development to which the regulatory regime must respond and that National Treasury is working with the Reserve Bank, Financial Services Board and other government entities towards a regulatory framework for all types of FinTech. The view of the SARS is that existing South African tax law is sufficient to establish the tax liability arising from gains or losses on cryptocurrencies and SARS will accordingly continue to apply normal tax rules to cryptocurrencies. Additionally cryptocurrencies will not be regarded as "currency" for income tax or capital gains tax purposes, but rather as intangible assets. For South African Value Added Tax (VAT) purposes SARS will not require registration as a VAT vendor by any person dealing in cryptocurrencies for the time being, pending the outcome of a policy review process.

## Spain

On 4 July 2018, Spain's Budget for 2018 was published in the *Official Gazette* as Law 6/2018, of 3 July 2018. There are no substantial changes from the earlier bill to the published law regarding the amendments to the Patent Box regime (See [The Latest on BEPS, dated 23 April 2018](#)). The amended patent box regime is effective as from 1 January 2018.

## Ukraine

On 7 July 2018, the President of Ukraine authorized the acting Minister of Finance to sign the MLI, by way of Order No. 98/2018-rp. According to the recent presentation of the Ministry of Finance, the MLI position of Ukraine is to implement the tax-treaty related minimum standards of the BEPS package (Actions 6 and 14), as well as modifications to PE definition (Action 7) into its existing double tax treaties. Ukraine became a member of the Inclusive Framework on BEPS on 25 November 2016.

## United Kingdom

On 6 July 2018, the UK published draft clauses intended to form part of the Bill that will eventually become *Finance Act 2019*. Other clauses may be published separately, possibly in advance of or as part of the Bill that will be published as Finance (No. 3) Bill in the autumn. The draft clauses are open for consultation until 31 August 2018. A number of technical notes, consultation responses and other documents were also released. Some of the key areas covered in the documents include minor changes to the UK controlled foreign company rules, exit charge and hybrid rules to meet the UK's obligations under the EU anti-tax avoidance directive. There are also minor changes to the UK corporate interest restriction and loss restriction rules to ensure the legislation works as intended.

See EY Global Tax Alert, [UK publishes draft Finance Bill clauses and other documents](#), dated 9 July 2018.

On 2 July 2018, the UK signed three new tax treaties (the Treaties) with Guernsey, Jersey and the Isle of Man. The new agreements are based, broadly, on the OECD Model Tax Convention, and take into account the recent BEPS recommendations in relation to treaties. These treaties are expected to come into force once each jurisdiction has completed their parliamentary processes and exchanged written notes, currently expected to be early in 2019.

Each treaty contains the new preamble clarifying that the treaty is not intended to result in double non-taxation or reduced taxation through tax evasion or avoidance. The treaties also include a principal purpose test for treaty benefits and an anti-fragmentation clause. Moreover, each treaty enables taxpayers to present a case for mutual agreement procedure to the competent authorities of either Contracting State.

All four jurisdictions (Guernsey, Isle of Man, Jersey and the UK) have signed up to the MLI prior to signing the new Treaty. For the MLI provisions to have effect on each of these three new Treaties, the respective jurisdictions will need to include it first in their notification of CTAs, indicating whether the Treaty falls within the scope of any of the reservations made by that respective jurisdiction.

## United States

On 28 June 2018, the Internal Revenue Service (IRS) added Indonesia to the list of countries with which the United States (US) has signed a Competent Authority Agreement (CAA) for the automatic exchange of CbC reports. The IRS maintains a

website that includes an up-to-date listing of the jurisdictions with which the US Competent Authority has entered into CAAs and the jurisdictions that are in negotiations for a CAA. The IRS is in the process of negotiating CAAs with another seven countries and is expected to update this database as other agreements are concluded.

Also, on 10 July 2018, the IRS released a [joint statement on the Exchange of Country-by-Country Reports \(2018\)](#) which was signed between Germany and the United States. The joint statement explains that the two countries are negotiating a CAA to allow for the automatic exchange of CbC reports. However, the Competent Authorities, without waiting for the negotiation's conclusion, desire to exchange CbC reports with respect to fiscal years of MNE groups commencing on or after 1 January 2016. The Competent Authorities intend to spontaneously exchange CbC reports for fiscal years of MNE groups commencing on or after 1 January 2016 and before 1 January 2017.

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EYG no. 03682-181Gbl

1508-1600216 NY  
ED None

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