

## The Latest on BEPS - 13 August 2018

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### **OECD**

On 8 August 2018, the OECD updated the [list](#) of signatories of the Multilateral Competent Authority Agreement on the exchange of Country-by-Country (CbC) reports (CbC MCAA). According to this latest update, Hong Kong, Kazakhstan and the United Arab Emirates signed the CbC MCAA on 26 July 2018, on 12 June 2018 and on 24 June 2018 respectively. The total number of jurisdictions that have joined the CbC MCAA is now 72.

On 16 July 2018, the Platform for Collaboration on Tax (PCT) - a joint initiative of the International Monetary Fund (IMF), OECD, United Nations (UN), and the World Bank Group- invited final comments on a revised version of its report on the "Taxation of Offshore Indirect Transfers- A Toolkit (Draft version 2)" (the toolkit). The toolkit provides analysis of and options for the tax treatment of offshore indirect transfers of assets (OITs), in essence, the sale of an entity owning an asset located in one country by a resident of another. This issue has emerged as a significant issue in many developing countries. It has been identified in IMF technical assistance work and scoping by the OECD, but was not covered by the G20-OECD project on BEPS. In relation to the extractive industries, OITs are also the subject of work at the UN. Interested stakeholders are invited to provide their input by 24 September 2018. The PCT aims to release the final toolkit by the end of 2018.

In July 2018, the OECD released additional exchange relationships that have been activated under the CbC MCAA. Currently, together with the exchange relationships under the European Union (EU) Council Directive 2016/881/EU and the bilateral competent authority agreements for exchanges under Double Tax Conventions or Tax Information Exchange Agreements, there are over 1,700 automatic exchange relationships established among jurisdictions committed

to exchanging CbC reports. The full list of automatic exchange relationships that are in place and an update on the implementation of the domestic legal framework for CbC reporting in jurisdictions are available on the OECD website. With this update, Bonaire, Saint Eustatius and Saba, Costa Rica and Romania have been included on the list of countries that have activated for the first time exchange relationships for CbC reporting.

## European Union

On 20 July 2018, the Council of the EU published an [overview](#) of the preferential tax regimes examined by the Code of Conduct Group (COCG) (Business Taxation) since its creation in March 1998. The overview is divided in three parts: (i) preferential regimes of EU Member States (including Gibraltar with regard to the United Kingdom); (ii) dependent or associated territories of EU Member States to which EU treaties do not apply (as of the date of notification of the regime); and (iii) other jurisdictions (now covered by the EU listing exercise). The overview concludes that the COCG has examined 638 preferential regimes (including 280 during the period 1998-1999), 254 of which were deemed harmful.

On 6 June 2018, the Austrian Federal Government presented in Brussels the [programme](#) for the Austrian Presidency of the Council of the EU. Based on the released programme, the creation of efficient, fair and transparent tax systems is among the priorities of the Austrian Presidency. High on its agenda is the protection of the public budgets against harmful tax competition, tax fraud and tax evasion and the modernization of the tax rules in view of globalization and new technologies. The Austrian Presidency will attach particular importance to this issue with the aim to advance the negotiations and to outline potential solutions in light of the developments at the G20, OECD and EU level. Also, the Austrian Presidency commits to continue to work on the European Commission's proposal for the introduction of a common corporate tax base.

## Belgium

On 9 July 2018, the Belgian Government published a Royal Decree dated 29 June 2018 outlining the administrative fines applicable in the event of infringements to the new transfer pricing documentation requirements. No penalty is applicable if the infringement took place due to: (i) circumstances

beyond the taxpayer's control; or (ii) on first offense if the infringement was not committed in bad faith or with the intention to avoid taxes. As of the second offense and if it can be demonstrated that the infringements were not committed in bad faith or with the intention to avoid taxes, the penalty will gradually increase from €1,250 up to €25,000 after the fourth offense. If the infringement was committed in bad faith or with the intention to avoid taxes (which includes intentional filing of an incomplete or incorrect corporate tax return), a penalty of €12,500 will apply as of the first offense. Any consecutive offense will be punished with a fine of €25,000.

## Colombia

On 30 July 2018, Resolution 40 of 26 July 2018 regarding transfer pricing was published in the *Official Gazette* of Colombia. Among others, Resolution 40 clarifies the process to submit the Country-by-Country Reporting (CbCR) notification. Accordingly, if a constituent entity is required to file a specific transfer pricing form (form 120), the CbCR notification will be submitted within that form. Otherwise, a constituent entity will need to download a specific form from the Tax Authority's website and send it via email to [preciostransferencia@dian.gov.co](mailto:preciostransferencia@dian.gov.co) with the subject "Notification - Country by Country Report." The notification due date is due between 11-24 September 2018. The specific notification deadline is determined based on the last digit of the taxpayer identification number.

On 17 July 2018, the Colombia Tax Authority (*Dirección de Impuestos y Aduanas Nacionales* - DIAN) issued Resolution 38 of 2018 regarding the procedure to file the BEPS Action 13 Local File and Master File for fiscal year 2017. Accordingly, the Local File and Master File should be filed electronically using Form 1729 V-7 and Form 5231 V-1, respectively. The filing of this Forms is due between 11-24 September 2018; the specific filing deadlines are determined based on the last digit of the taxpayer identification number.

## Cyprus-United Kingdom

On 18 July 2018, the Cyprus-United Kingdom (UK) new tax treaty (the New Treaty), which replaces the existing 1974 treaty, entered into force. The provisions of the New Treaty will have effect for taxes withheld at source from 1 January 2019 and for corporation tax any financial period beginning on or 1 April 2019.

The provisions of Article 25 (Mutual Agreement Procedure) and Article 26 (Exchange of information) shall have effect from 18 July 2018 without regard to the taxable year or chargeable period to which the matter relates.

The New Treaty contains some treaty-based BEPS recommendations from Action 2 (neutralizing the effects of hybrid mismatch arrangements), Action 6 (preventing the granting of treaty benefits in inappropriate circumstances) and Action 14 (making dispute resolution mechanisms more effective).

The main changes to the New Treaty are set out below:

- ▶ The treaty preamble uses the new OECD recommended 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.
- ▶ The New Treaty also contains a provision dealing with fiscally transparent entities which states that income or gains derived by an entity or an arrangement that is wholly or partly fiscally transparent shall be considered to be income or gains of a resident, but only to the extent that the income or gains are treated for purposes of taxation by that state, as the income or gains of a resident of the state.
- ▶ Where a person, other than an individual, is determined to be resident in both contracting states, the tie-breaker, which was previously "effective management," requires the competent authorities of the Contracting States to determine by mutual agreement the Contracting State of which the person shall be deemed to be a resident, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors.
- ▶ The New Treaty also contains new Entitlement to Benefits provisions (Article 23) which are based on a principal purpose test. Where the benefit is denied to a person under the provisions of this Article, the taxpayers may present a case for mutual agreement procedure to the competent authorities.

Both Cyprus and the UK have signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI) prior to signing this Treaty and neither has included this tax treaty as a Covered Tax Agreement (CTA). 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 New Treaty falls within the scope of any of the reservations made by that respective jurisdiction.

## Guernsey

On 6 August 2018, Guernsey's Government launched a consultation dealing with the introduction of substance requirements for companies tax resident in Guernsey. The consultation is conducted through an online survey and it seeks feedback on the outlined proposals. Among others, the online survey discusses: (i) the introduction of the requirement that certain sector companies must demonstrate the existence of Core Income Generating Activities (CIGA) in Guernsey; (ii) specific aspects of substance relating to intellectual property income and to Collective Investment Vehicles (CIVs); (iii) the adoption of an hierarchy of sanctions based on trigger events and their proportionality; and (iv) the adoption of mandatory disclosure rules by 31 December 2019. In addition, the consultation seeks views on a potential change to Guernsey's unusual definition of tax residence for companies, to bring it more into line with other jurisdictions. The closing date for submissions is 31 August 2018 and the outcomes of the consultation will be published on the Government's website 12 weeks after the closing date.

## Ireland

On 31 July 2018, the Irish Department of Finance published the [2018 Tax Strategy Group Papers](#). The Tax Strategy Group (TSG) is chaired by the Department of Finance and comprises senior officials and political advisors from a number of Civil Service departments and offices. The TSG is not a decision making body and the papers produced aim to facilitate informed discussions on various options for tax policy changes and offer a list of issues and options that may be taken into account for the 2019 Budgetary Process. The 2018 TSG Paper on Corporation Tax (TSG 18-01 - Corporation Tax) discusses various international and domestic tax issues such as the implementation of the EU Anti-Tax Avoidance Directive (ATAD). In this regard, these papers advise that it is intended that Ireland will legislate for option B when introducing Controlled Foreign Company (CFC) rules in Finance Bill 2018 (i.e., CFC taxation of non-distributed income of CFCs arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage) while leaving open several items for TSG members to comment on, including de minimus derogations allowed under the ATAD and whether the transposition of these rules should exceed the ATAD standard and develop measures to address "cash box" companies. The TSG papers also welcome input from TSG members on the implementation of an ATAD-compliant exit tax, with reference

to Ireland potentially advising of the exit tax rate in advance of 1 January 2020 to provide certainty to Irish stakeholders (i.e., 12.5% or 33% exit tax rate for trading assets). Also, the Papers advise that a 12-week technical consultation will be launched in Q3 2018 in relation to the introduction of the ATAD interest limitation rule and anti-hybrid rules. The TSG papers also note the intention of the Irish Government to complete the ratification process for the BEPS MLI before the end of this year. The TSG Papers also includes discussions around recent international developments such as US tax reform the common consolidated corporate tax base, a common EU list of non-cooperative tax jurisdictions and digital taxation.

## Italy

On 30 July 2018, the Italian Ministry of Economy and Finance launched a [public consultation](#) on the Legislative Decree that would transpose in Italy the EU Mandatory Disclosure Rules (Directive 2018/822 of 25 May 2018 that Directive 2011/16/EU with respect to mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements). The draft Legislative Decree includes, among others, a list of defined terms, who needs to disclose information, what information should be disclosed and when, and for how long that information needs to be stored by the taxpayer or intermediary. The hallmarks that will make a cross-border arrangement reportable will be prescribed in a separate Decree.

Comments on the draft Legislative Decree must be sent through the public consultation website by 28 September 2018.

## Kazakhstan

On 1 August 2018, the Kazakh Ministry of Finance released a draft bill to ratify the MLI. Once the domestic ratification process has been completed, Kazakhstan 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 Kazakhstan 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.

On 25 April 2018, the State Revenue Committee released a [communiqué](#) announcing the introduction of a three-tiered approach to transfer pricing documentation. In December 2017, Kazakhstan adopted changes to its domestic transfer pricing rules introducing CbC reporting obligations with

retroactive effects from 1 January 2016. (See EY's [The Latest on BEPS](#), dated 29 January 2018). According to the announcement, the requirement to prepare a Master File applies to members of an international group that executed in the reporting period international business transactions (as described by the TP Law) and have consolidated group revenue for the year preceding the reporting financial year for which the Master File is filled is not less than:

- Equivalent to €750 million using the arithmetic average market exchange rate determined in accordance with the tax legislation of the Republic of Kazakhstan for the relevant fiscal year (for a parent company that is a Kazakhstan tax resident); and
- Depends on the threshold established for CbCR filing for the jurisdiction of such nonresident parent company or authorized participant of international group (for nonresident parent company/authorized participant of international group).

The requirement to prepare the Local File applies to members of the international group that have executed in the reporting period international business transactions (as described by the TP Law) and have reported in their financial statements revenue for the fiscal year preceding the reporting year not less than the 5 million monthly calculation index (approximately US\$36.4 million) established by the Law on the National budget and effective on 1 January of the corresponding fiscal year.

The Master File should be submitted within 12 months from the date of the tax authorities' request, while the deadline for submission of the Local File is set within 12 months after the last day of the reporting fiscal year. The provisions of the Law with respect to the Master File and Local File will come into force from 1 January 2019. No specific penalties will apply in the case of noncompliance, while general penalties for non-submission should be applicable.

## Luxembourg

On 26 July 2018, the Luxembourg Tax Authorities issued an administrative circular providing guidance on the characterization of virtual currencies and the tax treatment of income derived from related trading or mining activities by Luxembourg taxpayers.

As a basic assumption, virtual currencies are considered as an intangible asset for income tax, local business tax and net worth tax purposes, rather than a currency. A virtual

currency is not legal tender and does not represent a means of exchange whose value is guaranteed by a central bank. As a result, income and gains, as well as expenses denominated in a virtual currency should be converted either in Euro or in any other accepted currency.

Further, the circular provides guidance on the potential qualification of the income from virtual currencies as taxable business or other income. Taxpayers are required to have consistent and continuous documentation available indicating the date of acquisition or creation of the virtual currency, and the related costs.

See EY Global Tax Alert, [Luxembourg releases circular on the tax treatment of virtual currencies](#), dated 2 August 2018.

## Poland

On 16 July 2018, Poland's Government Legislation Center published, for public consultation, a draft amendment to the Act on corporate income tax (CIT) and personal income tax (PIT) with respect to transfer pricing (TP) rules. The published draft proposes significant changes to the new provisions on TP documentation introduced in 2017. The proposed changes seek to reduce to some extent the administrative burden imposed on taxpayers by increasing documentation thresholds and introducing "safe harbors" for selected transactions (loans and low value adding services), but on the other hand the draft law grants also new rights to tax authorities in terms of auditing intragroup settlements. It is expected that the new law will be effective as from 1 January 2019.

Some of the key changes of the draft law refer to the obligation to prepare a Master File and Local File which generally should follow the BEPS Action 13 recommendations. According to the draft law, taxpayers will be obliged to prepare a Master File only if all of the following conditions are met: (i) the entity is required to prepare local documentation; (ii) the entity belongs to the group of related entities for which consolidated financial statements are prepared; and (iii) consolidated revenues of the Group exceeded PLN200 million (approx. US\$50.4 million) in the previous financial year. The proposed law also provides for the possibility of preparing the Master File documentation in English. Furthermore, it sets forth new deadlines for the preparation of documentation, i.e., 12 months from the end of the tax year for the Master File and 9 months from the end of the tax year for Local File.

In addition, the proposed law grants new rights to TP auditors. It expands the list of TP methods that can be used by tax authorities when assessing the arm's-length character of transactions adding the valuation techniques. It also gives them the right to reclassify or eliminate the transaction in the case of infringement of the arm's-length rule. This is a significant expansion of the rights of tax auditors which may make future TP audits even more challenging for taxpayers.

See EY Global Tax Alert, [Poland proposes changes to transfer pricing law](#), dated 1 August 2018.

## Saudi Arabia

On 17 July 2018, the Saudi Arabian Cabinet authorized the Minister of Finance to sign the MLI, by way of Order No. 98/2018-rp in order to implement the tax-treaty related minimum standards of the BEPS package. At the time of signature, Saudi Arabia will have to submit a list of the tax treaties that Saudi Arabia would like to designate as CTAs, i.e., tax treaties to be amended through the MLI. Together with the list of CTAs, Saudi Arabia will also submit a provisional list of reservations and notifications (MLI positions) in respect of the various provisions of the MLI. The definitive MLI positions will be provided upon the deposit of its instrument of ratification, acceptance or approval of the MLI.

## Singapore

On 7 August 2018, Singapore's Tax Authority published the third edition of the [e-Tax Guide](#) on CbCR. With this update, question 11 of the e-Tax Guide was amended in order to clarify the use of rounded figures in CbC reports. According to the guide, companies can report rounded figures in their CbC reports if the source data from which those amounts have been obtained consist of rounded figures. However, it is noted that companies should ensure that the rounding does not have a material impact in terms of understanding the CbC report. Also, when rounding off to the nearest thousand, companies have to show the figures in full, e.g. rounded figure SG\$1,126,000 instead of SG\$1,126.

## Slovakia

On 30 July 2018, the Slovak Republic ratified the MLI. At the time of signing of the MLI, the Slovak Republic submitted its MLI positions, including a list of 64 CTAs, as well as a preliminary overview of reservations and notifications.



Among others, the Slovak Republic opted for the introduction of a simplified limitation on benefits clause in the context of BEPS Action 6 as well as changes to the specific activity exemptions in relation to BEPS Action 7. The Slovak Republic did not opt for mandatory binding arbitration.

The Slovak Republic must now deposit its ratification instrument in order for the MLI to enter into force for its CTAs. For the Slovak Republic, the MLI will enter into force on the first day of the month following a three-month period after the deposit of the ratification instrument.

## South Africa

On 25 July 2018, the South African Government published new [guidance](#) on the mutual agreement procedure (MAP) that allows competent authorities from the governments of contracting jurisdictions to interact with the intent to resolve international tax disputes. The new guidance addresses issues such as when MAP applies, when MAP may be denied, and how taxpayers should make a MAP request. South Africa is one of the eight jurisdictions included in the sixth batch for which the OECD is now gathering input on the implementation of the BEPS Action 14 minimum standard by 24 August 2018 (for further details, see EY Global tax Alert, [OECD invites taxpayer input on sixth batch of peer reviews of dispute resolution processes under BEPS Action 14](#), dated 26 July 2018).

## United Kingdom

On 31 July 2018, the UK Tax Authority, HM Revenue & Customs (HMRC), published the 2017-2018 “[Transfer Pricing and Diverted Profits Tax](#)” statistics. These statistics provide insight into the revenue generated by the increased focus of HMRC on transfer pricing and the effect of the diverted profits tax (DPT) on the behavior of multinational enterprises, and reinforces the position that DPT strengthens HMRC’s ability to achieve enhanced TP settlements.

As might be expected from the increased tax yield, HMRC has also ramped up its activity in relation to DPT preliminary notices. Some businesses appear to have made successful representations to HMRC following receipt of these notices indicating that challenge at this stage can be worthwhile for taxpayers.

At the same time, the statistics evidence that it is taking longer to negotiate advance pricing agreements (APAs) and advance thin capitalization agreements (ATCAs). The number of cases entering into the MAP program to seek relief from double taxation has increased, and the OECD considers that the UK remains a good treaty partner with a well-resourced MAP team. Following the trends outlined above, MAP cases now take longer to resolve but the time is down on historic highs.

See EY Global Tax Alert, [UK Tax Authority releases transfer pricing and diverted profits statistics](#), dated 7 August 2018.

## United States

Recently, the United States (US) Internal Revenue Service (IRS) issued [Transfer Pricing Examination Process](#) (Publication 5300 (6-2018)), a guide to best practices and processes to assist with the planning, execution and resolution of transfer pricing examinations. The publication, which will be shared with taxpayers at the start of an examination, is intended to be consistent with the Large Business & International (LB&I) Examination Process (LEP) (Publication 5125). The *Transfer Pricing Examination Process* (TPEP) supplants the *Transfer Pricing Audit Roadmap* (Roadmap), a 2014 toolkit designed to provide IRS examiners with audit techniques, advice, links and reference materials that may be helpful in planning, executing and resolving transfer pricing examinations.

In many respects, the TPEP is similar to the Roadmap. For example, it is divided into three parts: Planning, Execution, and Resolution. It also continues to emphasize the early collection of facts, the notion of a working hypothesis, collaboration among team members of different disciplines and reporting chains, and meaningful discussion of the facts and working hypothesis with the taxpayer during the audit. However, the TPEP includes new material related to CbCR, the new instructions around the Initial Transfer Pricing Documentation Information Document Request, and exhibits related to the recently developed Practice Units.

See EY Global Tax Alert, [US IRS publishes new guide on transfer pricing examinations](#), dated 26 July 2018.

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