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Global Tax Alert

The Latest on BEPS - 10 September 2018

OECD

On 7 September 2018, the OECD published additional Transfer Pricing Country Profiles (TPCPs) for seven countries reflecting the existing transfer pricing legislation and practices for each country (namely, Costa Rica, Greece, Republic of Korea, Panama, Seychelles, South Africa and Turkey). In addition, the profile of Singapore has been updated. The profiles, prepared by means of questionnaires filled out by the countries, focus on the domestic legislative measures based on major transfer pricing issues including the transfer pricing methods, arm's-length principle, transfer pricing documentation, comparability analysis, intangible property, intra-group services, cost contribution agreements, administrative approaches to avoiding and resolving disputes, safe harbors and other implementation measures. The TPCPs also compared the state of the countries domestic legislation with the OECD Transfer Pricing Guidelines to reflect the extent to which the countries are following the guidelines. The TPCPs for another five countries are forthcoming (namely, Argentina, Chile, Finland, Iceland and Italy).

On 30 August 2018, the OECD released the fourth batch of peer review reports relating to the implementation by Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand and Portugal of the BEPS minimum standard on Action 14 (*Making Dispute Resolution Mechanisms More Effective*). Australia, Japan, Malta and New Zealand had also requested that the OECD provide feedback concerning their adoption of the Action 14 best practices, and the OECD therefore also released four accompanying best practices reports.

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Overall, the reports conclude that the majority of these jurisdictions meet almost all or most of the elements of the Action 14 minimum standard. Australia meets part of the elements of the Action 14 minimum standard, while Mexico meets half of these elements. In the next stage of the peer review process, each jurisdiction's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored.

See EY Global Tax Alert, *OECD releases fourth batch of peer review reports on Action 14*, dated 4 September 2018.

Australia

On 24 August 2018, the Australian hybrid mismatch integrity measures received Royal Assent. The hybrid mismatch rules will apply to income years starting on or after 1 January 2019. However, the imported mismatch rule (other than where an importing payment is made under a structured arrangement) will apply to income years starting on or after 1 January 2020 (to align with the European Union (EU) introduction of the hybrid mismatch rules).

The ATO will be issuing a range of guidance products.

Also on 24 August, the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI) received Royal Assent. Australia will now be able to formally ratify the MLI. The MLI will enter into force for Australia 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. If this ratification occurs prior to the end of September 2018, the MLI should enter into force for Australia from 1 January 2019.

See EY Global Tax Alert, *Australia's law to adopt Multilateral Instrument receives Royal Assent*, dated 5 September 2018.

Austria

On 14 August 2018, the bill for the *Annual Tax Act 2018* was published in the *Austrian Official Gazette*. There are no substantial changes from the earlier draft bill regarding the measures for the implementation of the EU Anti-Tax Avoidance Directive (ATAD) (See *The Latest on BEPS – 21 May 2018*). Note that the new controlled foreign company (CFC) regime shall now apply for fiscal years starting after 31 December 2018 (not 30 September 2018 as previously suggested).

Austria-Kosovo

On 8 June 2018, Austria and Kosovo signed a new income tax treaty (the Treaty) which contains a number of treaty-based recommendations from the BEPS project contained in Action 6 (preventing the granting of treaty benefits inappropriate circumstances), Action 7 (preventing the artificial avoidance of permanent establishment status), and Action 14 (making dispute resolution mechanisms more effective).

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. The Treaty contains the permanent establishment (PE) recommendation included in the BEPS project making all the specific activities exceptions subject to the preparatory or auxiliary requirement. The Treaty also contains a Principal Purpose Test. Moreover, taxpayers can request unresolved cases to be submitted to arbitration.

The MLI has no effect on the Treaty as Kosovo has not signed the MLI, and though Austria has signed the MLI, it has not included this treaty as a Covered Tax Agreement (CTA). For the MLI provisions to have effect on the Treaty, Kosovo would need to first sign the MLI, and then both jurisdictions would need to include the Treaty in their respective list of CTAs, indicating whether the treaty falls within the scope of any of the reservations made by that respective jurisdiction.

Belgium

On 26 July 2018, the Belgian Tax Authorities published a list of Frequently Asked Questions (FAQs) on the application of the Belgian intellectual property (IP) regime, i.e., the innovation deduction. The innovation deduction entered into force on 1 July 2016 and takes into account the requirements of Action 5 of the OECD's BEPS Action Plan. The regime provides a deduction of 85% of the net qualifying IP income, resulting in an effective tax rate of 4.4% (2018-2019) and 3.8% (as from 2020). Next to clarifications on the general (scope of) application of the incentive, the FAQs provide useful guidance and practical insights on the application of the innovation deduction by taxpayers by addressing a series of specific questions.

See EY Global Tax Alert, *Belgian Tax Authorities publish FAQs on IP regime*, dated 27 August 2018.

Bulgaria

On 30 August 2018, the Ministry of Finance of Bulgaria issued a draft bill which provides for several amendments to the Corporate Income Tax regime and contains measures for the implementation of the EU ATAD. The bill is open to public consultation until 29 September and after that date it will be submitted for further review and approval by the National Assembly. The bill is expected to be adopted at the end of the year and the rules will be effective as from 1 January 2019.

Among others, the draft bill proposes the following: (i) the introduction of CFC rules. Bulgaria has taken the first option of Art. 7, para 2 of the ATAD without explicitly outlining the categories of income. Only the second paragraph of this option has been introduced. According to it, the non-distributed income of the entity or the income of the PE shall not be included in the tax base where the CFC carries on a substantive economic activity supported by staff, equipment, assets and premises as evidenced by the taxpayer with relevant facts and circumstances. There is an exception of this provision regarding a CFC established in black-listed jurisdictions. The bill also introduces detailed rules for the calculation and apportionment of the taxable profit of CFCs for Bulgarian CIT purposes; and (ii) the introduction of a 30% earnings before interest, taxes, depreciation and amortization (EBITDA) rule. The bill provides for an exemption for taxpayers deducting interest cost up to €255,000. It also introduces the option to carry forward the restricted interest cost for an unlimited period.

According to the explanatory note to the bill, the existing anti-tax avoidance provision in Bulgaria is broader in scope compared to the General Anti-avoidance rule (GAAR) suggested by the ATAD, and thus no further amendments are expected in this regard. Furthermore, the draft bill does not address hybrid mismatch and exit taxation rules, however it notes that further amendments are expected.

Chile

On 23 August 2018, the Chilean Executive Power proposed a tax reform bill, which encompasses several tax rules. Among others, the tax reform bill proposes the following: (i) the establishment of a 10% tax rate on digital services provided by nonresidents to Chilean individuals (independent of where servers may be located). Also, the bill would establish electronic payment administrators (e.g., credit card companies) as withholding agents; (ii) the introduction of a PE definition which incorporates the agency PE definition as amended by BEPS Action 7; and (iii) the GAAR is adjusted providing more legal certainty under the principles of legality and free exercise of options. Also, the legal distinction between Specific Anti-avoidance Rules (SAAR) is reinforced. Although the Chilean Executive Power expects to adopt the bill before the end of this year, it is uncertain when the bill will be approved by Congress.

See EY Global Tax Alert, *Chile proposes tax reform*, dated 29 August 2018.

Finland

On 29 August 2018, the Finnish Government announced that agreement was reached on the measures included in the 2019 budget. These measures comprise a variety of tax-related budgetary measures, including the transposition of the interest limitation rule provided for by the EU ATAD into Finnish law.

On 27 August 2018, the Finnish Ministry of Finance launched a public consultation to transpose EU Council Directive 2017/1852 on tax dispute resolution mechanisms in the EU. In addition to the Directive, the public consultation also addresses: (i) tax disputes under a treaty-based mutual agreement procedure (MAP); and (ii) transfer pricing disputes based on the EU Arbitration Convention.

For disputes covered by the Directive, the proposed rules would apply to disputes filed on or after 1 July 2019 which concern tax years that started on or after 1 January 2018. In relation to other disputes, the proposed rules would apply to all applications filed on 1 July 2019 or thereafter, regardless of the tax year. The public consultation is open for comments until 21 September 2018.

India

On 29 March 2018, the *Finance Act, 2018* (FA 2018) was enacted as law upon receiving the Presidential Assent. The FA 2018 amended the existing law (with retroactive effect from 1 April 2017) regarding the due date for filing Country-by-Country (CbC) report in India. Based on the amended law, the deadline for furnishing a CbC report by every parent entity or the alternate reporting entity (ARE), resident in India is within 12 months from the end of the reporting accounting year. Consequently, there is a change in the due date for filing of the CbC notification by a constituent entity (CE) resident in India as well. Accordingly, every CE resident in India, shall, if it is a constituent of an international group, the parent entity of which is not resident in India, notify the prescribed income tax authority whether it is the ARE of the international group or the details of the parent entity or the ARE, if any, of the international group, and the country or territory of which the said entities are resident at least two months prior to the due date for furnishing of the CbC report by the parent entity. For example, notification in Form 3CEAC may be done in the month of January if the due date for filing CbC report is 31 March. Whereas if any other month is considered as the due date for filing CbC report, the notification may be done two months prior to the end of the month which is considered as the due date for filing CbC report.

Isle of Man

On 7 August 2018, the Isle of Man Government published an update on the proposed substance requirements for Isle of Man tax resident companies.

During 2017, the EU Code of Conduct Group (Business Taxation) (the "Code Group") carried out a screening process of the tax regimes in over 90 jurisdictions. The Isle of Man was found to be cooperative after giving its commitment to address the concerns raised by the Code Group in relation to the need for Isle of Man tax resident companies to demonstrate economic substance in the Island. Following months of preparation and dialogue with Code Group representatives, OECD officials and the EU Commission, the Isle of Man Government has delivered a response to this commitment, together with the other Crown Dependencies.

The proposed policy approach is largely based on the methodology adopted by the OECD's Forum on Harmful Tax Practices, focusing on a sector-by-sector assessment of what economic substance means.

The Isle of Man Government will be engaging with relevant industry sectors to discuss the proposals and obtain feedback, prior to finalizing the legislation.

Japan

In August 2018, the Japanese tax authorities updated the guidance on the new Japanese CFC rules in a question and answer format. The original guidance was published in January 2018. The updated version provides additional clarifications, such as documentation for a non-paper company CFC and the requirements for a capital gain exemption under qualified post-merger-integration.

The new Japanese CFC rules apply to CFC fiscal years starting on or after 1 April 2018.

Kuwait

On 9 July 2018, the Kuwaiti Cabinet approved the MLI. The MLI is awaiting approval by the Kuwait Parliament. Once the domestic ratification process has been completed, Kuwait 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 Kuwait 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.

Luxembourg

On 3 July 2018, the Luxembourg Government submitted a draft law to the Luxembourg Parliament, ratifying the MLI. The draft bill contains the preliminary MLI positions submitted at the time of signature of the MLI with one amendment; the draft provides for one additional reservation on arbitration, being the exclusion of the tax treaty with Switzerland from those provisions. Once the draft law has been adopted, Luxembourg will need to deposit its instrument of ratification, approval or acceptance of the MLI with the OECD and confirm its MLI positions.

See EY Global Tax Alert, *Luxembourg publishes draft law ratifying Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*, dated 4 September 2018.

Malta

On 30 August 2018, the OECD released the fourth batch of peer review reports relating to the implementation of the BEPS minimum standard under Action 14 on improving tax dispute resolution mechanisms. Malta was among the assessed jurisdictions in the fourth batch. Malta requested that the OECD also provide feedback concerning their adoption of the Action 14 best practices, and therefore, in addition to the peer review report, the OECD has released an accompanying best practices report.

Overall the report concludes that Malta meets almost all the elements of the Action 14 minimum standard, although several elements were not available for assessment at this stage due to Malta's limited experience with the MAP. Notwithstanding this limited experience, the Stage 1 peer review report appears to indicate that Malta generally has the tools to be able to resolve MAP cases satisfactorily. Malta has indicated that it is committed to address any shortcomings identified in its Stage 1 peer review report.

See EY Global Tax Alert, *OECD releases Malta peer review report on implementation of Action 14 minimum standard*, dated 5 September 2018.

Nordics

On 29 August 2018, the Nordic countries signed an amending protocol to the Denmark – Faroe Islands – Finland – Iceland – Norway – Sweden Income and Capital Tax Convention (Nordic Convention) (1996), as amended by the 1997 and 2008 protocols, and the 2014 protocol in relations between Denmark and the Faroe islands. The amending protocol contains some treaty-based BEPS recommendations from Action 6 (preventing the granting of treaty benefits in inappropriate circumstances) and Action 14 (making dispute resolution mechanisms more effective).

The amending protocol contains 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. Moreover, the amending protocol enables taxpayers to present a case for MAP to the competent authorities of either Contracting State.

All signatories of the Nordic Convention have signed the MLI, but none of the signatories of the Nordic Convention included it as a CTA on their preliminary positions. It is expected that the Nordic Convention will not be further modified by the MLI, particularly given that the amending protocol has incorporated the treaty-related BEPS minimum standards into the Nordic Convention. For the MLI to have effect on the Nordic Convention, all signatories of the Nordic Convention would need to include it in their respective list of CTAs, and indicate whether the Nordic Convention falls within the scope of any of the reservations made by that respective jurisdiction.

Panama

On 16 July 2018, Panama's Minister of Economy and Finance (MEF) proposed to the National Assembly a bill (Draft Bill No. 654) that would establish the method for calculating income that is derived from the "transfer or exploitation" of intangible assets and subject to a tax exemption or a preferential tax treatment. The bill would establish that taxpayers operating under a preferential tax regime that grants tax benefits or exemptions to income derived from the transfer or exploitation of intangible assets would only be eligible to access these benefits when the income originates from a qualifying intangible asset. To this end, the taxpayer would need to apply a formula contained in the bill and meet the rest of the bill's provisions (including tracking and documentation requirements) to access the tax benefit granted by the respective preferential regime. The bill follows the nexus approach recommended in the final report of BEPS Action 5 (*Countering Harmful Tax Practices More Effectively, Taking Into Account Transparency and Substance*).

See EY Global Tax Alert, *Panama's Minister of Economy and Finance proposes bill for calculating income subject to preferential tax treatment under an IP regime,* dated 28 August 2018.

Poland

On 24 August 2018, the Polish Minister of Finance published draft legislation introducing very favorable Intellectual Property regime (IPR). The IPR aims at incentivizing IP developments (including software and all kinds of research and development (R&D)) in Poland by taxing profits from qualifying IP rights at a preferential 5% tax rate. This incentive is based on the OECD recommendations on BEPS Action 5 regarding the modified nexus approach and it intends to link the relief to the proportion of R&D managed from Poland. The new regime is expected to enter into force on 1 January 2019.

See EY Global Tax Alert, *Poland publishes legislation on Innovation Box*, dated 30 August 2018.

Singapore

On 24 August 2018, the Inland Revenue Authority of Singapore (IRAS) published an updated list of activated bilateral Automatic Exchange of Information (AEOI) relationships for the automatic exchange of CbC reports for the Ultimate Parent Entity of Singapore Multinational Enterprise groups. The updated list available on IRAS' website now comprises 55 jurisdictions. The full list of jurisdictions and their respective effective taxable periods is set out below. This list should continue to be monitored as additional AEOI relationships may be concluded over time.

List of jurisdictions

AEOI relationships effective from fiscal year (FY) 2016: Australia, Belgium, Brazil, Bulgaria, Cayman Islands, Colombia, Denmark, Finland, France, Germany, Greece, Guernsey, India, Ireland, Italy, Japan, Jersey, Korea, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Pakistan, Poland, Romania, Slovak Republic, Slovenia, South Africa, Spain, Sweden and the United Kingdom

AEOI relationships effective from FY 2017: Argentina, Austria, Canada, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Estonia, Hungary, Iceland, Indonesia, Isle of Man, Latvia, Liechtenstein, Malaysia, Portugal, Russia and Uruguay

AEOI relationships effective from FY 2018: Mauritius and Switzerland

Sweden

On 29 August 2018, the Swedish Tax Agency (Skatteverket) published updated transfer pricing guidance which incorporates the OECD's revised guidance on the application of the profit split method that was published on 12 June 2018 based on BEPS Action 10. The Swedish Tax Agency takes the position that the OECD's revised guidance provides clarifications on the application of the profit split method, without effectively changing the application of the arm's-length principle as such. Therefore, the new guidance can also be applied retroactively.

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