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Global Tax Alert

The Latest on BEPS – 5 November 2018

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OECD

On 29 October 2018, the OECD released a policy note on tax and digitalization. The note highlights the challenges arising from the digital economy and it provides a summary of the OECD's work on this topic so far. Similar to the interim report published in March 2018, the policy note mentions that the members of the Inclusive Framework have agreed to undertake a coherent and concurrent review and they, through the Task Force on the Digital Economy, are working towards a consensus-based, global solution by 2020, with an update to be provided by the OECD Secretariat to the G20 in 2019. Additionally, the note also discusses other impacts of digitalization on taxation, such as understanding the tax implications of the changing nature of work, improving the effective taxation of activities facilitated by online platforms and tax compliance.

On 23 October 2018, Antigua and Barbuda, Dominica and Saint Vincent and the Grenadines, and on 26 October 2016, Grenada joined the BEPS Inclusive Framework, bringing the total number to 123. As new BEPS members, they committed to comply with the BEPS minimum standards, which are contained in Action 5 (countering harmful tax practices), Action 6 (preventing treaty abuse), Action 13 (transfer pricing documentation) and Action 14 (enhancing dispute resolution). They will also participate on an equal footing with the members of the Inclusive Framework on the remaining standard setting, as well as the review and monitoring of the implementation of the BEPS package.

On 10 October 2018, the OECD released its annual publication on the 2017 Mutual Agreement Procedure (MAP) statistics. For 2017, the report includes statistics from all OECD members and most of the members of the OECD Inclusive Framework on BEPS – a total of 87 jurisdictions and almost all MAP cases worldwide. The report provides information separately for transfer pricing cases and non-transfer-pricing cases regarding the opening and ending inventory of MAP cases for 2017, the number of new MAP cases initiated, the number of MAP cases completed, the cases closed or withdrawn, and the average cycle time for cases completed, closed or withdrawn.

In addition, the report provides, for each jurisdiction, the number of MAP cases it has with each of its treaty partners. This increased transparency should allow greater insight into each jurisdiction's unique MAP situation.

See EY Global Tax Alert, *OECD releases 2017 Mutual Agreement Procedure statistics*, dated 23 October 2018.

Recently, the OECD added new and also updated some of the existing MAP profiles of the members of the Inclusive Framework on BEPS. With the latest update, the OECD updated or added the profiles of the following countries: Bahrain, Colombia, Germany, Ireland, Luxembourg, South Africa, and the United Kingdom (UK).

As agreed under BEPS Action 14, all members of the Inclusive Framework on BEPS commit to the implementation of the minimum standard on MAP, including publishing their MAP profiles pursuant to an agreed template. Currently, 89 jurisdictions have published their MAP profiles, and 24 additional jurisdictions' MAP profiles are forthcoming. Angola, Djibouti, Haiti and the Turks and Caicos Islands have no tax treaties in place at the moment, and thus they do not have a MAP profile. Once there is a tax treaty in place, the MAP profiles for these jurisdictions will also be published. All the MAP profiles are available at the OECD website.

Argentina

Recently, the Argentinian Federal Administration of Public Revenue (*Administración Federal de Ingresos Públicos* or AFIP) published a new website with useful information on the County-by-Country (CbC) Reporting (CbCR) rules in Argentina. Among other things, the page includes answers to frequently asked questions, a step-by-step guide on the guidelines of CbCR, a list of international agreements in effect and of CbCR competent authority agreements in place, the text of the legislation and guidelines for the preparation and submission of CbC reports. It is important to consider that there are some differences between General Resolution 4130-E and some of the data included in this website. It is expected that AFIP would clarify some of these inconsistencies in the short term.

Australia

On 25 October 2018, the Australian Taxation Office (ATO) released its final Practical Compliance Guideline 2018/7 (PCG) which sets out the ATO's compliance approach to Part IVA (Australia's GAAR) and certain restructures that have the effect of preserving Australian tax benefits that would otherwise be disallowed with the enactment of Australia's hybrid mismatch rules.

The PCG states that where a hybrid restructure would prima facie generate a tax benefit, "the Commissioner would not seek to apply Part IVA where the restructure merely removes the double nontaxation outcome and the arrangement is itself an ordinary commercial dealing or structure without contrived features that would otherwise attract Part IVA." The PCG provides five (non-exhaustive) factors that the Commissioner would expect to be present for a restructure to qualify as "low risk" and six examples of restructures that the Commissioner considers to be "low risk" and to which he would not seek to apply Part IVA. The PCG indicates that "low risk" restructures will attract limited ATO compliance resources whereas restructures higher than "low risk" will likely require the ATO to conduct further compliance activity to review the restructure from a Part IVA perspective to obtain appropriate assurance. The Commissioner encourages taxpayers to engage early with the ATO regarding proposed restructures if they appear to not be "low risk" and if the taxpayer would like to mitigate the compliance risk/obtain a greater level of certainty. Taxpayers may be required to disclose such restructures in the Local File (as part of CbC reporting), International Dealings or Reportable Tax Position Schedules.

The PCG took effect from 24 August 2018 and applies to restructuring arrangements entered into before and after that date. The PCG will be under continuous review for the next three years.

See EY Global Tax Alert, *Australian Taxation Office issues guidance on GAAR and restructures of hybrid mismatch arrangements*, dated 26 October 2016.

British Virgin Islands

On 18 September 2018, the *Virgin Islands Mutual Legal Assistance (Tax Matters) (Amendment) Act 2018* (the Amendment Act), which among others introduced CbCR rules, came into force. According to the Amendment Act, all Virgin Islands tax resident constituent entities that are ultimate parent entities (UPEs) of a multinational enterprise (MNE) group with annual consolidated group revenue equal to or exceeding €750 million have to prepare a CbC report for financial years starting on or after 1 January 2018. The CbC report should be submitted within 12 months after the end of the reporting fiscal year. Failure to submit the CbC report will trigger a fine of up to US$100,000. Moreover, a Virgin Islands constituent entity will need to notify the tax authorities whether it is the UPE or surrogate parent entity (SPE) by the last day of the reporting fiscal year. If it is neither a UPE nor an SPE, it will have to inform the tax authorities of the identity of the UPE or SPE along with its tax residency within the same deadline.

Croatia–Japan

On 19 October 2018, Croatia and Japan 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), Action 7 (preventing the artificial avoidance of permanent establishment status), and Action 14 (making dispute resolution mechanisms more effective).

The Treaty contains 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. It also contains a provision dealing with fiscally transparent entities. In cases where a person other than an individual is resident in both Croatia and Japan (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. Moreover, the Treaty contains a Principal Purpose Test. In the permanent establishment (PE) clause, the Treaty contains an anti-fragmentation rule and the new definition of agency PE. Furthermore, the Treaty provides a period of three years for submission of a MAP request, beginning on the date of the first notification of the action resulting in taxation not in accordance with the provisions of the Treaty.

Both Croatia and Japan have signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI) and neither of them has included this tax treaty as a covered tax agreement (CTA). Therefore, it may be expected that the Treaty will not be further modified by the MLI, particularly given that the Treaty already incorporates the treaty-related BEPS minimum standards.

Czech Republic

On 12 October 2018, the Czech Ministry of Finance published an online statement regarding its position on digital taxation. According to the statement, the Czech Republic recognizes the need to react in a flexible way to the changing business environment in the context of digitalization and supports a common approach within the European Union (EU). However, as there is no consensus on the EU Digital Services Tax (DST) directive nor on introduction of a long-term measure, the Czech Republic supports technical discussions on refining the DST as a short-term solution. The Czech Republic also recognizes that long-term solutions need to be reached on a global level.

Ireland

On 26 October 2018, the Irish Prime Minister signed an order on behalf of the Irish Government, approving the MLI. The order will now be added to the Finance Bill 2018 by way of a Committee Stage amendment. At the time of signing, Ireland submitted a list of 71 CTAs as well as a provisional list of Reservations and Notifications with respect to the various provisions of the MLI. Once the Finance Bill 2018 is passed, Ireland will need to deposit its instrument of ratification of the MLI with the OECD. The MLI will enter into force for Ireland 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 such instrument.

On 16 October 2018, the Irish Revenue Commissioners published updated guidance on the application of the Irish Knowledge Development Box (KDB) regime. The KDB entered into force for companies in respect of accounting periods commencing on or after on 1 January 2016 and takes into account the requirements of BEPS Action 5. The KDB aims at incentivizing innovative research and development (R&D) activities by taxing profits from patented inventions, copyrighted software, software and in relation to smaller companies, other intellectual property that is similar to an invention which could be patented at an effective rate of 6.25%. The main clarifications provided in the updated guidance relate to the impact of KDB claims of incorporating an Irish branch into an Irish entity while carrying out qualifying R&D activities and KDB consequences of a merger. Appendix II of the manual contains a full list of updates.

Jersey

On 9 October 2018, the Jersey Minister of Treasury and Resources issued the 2019 draft Budget Law. Among many other measures, the draft Budget Law contains a proposal of new legislation to introduce an economic substance test for companies in line with the EU Code of Conduct. The draft legislation will be discussed in the States meeting on 4 December 2018. The law relating to substance will come into force immediately after being approved by the States during the Budget debate on 4 December 2018 but will be effective from accounting periods starting on or after 1 January 2019.

Malta

On 22 October 2018, the Minister for Finance released the 2019 Budget, which contains among others measures, the implementation of the EU Anti-Tax Avoidance Directive (ATAD). The Budget proposes the introduction of: (i) a 30% earnings before interest, taxes, depreciation and amortization (EBITDA) interest deduction limitation rule; (ii) rules on controlled foreign corporations (CFC) legislation whereby profits earned by associated enterprises whose tax thereon is less than half the tax that would have been paid in Malta will be attributed to the Maltese resident controlling entity; (iii) a broad general anti avoidance rule that will extend the scope of application of the already existing anti-abuse rule; and (iv) an exit tax for the transfer of tax residence and assets or business activity to another jurisdiction. The amendments will generally be effective from 1 January 2019. The Minister for Finance also announced that regulations transposing ATAD 2 are being developed and should be implemented within the stipulated deadlines, i.e., 1 January 2020 and 1 January 2022.

Netherlands

On 29 October 2018, the Dutch Government initiated an internet consultation on the implementation of the EU ATAD 2, dealing with anti-abuse provisions aimed to tackle hybrid mismatch structures. This includes the implementation of provisions for hybrid mismatches resulting from: (i) hybrid entities; (ii) hybrid financial instruments; (iii) hybrid PEs; (iv) hybrid transfers; (v) imported mismatches; and (vi) dual residency cases.

In addition, the Dutch Government announced its intent to repeal a Decree relating to the application of the Netherlands-United States tax treaty to hybrid entities (CV/BV Decree) by 2020. Under the CV/BV Decree, treaty benefits (e.g., lowered or exempt dividend withholding tax rates) may be granted if the investors in a (reverse) hybrid entity are tax treaty eligible. Upon repeal of the CV/BV Decree as of 1 January 2020, dividend distributions from Dutch entities to certain LPs and CVs may become subject to the 15% Dutch dividend withholding tax, unless restructuring takes place before that time.

The internet consultation is open from 29 October 2018 until 10 December 2018. After this period, the input received shall be processed by the Ministry for Finance, with expected formal legislative proposals to be sent to the Dutch Parliament during the first half of 2019. It is expected that the legislative proposals for the hybrid mismatch rules will come into effect as of 1 January 2020. The so-called reverse hybrid mismatch rules are expected to be implemented as of 2022.

See EY Global Tax Alert, *Dutch Government opens internet consultation on anti-hybrid measures of ATAD 2*, dated 30 October 2018.

Poland

On 26 October 2018, the upper house of the Polish Parliament (Senate) passed the draft bill introducing far-reaching changes to the Polish tax law, including the implementation of Mandatory Disclosure Rules (MDR) in the Polish legal system, as provided by Directive 2018/822.

The Polish MDR legislation has a wider scope (includes not only cross-border but also domestic tax arrangements as well as a wider definition of covered taxes, including Value Added Tax with respect to the domestic tax arrangements) and earlier reporting requirements in comparison to what is required by the Directive. Under the Polish MDR legislation, the cross-border tax schemes implemented after 25 June 2018 until 1 January 2019 are reportable before 30 June 2019 by intermediaries and before 30 September 2019 by taxpayers (if the intermediary would not be obliged to report). Domestic tax schemes implemented after 1 November 2018 until 1 January 2019 are reportable before 30 June 2019 by the intermediaries and before 30 September 2019 by taxpayers (if the intermediary would not be obliged to report). Tax arrangements commencing after 1 January 2019 are reportable within 30 days after the day when the scheme is: (i) available for the client, (ii) ready for implementation, or (iii) started, whichever is sooner. This is significantly earlier than the deadline of 31 August 2020 required by the EU Directive. The MDR regulations are expected to come into force as of 1 January 2019.

Spain

On 23 October 2018, the Spanish Ministry of Taxation released a draft Bill proposing measures to prevent and fight tax evasion, including implementation of the EU ATAD. The draft Bill includes, among others, amendments to the Spanish CFC and exit tax rules to align them with the EU ATAD. Stakeholders can provide comments during the public consultation phase until 15 November 2018. After that date, the Ministry of Taxation will publish the final Bill to be submitted to the Spanish Parliament for approval.

See EY Global Tax Alert, *Spanish Council of Ministers releases draft anti-tax evasion Bill for public consultation*, dated 26 October 2018.

On 23 October 2018, the Spanish Government released a preliminary draft bill introducing a DST. If approved, the DST would be applicable as of 2019 as an indirect tax. The tax rate would be 3%, applicable to gross income derived from certain digital services in which there is an essential user participation in the company's value creation process. Thus, the DST should apply only to services that could not exist without user involvement. Apart from some details, its main features (scope and DST taxable events) are mainly in line with the Directive proposal presented by the EU Commission on 21 March 2018.

See EY Global Tax Alert, *Spain releases draft bill on Digital Services Tax*, dated 25 October 2018.

United Kingdom

On 29 October 2018, the UK Chancellor presented the UK Budget for the forthcoming financial year starting in April 2019. Among other announcements, the Budget aims to introduce a DST in the UK as from April 2020. The UK will continue to participate in discussions on future reforms to the international corporate tax framework, and will amend the DST if a multilateral proposal can be agreed by this time. The DST will be set at 2% (rather than the EU's 3% proposal) and apply to search engines, social media platforms and online marketplaces that meet the qualifying threshold.

As previously announced, the Budget also includes amendments required in the context of the EU ATAD, related to the UK's CFC rules, exit taxation rules and certain anti-hybrid rules. In addition, the UK Government aims to tackle the artificial avoidance of PE status by introducing an anti-fragmentation rule, as provided by BEPS Action 7.

In addition, new UK legislation was introduced which tangentially aligns with Action 8 (i.e., the alignment of taxation of intangible property (IP) with value creation) but was not in direct response to it, in respect of a tax charge on offshore receipts in relation to intangible property. The UK income tax charge will arise to the offshore IP owner on amounts received in low tax jurisdictions where there is no double taxation agreement with the UK, that are considered to be UK-derived amounts, in other words amounts from the enjoyment or exercise of IP rights that are ultimately exploited in the UK market. The new legislation will apply from April 2019 although there are anti-avoidance provisions which apply from 29 October 2018.

See EY Global Tax Alert, *United Kingdom: Highlights of Budget 2018 documents and other consultations*, dated 30 October 2018.

United States

On 23 October 2018, the Internal Revenue Service (IRS) added Japan to the list of countries with which the United States 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.

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