

## The Latest on BEPS - 19 November 2018

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### EY OECD BEPS project

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### OECD

On 15 November 2018, the OECD announced that it is now gathering input on the implementation of the BEPS Action 14 minimum standard in relation to the review of the seventh batch of jurisdictions (Brazil, Bulgaria, China, Hong Kong, Indonesia, Papua New Guinea, Russian Federation and Saudi Arabia) and invites taxpayers to submit their input related to their experiences in these jurisdictions, via an electronic questionnaire, by 13 December 2018. The exercise is part of the process of the mutual agreement procedure (MAP) peer review and monitoring process that the OECD launched in December 2016 under Action 14 of the BEPS project in relation to more effective dispute resolution mechanisms. Business taxpayers are encouraged to take this opportunity to submit their views. The OECD will continue to launch peer reviews of further batches of jurisdictions and publish peer review reports in accordance with the assessment schedule of peer reviews published by the OECD in October 2016.

On 14 November 2018, the OECD released *Guidance for the Development of Synthesized Texts* (the Guidance) to facilitate the interpretation and application of tax treaties modified by the *Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting* (the MLI). Synthesized text refers to a single document showing the text of specific tax treaties covered by the MLI (i.e., Covered Tax Agreement (CTA)) and the elements of the MLI that have an effect on the CTA as a result of the interaction of the MLI positions of its Contracting Jurisdictions, as well as information on the dates on which the provisions of the MLI have effect in each Contracting Jurisdiction for the CTA.

The Guidance, which has been developed by the OECD Secretariat with input from the members of the ad hoc Group on the MLI, sets out a suggested approach for the development of synthesized texts, and it also suggests sample

language that could be included in the synthesized texts. Parties to the MLI have no legal obligation under the MLI to develop synthesized texts. However, if they decide to do so, the OECD encourages them to consult each other and take a consistent approach in developing such documents. The OECD expects that many Parties to the MLI will eventually develop synthesized texts based on the released Guidance, providing greater certainty and clarity for taxpayers.

Also, on the same date, the OECD released a secretariat note (the note) that seeks to clarify the entry into effect rules of the MLI. Generally, the provisions of the MLI have effect with respect to taxes withheld at source on amounts paid or credited to nonresidents, where the event giving rise to such taxes occurs on or after the first day of the next calendar year that begins on or after the latest of the dates on which the MLI enters into force for each of the Contracting Jurisdictions to the CTA. The note addressed the situation where the latest of the dates on which the MLI enters into force is 1 January of a given year. As per the note, in such a case the MLI will have effect for taxes withheld at source on 1 January of that same given year.

See EY Global Tax Alert, [\*OECD releases guidance for development of synthesized texts and a note clarifying the entry into effect of BEPS Multilateral Convention\*](#), dated 14 November 2018.

On 8 November 2018, the OECD released additional exchange relationships that have been activated under the Multilateral Competent Authority Agreement (MCAA) on the exchange of Country-by-Country (CbC) reports. 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 1,900 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 (CbCR) in jurisdictions are available on the OECD website. With this update, Nigeria and Qatar have been included on the list of countries that have activated for the first time exchange relationships for CbCR. Nigeria has activated 48 exchange relationships, while Qatar activated 47 exchange relationships. Additionally, China has activated 38 additional exchange relationships, bringing the total number of activated exchange relationships to 42.

On 7-9 November 2018, the OECD conducted the fourth regional meeting of the inclusive framework on BEPS in Eastern Europe and Central Asia. The meeting was held in Yerevan, Armenia and it was attended by over 60 delegates from 16 countries. This meeting allowed participants to discuss the latest developments on the implementation work on the four BEPS minimum standards, and the peer review processes. According to the [\*summary\*](#) of the discussions, in the context of Action 5, the participants discussed for the purposes of a case study the criteria against which a preferential regime is reviewed by the Forum on Harmful Tax Practices (FHTP) to determine whether it is compliant with the BEPS Action 5 minimum standard. A number of possible options to fix the harmful features of the regime were also discussed. With respect to treaty abuse, a number of scenarios were discussed, together with how the anti-treaty abuse mechanisms would apply in each case, and how the MLI could implement these approaches. The identification of the MLI effects on the tax treaties via the matching exercise of the MLI positions was identified as one of important challenges during the meeting. For that, the participants welcomed the development of tools to enhance the readability of these effects and the opportunity to take part in workshops focused on the MLI. Additionally, the participants exchanged views on how they are using CbCR information for high level risk assessment in their respective country and they also discussed the limitations of the information contained in a CbC report. In light of this, the group also considered what additional information may need to be gathered following the high level risk assessment stage in order to progress towards any possible audit adjustment. Participants also discussed the Action 14 minimum standard on improving dispute resolution, including both the treaty-based mechanisms and administrative practices.

Additionally, an update on the follow-up work on transfer pricing was provided and participants exchanged views on the application of the profit split method, the implementation of the measures addressing hard to value intangibles, and the current work on financial transactions. Participants were also updated on the progress of the work on the toolkits aimed at addressing the specific needs of developing countries in implementing the BEPS measures.

## European Union

On 6 November 2018, the Economic and Financial Affairs Council (ECOFIN) removed Namibia from the EU's list of non-cooperative jurisdictions for tax purposes, as it was found

that Namibia has made sufficient commitments at a high political level to address EU concerns. Namibia has now been moved to Annex II of the Council conclusions of 5 December 2017 (the “grey list”). The grey list covers jurisdictions that have undertaken sufficient commitments to reform their tax policies, but they remain subject to close monitoring. The Finance and Economic Affairs Ministers of the EU Member States agreed that a de-listing was justified in light of an expert assessment of the commitments made by these jurisdictions to address deficiencies identified by the EU. The decision leaves 5 jurisdictions on the list of non-cooperative jurisdictions out of the 17 announced initially on 5 December 2017. These are American Samoa, Guam, Samoa, Trinidad and Tobago and the US Virgin Islands.

Currently the grey list consists of 65 jurisdictions which are officially committed to implement recommendations requested by the Council in order to address the issues identified within a specific timeframe. Those recommendations are split into three broad categories: (i) transparency, (ii) fair taxation, and (iii) anti-BEPS measures. If the jurisdictions included on the grey list fulfil their commitments, the Council will swiftly remove them from such list. Should these jurisdictions fail to address their commitments by the established timeframe, the Council may move the jurisdictions concerned into the list set out in Annex I of the Council conclusions of 5 December 2017 (the blacklist).

Also on 6 November, the finance and economic affairs Ministers of the EU Member States discussed the European Commission's (the Commission) proposal for the short-term solution of the digital services tax (DST) at their ECOFIN meeting in Brussels, Belgium. The discussion focused on two key issues in the Commission proposal, i.e., the scope of taxable services and the question of the expiry of the directive, the so-called “sunset clause.” While the proposal has been thoroughly discussed at a technical level and progress has been achieved, there are still differences between Member States on several issues, including the precise scope of services which would be subject to the future tax. On the sunset clause, all Member States agree that the directive should expire once there is a comprehensive solution to taxing the digital economy at the OECD level. According to the announcement of the Austrian Minister of Finance, Hartwig Löger, the Presidency wants to achieve concrete results by the end of this year. To that end, there will be further work at the technical level in order to be able to reach an agreement at the Council meeting on 4 December.

## Argentina

On 12 November 2018, the Resolution General 4332 (the [Resolution](#)) which introduces amendments to the CbCR rules in Argentina, was published in the *Official Gazette*. The Resolution aligns the existing CbCR rules with the BEPS Action 13 minimum standard as it was announced in the peer review report of Argentina. Among others, the Resolution provides that local filing can only be required in Argentina when there is an underlying international agreement in effect, but there is not a Competent Authority Agreement. The amendments are effective from the date of the publication of the Resolution in the *Official Gazette*.

## Barbados

On 25 October 2018, the Minister of International Business and Industry announced that the International Business regime will be replaced by a new converged tax regime, which is expected to apply from 1 January 2019. The Minister announced that this decision is as a consequence of Barbados' commitment to the OECD's BEPS Action 5.

## Colombia

On 31 October 2018, Colombia's Executive Power submitted a tax reform bill which among other measures, proposes many amendments to the international tax rules. According to the bill, the Colombian controlled foreign corporation (CFC) regime would not apply when the CFC's income is 80% or more active income. The bill also would add requirements for claiming indirect foreign tax credits (FTCs), but indirect FTCs could not be claimed for portfolio investments. The bill would allow taxpayers to carry forward FTCs without limitation (currently capped at four years). Additionally, the bill would establish a holding company regime under which dividends received from, and proceeds from the sale of, certain non-Colombian entities would not be taxable in Colombia. The bill also would allow foreign service providers of electronic services or digital content to voluntarily opt into a value added tax (VAT) withholding tax collection system through debit and credit card issuers. The bill will be debated in Congress, likely until the end of this year. Even though the bill is subject to change during the debates, it is highly likely that some form of this law will be enacted.

See EY Global Tax Alert, [Colombia proposes tax reform](#), dated 7 November 2018.

## Egypt

On 23 October 2018, the Egyptian Tax Authority (ETA) published on its website the new transfer pricing guidelines. According to the guidelines, all Egyptian tax resident entities that are ultimate parent entities (UPEs) of a multinational enterprise (MNE) group with annual consolidated group revenue equal to or exceeding EGP3b will have to prepare a CbC report for financial years starting on or after 1 January 2018. For UPEs nonresident for tax purposes in Egypt, the group revenue threshold of €750m will apply. The CbC report should be submitted by the end of the reporting fiscal year. However, for the first year, the deadline will be within 12 months after the end of the reporting fiscal year. Failure to submit the CbC report will trigger monetary penalties.

Additionally, the guidelines also introduce Master File and Local File requirements by 1 January 2018. The deadline for submission of the Master File is the date of the parent entity's tax return filing in its home jurisdiction. The Local File is required to be submitted to the ETA within two months following the filing of the annual corporate tax return.

See EY Global Tax Alert, [Egypt implements new transfer pricing guidelines](#), dated 7 November 2018.

## Finland

On 1 November 2018, the Finnish Ministry of Finance submitted a bill to the Finnish Parliament on amendments to the Finnish CFC rules. The bill was issued to implement the CFC provisions provided by the EU Anti-Tax Avoidance Directive (ATAD). Under the proposed rules, the control threshold determining the CFC status would be lowered from 50% to 25% and both resident and nonresident related parties' direct or indirect holdings would be taken into account in assessing the threshold. The Bill does not differentiate between active and passive income as proposed in the ATAD. The rules concerning the calculation of CFC income also remain mostly unchanged. However, several technical changes are introduced for the purposes of alignment with the ATAD provisions. According to the bill, the new rules would enter into force as of 1 January 2019 and would apply for the first time for the 2019 tax assessment.

See EY Global Tax Alert, [Finland issues government bill on changes to CFC rules to be effective as of 1 January 2019](#), dated 9 November 2018.

## Japan

On 6 November 2018, the Japanese tax authorities published the synthesized text of the Japanese tax treaties with Israel, New Zealand, Poland, Slovakia, Sweden and the United Kingdom (UK) as modified by the MLI. The synthesized text reflects the agreement reached between the relevant authorities of both Japan and these jurisdictions on how the treaties should be impacted by the MLI. The synthesized texts for other treaties (Australia and France) that will be amended by the MLI are expected shortly.

The OECD released, on 30 August 2018, 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. Japan was among the assessed jurisdictions in the fourth batch. Japan 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 Japan meets most of the elements of the Action 14 minimum standard.

See EY Global Tax Alert, [OECD releases Japan peer review report on implementation of Action 14 minimum standard](#), dated 7 November 2018.

## Jersey, Guernsey, Isle of Man

On 7 November 2018, Jersey, Guernsey and the Isle of Man jointly issued a document to provide guidance on how the draft legislation introducing an economic substance test for companies will apply. Based on the proposed substance test, companies performing certain activities (such as banking, insurance and fund management) will need to evidence that they have sufficient economic substance in the relevant jurisdiction by: (i) being directed and managed; (ii) carrying out core income generating activities; and (iii) having adequate human and material resources and incurring adequate expenditure. More detailed guidance is expected to be published later this year.

## Mexico

Recently, a bill for the introduction of a DST was introduced in the Mexican Congress by a member of a minority party. The bill to some extent resembles the European Proposal proposed Directive on a DST. According to the bill, profits

derived by Mexican residents (both individuals and legal entities) and nonresidents with a permanent establishment in Mexico providing digital services would be taxed at a rate of 3%. The DST would only apply to income derived from digital services exceeding MXN100 million (approximately US\$4.9 million) after deductions. Among others, the bill limits the scope of the DST to services falling in one of the following activities: (i) advertising in a digital interface targeted at the users of such an interface; (ii) providing a multifaceted interface that allows users to locate other users and interact with them, and facilitates the delivery of goods or rendering of underlying services among those users; and (iii) transmission of user data generated from the activities carried on in digital interfaces by such users. The bill is likely to be further modified in the legislative process. If the bill is adopted, it would enter into force on the day following the date in which it is published in the *Official Gazette*.

## Peru

On 11 November 2018, the Ruling N° 264-2018 SUNAT, which postpones the deadline for filing the CbC report for fiscal year 2017 for Peruvian taxpayers that are members of an MNE group whose UPE is a non-domiciled related party that has the obligation to file a CbC report, was published in the *Official Gazette*. The new deadline is March 2019 (between 14-22 depending on the tax identification number).

## United Kingdom

On 7 November 2018, HM Revenue & Customs (HMRC) launched a public consultation on the detailed design and implementation of the DST ahead of its proposed inclusion in the Finance Bill 2019/20. The tax is targeted at capturing value generated by certain digital business models (being search engines, social media platforms and online marketplaces) from their UK user-base. For businesses undertaking the in-scope activities, the revenues linked to UK users will be subject to the DST at 2%. This tax can be claimed as an allowable expense against UK corporation tax, but it is not creditable. The digital services tax is proposed to apply from April 2020. The consultation runs until 28 February 2019. The UK Government has reiterated its commitment to developing an international solution that will ultimately replace the UK DST if such a solution can be agreed.

See EY Global Tax Alert, [UK proposes Digital Services Tax: unilateral measure announced in Budget 2018](#), dated 5 November 2018.

Also on 7 November, HMRC published policy papers on the changes to (i) the corporate interest restriction rules; and (ii) the CFC regime. The policy papers provide for more information regarding the measures included in the Finance (No. 3) Bill 2017-19 in order to ensure that both regimes will work as intended. The amendments to the corporate interest restrictions rules will have effect for periods commencing on or after 1 January 2019, unless otherwise stated. The changes to the UK CFC regime will have effect from 1 January 2019.

HMRC published the synthesized text of the 2006 UK-Japan Double Taxation Convention, as modified by the MLI on 13 November 2018. The synthesized text reflects the agreement reached between the relevant authorities of both the UK and Japan on how the treaty should be impacted by the MLI. The provisions of the MLI enter into force for the UK and Japan on 1 October 2018 and 1 January 2019, respectively. The provisions of the MLI are effective from: (i) 1 January 2019 for taxes withheld at source; (ii) 1 April 2020 for UK Corporation Tax; (iii) 6 April 2020 for UK Income Tax and Capital Gains Tax; and (iv) 1 April 2019 for all other taxes levied by Japan for taxable periods beginning on or after that date.

HMRC published the synthesized text of the 1983 UK-New Zealand Double Taxation Convention, as modified by the MLI, on 6 November 2018. The synthesized text reflects the agreement reached between the relevant authorities of both the UK and New Zealand on how the treaty should be impacted by the MLI. The provisions of the MLI entered into force for both the UK and New Zealand on 1 October 2018. The provisions of the MLI are effective from: (i) 1 January 2019 for taxes withheld at source; (ii) 1 April 2019 in the UK for Corporation Tax; (iii) 6 April 2019 in the UK for Income Tax and Capital Gains Tax; and (iv) 1 April 2019 for all other taxes levied by New Zealand for taxable periods beginning on or after that date.

## United States

On 9 November 2018, the Internal Revenue Service (IRS) updated the [website](#) on which it maintains a list of the jurisdictions with which the US is negotiating or has concluded a competent authority agreements (CAA) for the exchange of CbC reports. With this update, the IRS included a note indicating that it does not anticipate concluding CAA negotiations in 2018 with any jurisdictions not appearing on the list posted on this IRS website.

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