3 December 2018

Global Tax Alert

The Latest on BEPS – 3 December 2018

NEW! EY Tax News Update: Global Edition

EY's new Tax News Update: Global Edition is a free, personalized email subscription service that allows you to receive EY Global Tax Alerts, newsletters, events, and thought leadership published across all areas of tax. Access more information about the tool and registration here.

Also available is our EY Global Tax Alert Library on ey.com.

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 19 November 2018, Cabo Verde became the 123rd member to join the BEPS Inclusive Framework. As a new BEPS member, Cabo Verde 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). Cabo Verde 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 15 November 2018, the OECD released an update to the 2017 Progress report on Preferential Tax Regimes conducted in connection with Action 5 of the OECD/G20 BEPS Project.

The updated results cover 53 regimes, bringing the number of regimes reviewed, or under review, to 246. The assessments were undertaken by the Forum on Harmful Tax Practices (FHTP), comprised of the 123-member jurisdictions of the Inclusive Framework on BEPS (IF on BEPS). The updated results indicate the extent of continuing work to end harmful tax practices, under which all preferential regimes will require adequate levels substance. The results will be updated from time to time as approved by the IF on BEPS.

Additionally, on the same date, the IF on BEPS released a Substantial Activities Requirement for "no or only nominal tax" jurisdictions (the Standard). The document sets out the background and rationale for the resumption of the substantial activities requirement, a requirement first set out in an OECD 1998 report. It also sets out the technical guidance governing the application of that requirement.

An update on other aspects of this work will be included in the next progress report on BEPS Action 5.

See EY Global Tax Alert, *OECD releases updated results on scrutiny of preferential tax regimes and substantial activity requirements for no or only nominal tax jurisdictions*, dated 20 November 2018.

European Union

On 20 November 2018, the Council of the European Union (EU) published a report from the Code of Conduct Group (COCG) (Business Taxation), which encompasses the work of the COCG in the second half of 2018 under the Austrian Presidency of the Council. One of the main items included in the report is the follow up work undertaken by the COCG on the EU list of non-cooperative jurisdictions for tax purposes (Annex I) (the black list), and on the commitments taken to implement tax good governance principles (Annex II) (the grey list) of the Council conclusions of 5 December 2017.

The report discusses the process of the de-listing, and it mentions that currently 5 jurisdictions remain on the black list, i.e., American Samoa, Guam, Samoa, Trinidad and Tobago, and the US Virgin Islands. With respect to the scope, the general "two out of three" exception for the three tax transparency sub criteria (1.1, 1.2 and 1.3) will come to an end on 30 June 2019. According to the report, the expiration of this exception will affect several jurisdictions that are currently compliant with the tax transparency criterion, including some jurisdictions that are not on the grey list. Also, the report discusses that the aspect of beneficial ownership and the effective implementation of the agreed OECD anti-BEPS minimum standards will be included with the EU listing criteria for screening. Additionally, a proposal for draft guidance on further coordination of defensive measures in the tax area against listed jurisdictions was discussed at the subgroup meetings during the second half of 2018 and further political discussions on this file are expected to take place under the incoming Presidency. In the context of the monitoring process conducted by the COCG, the report provides a general overview of the implementation of commitments taken by jurisdictions, as well as summary tables. The report states that as of 15 November 2018, there are still 116 commitments of 65 jurisdictions to be monitored by the COCG. The report also recommends some updates to the grey list with respect to Andorra, Antigua and Barbuda, Dominica, Grenada, Macao SAR, Oman, Saint Vincent and the Grenadines and San Marino. The COCG agreed on a set of practical benchmarks to review the implementation of each standard in respect of jurisdictions that decided to implement anti-BEPS minimum standards without joining the IF on BEPS. The report includes as annex 2 the steps in the review process by the COCG based on the agreed benchmarks for each BEPS minimum standard.

Belgium

On 9 November 2018, the Belgian tax authorities issued new draft transfer pricing administrative guidelines on their website for public consultation. The draft administrative guidelines provide a short overview of the OECD Transfer Pricing Guidelines (TPG), including the changes of the OECD BEPS project. In particular, the draft administrative guidelines list key aspects of chapters 1, 2, 3, 6, 7, 8 and 9 of the OECD TPG. Chapter 4 is not included given the ongoing work of the OECD to revise this chapter on the administrative approaches to avoiding and resolving transfer pricing disputes. The draft administrative guidelines also include a short description of the OECD TPG on the attribution of profits to permanent establishments. Public comments to the draft administrative guidelines can be provided to the Belgian tax authorities by 12 December 2018.

At the end of 2018, the Belgian tax authorities will start a pilot project, called the "Cooperative Tax Compliance Program." This program is aimed at improving cooperation between the participating companies and the tax authorities, whereby the main result would be faster legal certainty for companies and improved compliance with tax obligations. This cooperation would be modeled based on the Dutch "horizontal monitoring" mechanism. The program is only open to very large companies which are subject to corporate income tax or nonresident corporate income tax. Only a limited number of companies have been invited to participate during the pilot phase, which will last at least two years. Once a pre-selected company is interested in participating in the pilot program, an introduction meeting will be held to evaluate the readiness of the company. In a next step, more in-depth discussions will take place during the intake-phase, whereby the tax control framework will be evaluated and sample tested, and a coordinator (i.e., single point of contact) will be appointed based on sector specificities. The intake-phase is anticipated to take between six months and one year.

Bulgaria

On 5 November 2018, Bulgaria launched for consultation a draft bill proposing new mandatory transfer pricing documentation requirements, in line with the requirements of the OECD's BEPS Action 13. The public consultation will run until 5 December 2018.

Among others, the draft bill introduces Master File and Local File requirements as of 1 January 2019. The Master File and Local File requirements will apply to taxpayers that: (i) have a book value of assets higher than BGN8 million and net revenue exceeding BGN16 million; and (ii) are engaged in related-party transactions that exceed certain thresholds. The deadline for submission of the Master File is within 12 months after the end of the reporting fiscal year. The Local File is required to be submitted upon request by 31 March of the year following the year to which it relates. Failure to submit the Master File and Local File may trigger penalties ranging from 0.5 to 1% of the volume of the related-party transactions that should have been documented.

See EY Global Tax Alert, *Bulgaria publishes draft mandatory transfer pricing documentation bill for consultation*, dated 19 November 2018.

Croatia

On 2 November 2018, a proposal of amendments to the Corporate Income Tax was released, which contains among others, measures for the implementation of the EU Anti-Tax Avoidance Directive (ATAD). The proposal needs to be approved by the Parliament.

In particular, the proposal includes: (i) a 30% earnings before interest, taxes, depreciation and amortization (EBITDA) rule with a €3 million threshold. Companies will be able to carry forward interest disallowed under the 30% EBITDA over a three-year period up to the threshold of €3 million; and (ii) rules on controlled foreign corporations (CFC) whereby specific categories of income derived by low-taxed nonresident entities would be attributed to the Croatian resident controlling entity. CFC rules would not apply to entities that are engaged in substantial economic activity, or if the value of the passive income (e.g., dividends, interest, royalties, rental income or capital gains) does not exceed one-third of the foreign subsidiary's total income unless the foreign entity is resident in one of the countries included on the EU list of non-cooperative jurisdiction for tax purposes.

Once approved, the amendments will enter into force within eight days after the publication in the *Official Gazette* and would generally be effective from 1 January 2019.

Denmark – Netherlands

On 15 November 2018, the Danish Parliament approved the amending protocol, which was signed on 9 May 2018 and amends the treaty between Denmark and the Netherlands (the Treaty). The amending protocol contains a number of treaty-based recommendations from the BEPS project contained in Action 6 (preventing the granting of treaty benefits 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 Mutual Agreement Procedure (MAP) to the competent authorities of either Contracting State. Both Denmark and the Netherlands have signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI) and this Treaty is not included as a covered tax agreement (CTA) on their preliminary positions. It is expected that the Treaty will not be further modified by the MLI, particularly given that the amending protocol has incorporated the treaty-related BEPS minimum standards into the Treaty. The protocol will enter into force on 31 December 2018.

Finland

On 16 November 2018, the Finish Parliamentary Finance Committee published its comments regarding the proposal introducing new interest deduction limitation rules for the implementation of the EU ATAD. The Committee proposed amending the provision regarding the financial statements qualifying for the application of the equity ratio based escape rule and also suggested specifying the wording of the justifications related to the grandfathering regime for loans concluded before 17 June 2016.

Ireland

On 14 November 2018, the Irish Department of Finance launched a public consultation on the implementation of the anti-hybrid and interest limitation rules as provided by the EU ATAD I and ATAD II. In Ireland's Corporation Tax Roadmap published in September 2018, the Irish Government announced that the consultation would be launched in Q3 2018, given the complexity of the anti-hybrid and anti-reverse hybrid rules. The Department of Finance has launched a single consultation in order to seek views on the interlinked issues of the ATAD anti-hybrid and interest limitation rules. Tax policy issues detailed in this public consultation will form part of the Minister for Finance and Public Expenditure and Reform's considerations of the transposition of the ATADs into national law. In this respect, the consultation includes 44 questions open for public input. The consultation period will run from 14 November 2018 to 18 January 2019.

Norway

On 16 November 2018, the Norwegian Cabinet approved the MLI after receiving a recommendation from the Ministry of Finance. The MLI has now been submitted to the Norwegian Parliament for further approval. At the time of signing, Norway submitted a list of 28 CTAs as well as a provisional list of Reservations and Notifications with respect to the various provisions of the MLI. Once the ratification process is completed, Norway will need to deposit its instrument of ratification of the MLI with the OECD. The MLI will enter into force for Norway 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.

Poland

On 14 November, 2018, the Polish President signed the bill incorporating several changes to the Polish tax legislation. Among others, the new legislation introduces: (i) the intellectual property (IP) regime based on which profits from qualifying IP rights will be taxed at a preferential 5% tax rate; (ii) mandatory disclosure rules (MDR) with broader scope of reporting; (iii) changes to the withholding tax (WHT) regime and shifting from tax exemption or a lower rate at source system to pay-and-refund model; and (iv) transfer pricing rules. The above changes are binding from 1 January 2019. As the changes are significant for many taxpayers, on 16 November 2018, the Ministry of Finance initiated further discussion on the practical aspects of the implementation of the rules on the WHT regime and MDR reporting.

On 8 October 2018, the Polish Ministry of Finance published the synthesized text of the 2004 Poland-Austria Double Taxation Convention, as modified by the MLI. The synthesized text aims to facilitate the application of the MLI and serves as an auxiliary tool, aimed at documenting the impact of the MLI. The provisions of the MLI entered into force for both Poland and Austria on 1 July 2018. The provisions of the MLI are applicable to a company's income received from 1 January 2019 for: (i) taxes withheld at source where the event giving rise to such taxes occurs on or after that date; and (ii) all other taxes for taxable periods beginning on or after that date.

South Africa

On 24 October 2018, South Africa's National Treasury published revised regulations broadening the scope of electronic services for the purpose of the *Value Added Tax Act (VAT) 1991*. The regulations extended electronic services to all services provided by means of an electronic agent, electronic communication or the internet for any consideration. The supplier of the electronic services will be required to register for VAT purposes in South Africa if: (i) electronic services are supplied by a person outside South Africa; and (ii) such person is conducting an enterprise in South Africa and other conditions specified in the regulations are met. The revised regulations exclude educational services regulated by an offshore educational authority, telecommunications services and certain supplies made within a group of companies, if held 100%, from the definition of electronic services. The revised regulations will repeal the current regulation, introduced in 2014, and will come into effect on 1 April 2019.

See EY Global Tax Alert, *South Africa releases final E-services VAT regulations, effective 1 April 2019*, dated 5 November 2018.

Sweden

On 14 November 2018, the Swedish Parliament adopted the proposal transposing the amendments to the current Swedish CFC rules, in view of implementing the EU ATAD. The proposed changes include a new white list of jurisdictions that are explicitly excluded from the scope of the Swedish CFC rules. The new regulations would enter into force as of 1 January 2019.

Thailand

On 21 November 2018, Thailand's *Transfer Pricing Act* was published in the *Royal Gazette* and will be effective for accounting years starting on or after 1 January 2019. Taxpayers with related parties, regardless of having related-party transaction or the length of the relationship during an accounting period, are required to prepare a report providing descriptions of the related-party relationships and disclosing the value of related-party transactions for each fiscal year in accordance with the specified format and submit them to the tax authority within 150 days from the closing of the accounting period. Taxpayers with annual revenue of less than THB200 million (US$6 million) are exempt from the above requirement. Failure to file the required report or to submit incomplete/incorrect documents without justification is subject to fine of not more than THB200,000 (US$6,000). Further measures will be stipulated later in related Ministerial Regulations.

See EY Global Tax Alert, *Thailand enacts Transfer Pricing Act*, dated 3 December 2018.

Tunisia

On 15 October 2018, the draft Finance Law 2019, which among other transfer pricing (TP) documentation requirements provisions, introduces Country-by-Country (CbC) reporting (CbCR) rules in Tunisia, was submitted to the Parliament. According to the draft law, the CbC report filing is required, and this is, for financial years starting on or after 1 January 2020, by any Tunisian tax resident entity if the following cumulative conditions are met: (i) The entity is preparing consolidated financial returns; (ii) The entity is owning or controlling directly or indirectly one or more companies resident or established abroad; (iii) The entity is realizing annual consolidated group revenue excluding taxes equal to or exceeding TND1,636,800 million with regard to the year previous to the one concerned by the filing requirement; and (iv) The entity is not owned by another Tunisian resident company which is required to file the CbC report or by a nonresident company which is required to file the CbC report pursuant to a foreign similar legislation.

In addition, CbC report filing is also required by any entity resident in Tunisia that is owned or controlled directly or indirectly by an entity resident or established in a country or a jurisdiction that has not adopted a regulation that provides the requirement to file a CbC report and that has not concluded with Tunisia an agreement to automatically exchange the said report or to comply with the obligations resulting from such an agreement, and this is, in the following cases: (i) Case of designation of the entity resident in Tunisia for this purpose by its Group of membership and provided that this designation is notified to Tunisian tax authorities; or (ii) Case of inability to demonstrate the designation of another group company to take over the obligation to file the relevant declaration and who should be resident in Tunisia or in a Country or a jurisdiction that adopted a regulation that requires the CbC report filing similar to that required according to the Tunisian regulation, which has concluded with Tunisia an agreement allowing the automatic exchange of CbCR and having complied with the obligations resulting from this agreement. The CbC report should be submitted within the 12 months that follow the closing date of the entity having the obligation to file the CbC report. Non-compliance with the CbC report annual filing and notifications requirements may trigger monetary fines.

Moreover, the draft law also proposes the introduction of TP annual reporting and filing requirements by 1 January, 2020 for entities undertaking particular relationship of dependency or control, of which the annual gross revenue is greater than or equal to 20 million dinars. The deadline for submission is the date of the filing of the corporate income tax return, and this is, through reliable electronic means in accordance with a model that will be prepared for this purpose by the tax administration. Non-compliance with the TP annual filing and notifications requirements may trigger monetary fines.

Additionally, above mentioned entities, which are required to comply with the TP annual reporting and filing requirements, must provide to tax authorities the supporting documentation of the transfer pricing policy at the starting date of the in-depth tax audit. Non-compliance with this communication requirement within the delay of 30 days may trigger monetary fines.

For additional information with respect to this Alert, please contact the following:

Ernst & Young LLP, International Tax Services, Washington, DC

- Arlene Fitzpatrick arlene.fitzpatrick@ey.com

Ernst & Young LLP, Global Tax Desk Network, New York

- Gerrit Groen gerrit.groen@ey.com
- Jose A. (Jano) Bustos joseantonio.bustos@ey.com
- David Corredor-Velásquez david.corredorvelasquez@ey.com

Ernst & Young Belastingadviseurs LLP, Amsterdam

- Konstantina Tsilimigka konstantina.tsilimigka@nl.ey.com

EY | Assurance | Tax | Transactions | Advisory

EYG no. 012304-18Gbl

1508-1600216 NY
ED None

ey.com