

The Latest on BEPS - 2 January 2019

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OECD

On 21 December 2018, the OECD announced that two additional jurisdictions, i.e., Malta and Singapore, have deposited their instrument of ratification, acceptance or approval of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (the MLI) - bringing the total number to 17. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, Malta confirmed its MLI positions and added two additional tax treaties, Curacao and Ukraine, to its list of covered tax agreements (CTAs). Among other changes, Malta updated its reservation under Article 28(2)(a) of the MLI (Mandatory Binding Arbitration (MBT)), which limits the scope of cases that are eligible for arbitration. Singapore also deposited its definitive MLI positions and added 18 additional tax treaties to its list of CTAs (namely Albania, Bahrain, Belarus, Brunei, Cambodia, Ecuador, Ethiopia, Ghana, Kenya, Laos, Libya, Myanmar, Nigeria, Oman, Panama, Rwanda, Tunisia, and Uzbekistan). Singapore also amended its reservation regarding MBT under Article 28(2)(a) of the MLI. The MLI will enter into force for Malta and Singapore on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by these jurisdictions of their instrument of ratification, acceptance or approval, i.e., on 1 April 2019.

Austria

On 30 October 2018, the Austrian Ministry of Finance published the synthesized text of the 2004 Austria-Poland Double Taxation Convention, as modified by the MLI. The synthesized text reflects the agreement reached between the relevant tax authorities of both countries on how the treaty should be impacted by the MLI. The provisions of the MLI entered into force for Poland and Austria on

1 July 2018. The provisions of the MLI will have effect with respect to the Austria-Poland Double Taxation Convention in both jurisdictions for taxes withheld at source on amounts paid or credited to nonresidents where the event giving rise to such taxes occurs on or after 1 January 2019, and with respect to all other taxes levied by Poland or Austria for taxable periods beginning after 1 January 2019.

Also on 30 October, the Austrian Ministry of Finance published the synthesized text of the 1997 Austria-Slovenia Double Taxation Convention as modified by the MLI. The synthesized text reflects the agreement reached between the relevant tax authorities of both countries on how the treaty should be impacted by the MLI. The provisions of the MLI entered into force for Slovenia and Austria on 1 July 2018. The provisions of the MLI will have effect with respect to the Austria-Slovenia Double Taxation Convention in both jurisdictions for taxes withheld at source on amounts paid or credited to nonresidents where the event giving rise to such taxes occurs on or after 1 January 2019, and with respect to all other taxes levied by Slovenia or Austria for taxable periods beginning on or after 1 January 2019.

Brazil

On 29 November 2018, Brazil's Revenue Authority (RFB) published new Mutual Agreement Procedure (MAP) Normative Instruction (NI) 1,846/18, which replaces NI 1,669/16. The newly adopted NI amends the MAP to allow taxpayers access to the MAP, even if they have already had an issue decided by an administrative or judicial court. The new NI also clarifies the manner in which the Brazilian taxpayer will be notified by the RFB about the MAP conclusions.

See EY Global Tax Alert, [Brazil's Revenue Authority gives more taxpayers access to Mutual Agreement Procedure in Brazil](#), dated 3 December 2018.

Colombia - Japan

On 19 December 2018, Colombia and Japan signed a new tax treaty (the New Treaty). The New Treaty 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 in inappropriate circumstances), Action 7 (preventing the artificial avoidance of permanent establishment status) and Action 14 (making dispute resolution mechanisms more effective).

The New Treaty contains the new preamble language which clarifies that the tax treaty is not intended to be used to generate non-taxation or reduced taxation through tax evasion or avoidance. It also contains a provision dealing with fiscally transparent entities. In cases where a person other than an individual is resident in both Colombia 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. The New Treaty has a Limitation on Benefits clause and a Principal Purpose Test. In the permanent establishment (PE) clause the New Treaty contains an anti-fragmentation rule and the new definition of agency PE. Furthermore, the New Treaty includes the MAP provision.

Both Colombia and Japan have signed the MLI and neither of them has included this tax treaty as a CTA. Therefore, it may be expected that the New Treaty will not be further modified by the MLI, particularly given that the New Treaty already has incorporated the treaty-related BEPS minimum standards.

Cyprus

On 18 December 2018, the Cyprus Tax Department announced that the deadline for submission of Country-by-Country (CbC) reports for reporting fiscal year 2017 that were due on 31 December 2018 was extended to 31 January 2019. The extension also applies to constituent entities that have to locally file a CbC report by 31 December 2018.

Finland

On 13 December 2018, the Finnish Government submitted to the Parliament a law proposal on international tax dispute resolution. This law proposal implements the Directive 2017/1852 on Tax Dispute Resolution Mechanisms. In addition, the law proposal addresses certain other tax dispute resolution mechanisms related to the interpretation of tax treaties. The law proposal is largely in line with the proposal published earlier in August 2018 for public consultation. The provisions are suggested to apply to disputes (covered by the Directive) filed on or after 1 July 2019 which concern the tax years started on or after 1 January 2018. In respect of other disputes, the new rules apply to disputes filed on or after 1 July 2019, irrespective of the tax year the issue relates to.

India

On 18 December 2018, the Indian Tax Administration by way of a notification prescribed the due dates for undertaking local filing by Indian constituent entities (CEs) of a multinational enterprise (MNE) group whose ultimate parent entity (UPE) or surrogate parent entity is not resident in India. According to the notification, the due date shall be 12 months after the last day of the reporting accounting year of the MNE group. For example, for MNE groups that have the calendar year, the 2017 CbC report will be due by 31 December 2018. Under the Indian tax law, monetary penalties are applicable if the “reporting entity” fails to furnish or furnishes an inaccurate CbC report within the due date unless the taxpayer is able to demonstrate “reasonable cause” for such non-compliance. Indian resident CEs who are required to undertake local filing would be impacted and would need to review the implications. Specifically, MNE groups that have a UPE resident in the United States (US) would need to consider if their Indian resident CEs could have a CbC report filing obligation in India and the due date for the same as India and the US are yet to conclude a Bilateral Competent Authority Agreement for the exchange of CbC reports. The Indian Tax Administration is likely to issue further clarifications to address some of the practical challenges or issues and the unintended consequences arising from the notification.

Japan

On 14 December 2018, Japan’s coalition leading parties released the 2019 tax reform outline (the Outline). A tax reform bill (the Bill) will be prepared based on the Outline. The Bill will be submitted to the Diet (Japanese legislature) and is expected to be enacted by the end of March 2019.

Pursuant to the BEPS initiatives and the recommendations by the BEPS Action 4 final report, the earnings stripping rules will be amended by reducing the current 50% of adjusted taxable income (ATI) to 20% in computing interest expense disallowance. In addition, the Outline includes in an ATI computation a domestic and foreign dividend received deduction and an add-back tax adjustment of non-deductible income taxes. ATI for an operator under a silent partnership arrangement will also be amended. The Outline revises the scope of interest subject to the earnings stripping rules and the de minimis exceptions. The revision will apply to taxable years beginning on or after 1 April 2020.

The scope of intangibles subject to the transfer pricing rules is clarified and defined as property other than tangible property or financial assets and investments, for which consideration would be paid for a transfer or lease of the property if the transfer or the lease were carried out between unrelated parties. The discounted cash flow recognized under the OECD Transfer Pricing Guideline is added as a new transfer pricing methodology. The Japanese tax authorities will be authorized to make an assessment if there is a discrepancy between an outcome and the projected value if the discrepancy is 20% or more without proper documentation. This revision will apply to taxable years beginning on or after 1 April 2020 and calendar years beginning 2021 for corporations and individuals, respectively.

The Outline contains new exceptions to the paper company test for holding company, real estate and resource development controlled foreign corporations (CFCs). The Outline clarifies that local tax laws of the CFCs, such as tax consolidation and distributive share of partnership income, will be disregarded in determining the effective tax rate test, income inclusion or indirect foreign tax credit from CFCs.

See EY Global Tax Alert, [Japan releases 2019 tax reform outline](#), dated 19 December 2018.

Jersey

On 6 December 2018, Jersey approved the draft law on economic substance that was published in October 2018. The final law, a Key Aspects document and Q&A are available on the Government’s [website](#). These rules apply for accounting periods beginning on or after 1 January 2019. Further guidance is anticipated in the coming months but it is recommended that businesses undertake an impact assessment as soon as possible to determine the extent to which they are in scope.

Lithuania

On 13 December 2018, the Lithuanian Parliament adopted amendments to the Law on Corporate Income Tax in order to implement the European Union (EU) Anti-Tax Avoidance Directive (ATAD). Those amendments include (i) rules limiting interest deductibility and (ii) rules on CFCs. The existing thin capitalization rule limiting the interest deduction will still be applicable. These amendments will enter into force and apply to tax years starting on or after 1 January 2019.

Luxembourg

On 12 December 2018, Luxembourg's Minister of Finance announced that the interest limitation rules implementing the EU ATAD will apply to fiscal unities as a whole and will not have to be applied at the level of each individual entity as initially proposed by the draft law of 20 June 2018. While the implementation of the ATAD should be approved by the Luxembourg Parliament on 18 December 2018 to be applicable to financial years starting on or after 1 January 2019, the announced amendments, as a result of which interest limitation will apply to fiscal unities as a whole will only be made after 1 January 2019 but with a retroactive effect to that date.

See EY Global Tax Alert, [Luxembourg Minister of Finance announces interest limitation will apply at fiscal unity level](#), dated 12 December 2018.

Malaysia

On 19 October 2018, the Malaysian Inland Revenue Board (IRB) published on its website [Frequently Asked Questions](#) (FAQs) on CbC Reporting (CbCR) rules in Malaysia. The FAQs provide practical guidance as well as examples to assist local and foreign MNEs with their CbCR obligations in Malaysia.

The main clarification included in the FAQs is that there is no provision for filing the CbC report through local filing in Malaysia in the event the CbC report is filed in the tax jurisdiction of the UPE or surrogate parent entity (SPE). Some additional key clarifications mentioned in the FAQs are as follows: (i) the CbCR notification should be submitted not only by the Malaysian Reporting Entity that is the UPE or SPE, but also by the Malaysian CEs of such Malaysian UPE or SPE, specifying that they are non-reporting entities; (ii) A CE in Malaysia is allowed to submit one consolidated notification on behalf of all the other Malaysian non-reporting CEs only if the reporting entity is a Malaysian entity. The IRB has published the updated CbCR Notification formats as follows: (a) Annex B for CbCR notification to be filed a Malaysian UPE or SPE, (b) Annex C1 for CbCR notification to be filed a Malaysian CE (consolidated notification allowed) where the reporting entity is a Malaysian entity; and (c) Annex C2 for CbCR notification to be filed a Malaysian constituent entity separately where the reporting entity is a foreign entity; (iii) A CE in Malaysia is required to submit separate CbCR notification if the reporting entity is a foreign entity (i.e., not a Malaysian entity); (iv) The reporting of any CbCR data

in Malaysia should be in the local currency, i.e., Malaysia Ringgit (MYR). The FAQs indicate that the foreign currency exchange rate published by the Central Bank of Malaysia may be used as source for converting foreign currencies to MYR; and (v) For foreign MNE groups where the UPE or SPE has filed the CbC report in a tax jurisdiction outside Malaysia, no local filing of the CbC report is required by the Malaysian CEs and the IRB will obtain the report through available exchange mechanism. Only upon request from the IRB (due to the failure to obtain the CbC report from the tax authorities in overseas tax jurisdiction), the local Malaysian CEs will be required to file the CbC report locally.

Mexico

On 23 November 2018, the Federal Executive through the Ministry of the Interior submitted the MLI to the Senate of Mexico for approval. Once the ratification process is completed, Mexico will need to deposit its instrument of ratification of the MLI with the OECD. The MLI will enter into force for Mexico 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.

Netherlands

On 19 December 2018, the Dutch Ministry of Finance launched a public consultation related to a draft law implementing the Directive 2018/822/EU amending the 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 Directive). This public consultation will be open from 19 December 2018 to 1 February 2019. The draft law implementing the Directive will likely be submitted to the Dutch House of Representatives in July 2019. EU Members States have to implement the Directive into national legislation before 31 December 2019 and the legislation will take effect as of 1 July 2020 for transactions/structures of which the implementation started after 25 June 2018.

On 18 December 2018, the Dutch Senate approved the tax budget proposals for fiscal year 2019. The Dutch House of Representatives already approved these proposals on 15 November 2018. These tax budget proposals contain both measures to implement the EU ATAD into domestic legislation by 1 January 2019 (e.g., introduction of earnings stripping rules and CFC rules) and contains measures to increase the

attractiveness of the Dutch business and investment climate (e.g., lowering the corporate income tax rate to 20.5% in 2021). For more information, see the [Latest on BEPS](#), dated 8 October 2018.

Qatar

On 4 December 2018, Qatar signed the MLI. At the time of signature, Qatar submitted a list of its tax treaties in force that they would like to designate as CTAs, i.e., treaties to be amended through the MLI. Together with the list of CTAs, Qatar also submitted a preliminary list of its reservations and notifications in relation to the CTAs (MLI positions) in respect of the various provisions of the MLI. The definitive MLI positions for Qatar will be provided upon the deposit of its instrument of ratification, acceptance or approval of the MLI.

See EY Global tax Alert, [Qatar signs Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS](#), dated 5 December 2018.

Saudi Arabia

On 10 December 2018, Saudi Arabia released draft Transfer Pricing Regulations for public comments. The draft Regulations propose, among others, a three-tiered approach to transfer pricing documentation in line with BEPS Action 13. According to the draft Regulations, all Saudi Arabia tax resident entities that are UPEs of an MNE group with annual consolidated group revenue equal to or exceeding SAR3.2 billion (approximately €750 million) have to prepare and submit 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. In addition, any other CE of the MNE group that is tax resident in Saudi Arabia will have to prepare and submit the CbC report if the UPE is not resident in Saudi Arabia and any of the following conditions are met: (i) it is not obliged to

file a CbC report in its country of residence; (ii) Saudi Arabia and that jurisdiction have an international agreement but do not have a Qualifying Competent Authority Agreement (QCAA) in place; or (iii) the jurisdiction has a QCAA in place, however has suspended or failed to provide automatic information. Failure to submit the CbC report do not attract any specific penalties at present. Moreover, a Saudi Arabia constituent entity that is not an UPE will have to inform the tax authorities of the identity of the reporting entity along with its tax residency within 120 days following the end of the Reporting Year. The present version of the by-laws do not specifically mention any notification to be filed by a UPE of an MNE group, at present.

Slovenia

On 7 December 2018, certain amendments to the Corporate Income Tax Law were published in the *Slovenian Official Gazette*. The amendments include the introduction of a general anti-abuse rule (GAAR) and rules on CFCs in line with the EU ATAD. These measure will be effective from 1 January 2019. For more information, see the [Latest on BEPS](#), 24 September 2018.

United States

On 19 December 2018, the Internal Revenue Service (IRS) added France and Gibraltar to the list of countries with which the US 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 four countries and is expected to update this database as other agreements are concluded.

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EYG no. 012571-18Gbl

1508-1600216 NY
ED None

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