The latest on BEPS – 2018 year-end review

A review of OECD and country actions in 2018 year-end

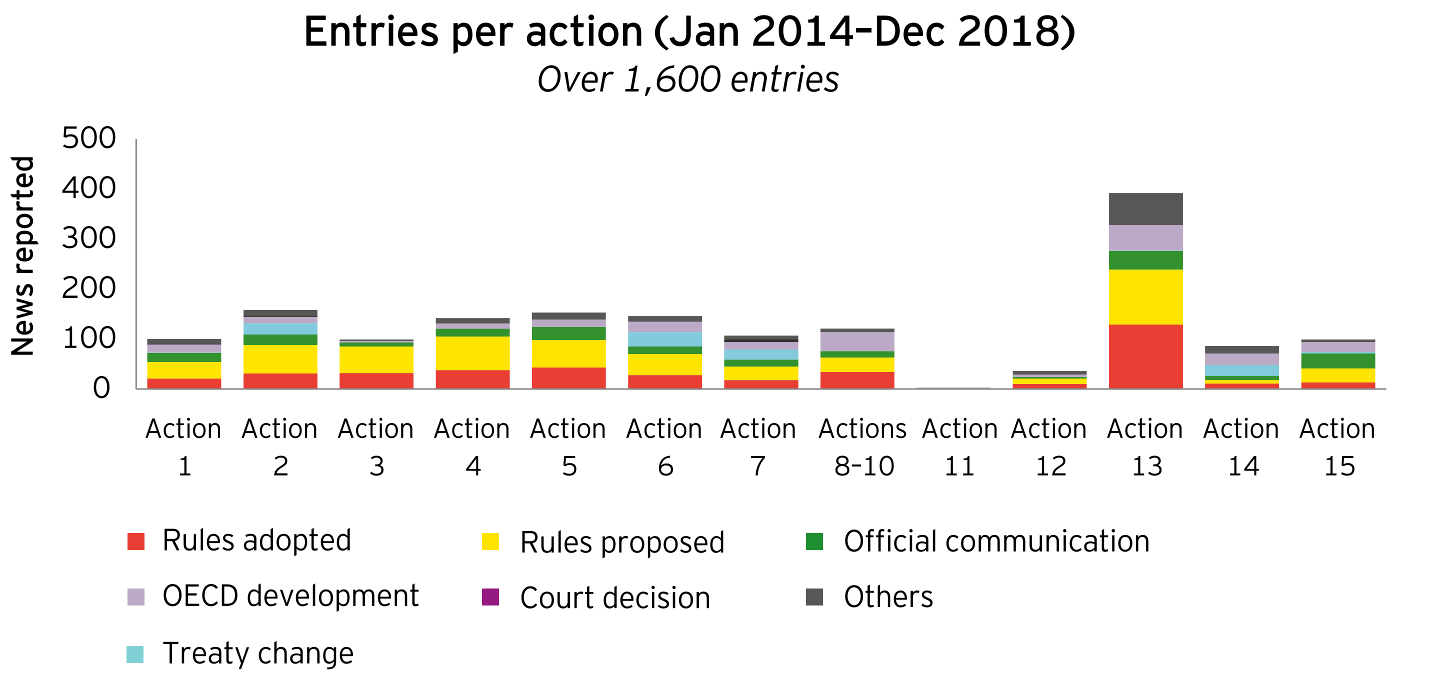
Building a better working world

Through our series of EY Global Tax Alert articles, *The Latest on BEPS*, we have tracked developments related to the OECD/G20 BEPS project since the beginning of 2014. Based on the content of these alerts, there is a database maintained of BEPS-related developments. There also is an interactive tool that, through the use of interactive maps and other visualizations, allows users to browse and filter this content by date, geographical location and the related BEPS Action. The interactive tool is part of our BEPS website at ey.com/beps. Past editions are available through the following links: 2014 edition, 2015 edition, 2016 midyear edition, 2016 year-end edition, 2017 edition, and 2018 midyear edition.

Overview

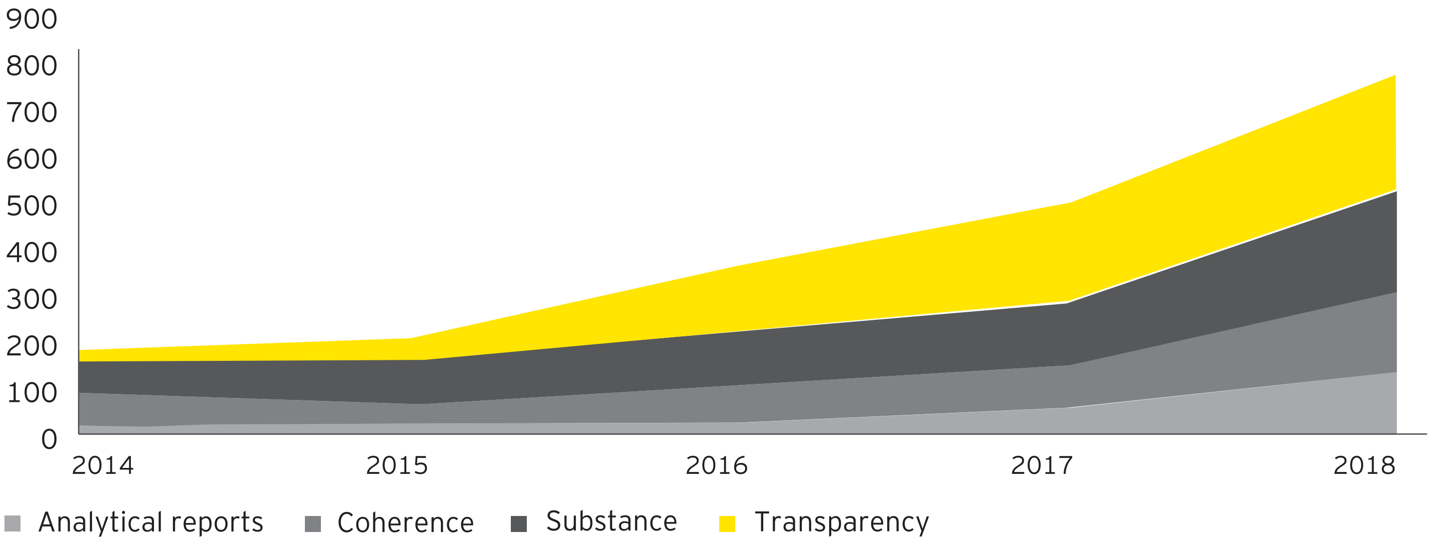
The landscape of international corporate taxation continues to rapidly and radically change. The international tax debate started focusing on measures to prevent tax avoidance with the aim of making the international corporate tax system more robust to aggressive tax planning. The current trend is to create stronger protection against aggressive tax planning activities, and the anti-avoidance rules worldwide are getting tighter.

In light of this, the Organisation for Economic Co-operation and Development (OECD) launched the base erosion and profit shifting (BEPS) project, in partnership with the G20. At its heart, the project aims to ensure that the international tax rules do not facilitate the shifting of corporate profits away from where the real economic activity and value creation are taking place. The BEPS package, presented in October 2015, covers the 15 areas identified in the 2013 BEPS Action Plan. The OECD has structured the 15 BEPS actions around three fundamental "pillars" and "horizontal areas of work," which connect multiple actions. The three pillars are coherence, substance and transparency. The first pillar aims to improve the coherence of international tax rules by combating the harmful or inappropriate use of international tax legislation to obtain unintended tax benefits. It encompasses Action 2 (*Neutralising the effects of hybrid mismatch arrangements*), Action 3 (*Designing effective controlled foreign company rules*), Action 4 (*Limiting base erosion involving interest deductions and other financial payments*) and Action 5 (*Countering harmful tax practices more effectively, taking into account transparency and substance*). The second pillar focuses on reinforcing substance requirements in the



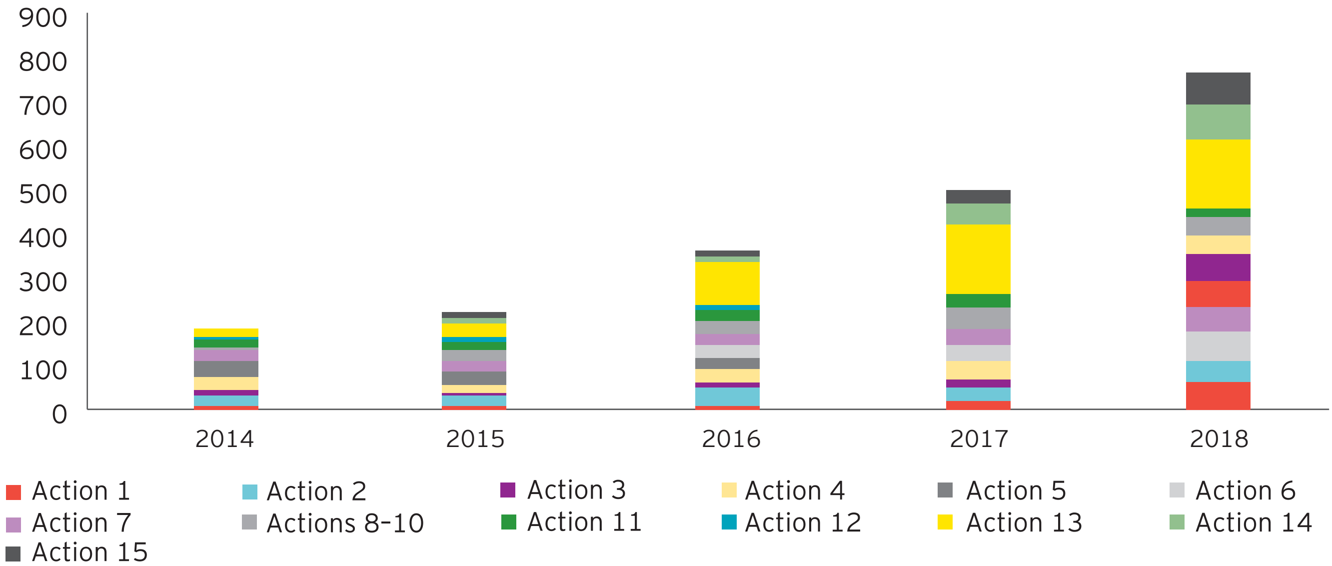
existing international standards, and ensuring alignment of taxation with the location of economic activity and value creations. The actions included under this pillar are Action 6 (*Preventing the granting of treaty benefits in inappropriate circumstances*), Action 7 (*Preventing the artificial avoidance of permanent establishment status*) and Actions 8-10 (*Aligning transfer pricing outcomes with value creation*). The third pillar has the objective of improving transparency and certainty for businesses and governments, and it spans Action 12 (*Mandatory disclosure rules*), Action 13 (*Transfer pricing documentation and country-by-country reporting*) and Action 14 (*Making dispute resolution mechanisms more effective*). The package also includes horizontal areas of work by taking a holistic look at the tax challenges raised by the evolving digitalization of the economy (Action 1), measure the size and extent of BEPS activities (Action 11) and set the basis for negotiation of the multilateral instrument. Finalized in 2016, the package allows countries to swiftly update their tax treaty network to implement treaty-related BEPS measures (Action 15).

Entries by pillar



The BEPS package also includes four new minimum standards, updates of the existing standards, agreed common approaches and guidance that draws on best practices. BEPS actions go alongside the domestic implementation and coordination of treaty provisions in a coordinated manner, together with increased transparency and targeted monitoring. As seen in the following chart, the implementation of the different BEPS actions has increased over the years.

The BEPS project has moved to the implementation phase, leaving a fundamentally changed landscape in its wake. The OECD is now focused on supporting governments' efforts to implement the BEPS measures, ensuring effective and consistent implementation of the BEPS minimum standards, and finalizing the remaining standard setting work, particularly on transfer pricing and the tax challenges arising from the digitalized economy. All of this work is carried out by the Inclusive Framework (IF) on BEPS. Membership of the IF includes jurisdictions that have committed to the comprehensive BEPS package and its consistent implementation. As of 15 January 2019, there are 125 members on the IF, and this number continues to increase.



While in 2016 and 2017 the focus was on putting in place the OECD/G20 IF on BEPS' processes and on launching the peer reviews of the four BEPS minimum standards, 2018 is the first year in which the results of the implementation phase are becoming available. Peer reviews of the BEPS minimum standards, namely, Action 5, Action 6, Action 13 and Action 14, are an essential tool effectively implement the BEPS package. Some of the results for BEPS Action 5, Action 13 and Action 14 are already available, while the first report for Action 6 will be finalized in January effectively implement 2019.

One of the key issues for the international tax community in 2018 revolved around the tax challenges arising from digitalization. This topic will also be high on the agenda of 2019 for the European Union (EU) and OECD, both of which are working on the challenges of taxing digitalized business. The IF on BEPS agreed to continue working on tax and digitalization with the objective of producing a final consensus-based solution in 2020.

The BEPS Multilateral Instrument (MLI) is the first treaty of its kind, allowing jurisdictions to integrate results from the OECD/G20 BEPS project into their existing networks of bilateral tax treaties. Progress continues on the implementation of this landmark treaty which, as of 15 January 2019 covers 86 jurisdictions and has some effects from 1 January 2019 for the first 47 tax treaties concluded among the jurisdictions to which the MLI has entered into force because they have deposited their instrument of ratification with the OECD. It is expected that in 2019, the number of the signatories of the MLI as well as the number of countries that will proceed with the deposit of the instrument of ratification will increase.

The OECD and G20 countries will extend their cooperation on BEPS until 2020 to complete pending work and ensure an efficient targeted monitoring of the agreed measures. A thorough review of the BEPS measures will take place in 2020, which will assess the impact and the effectiveness of the BEPS project and whether modifications or additions to the recommendations are required.

Review of OECD and country developments

The latest on BEPS — 2018 year-end review report (the report) is divided in topics and is structured in the following way. Each topic is split into three parts. The first part provides some background information on the topic. The second discusses the OECD developments during the period under review and the guidance and work of the OECD around the implementation of the relevant measures. The third part includes a selection of specific country developments during the second semester of 2018 with respect to each topic. This section of the report highlights that the countries are adopting new measures in line with the OECD recommendations and are moving actively toward their implementation. Due to the increased activity at the EU level, a separate sub-report now addresses the EU BEPS-related activity with the same structure.

Digital economy

Background

The OECD released its final report on the tax challenges of the digital economy (Action 1) under its BEPS Action Plan. The final report indicated that there would be follow-up work carried out in this area and that a supplementary report reflecting the outcomes of continued work on the overall taxation of the digitalization economy would be released by 2020.

In March 2018, the OECD released *Tax Challenges Arising from Digitalisation — Interim Report 2018* (the Interim Report) as a follow-up to the work delivered by the OECD under Action 1. The Interim Report provides an in-depth analysis of the main features commonly found in certain highly digitalized business models and value creation in the digitalized age, but did not make any specific recommendations to countries. The Interim Report also considers the implementation and impact of the BEPS package, in particular of those BEPS Actions Points that are most relevant to digitalization. It also provides an overview of unilateral measures that have been introduced by countries in this area. Further, the Interim Report includes a framework that can be considered when designing interim measures to address the tax challenges of digitalization, as well as an outline of the possible long-term approaches to address these challenges. The Interim Report notes that further work will need to be carried out to understand the various business models operated by enterprises offering digital goods and services, as well as digitalization more broadly.

2018 year-end developments

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 summarizes the OECD's work on this topic so far. One month later, the OECD issued a report to the G20 Leaders at their summit in Buenos Aires, updating them on progress in key areas of the G20/OECD's tax work. Part of the report is an overview and update of the activities and achievements in relation to the OECD's tax agenda and the actions required in the future, in particular through the OECD/G20 IF on BEPS. In the context of digital economy, the report considers that the key issue for the international tax community in 2018 remains how to address the tax challenges arising from digitalization. Since the release of the interim report in March, all members of the IF on BEPS supported by G20 countries have made significant progress to bridge the gaps in their position. The report notes that the dynamic of the discussions has shifted, with the potential for an agreement in sight. The Task Force on the Digital Economy met in December and the IF on BEPS in January to take these proposals further. The IF on BEPS will hold a second meeting in 2019 just before the next G20 Leaders' summit. This is the first time the OECD has explicitly acknowledged the possibility of a long-term, consensus-based solution on digital tax policy.

Country-specific developments

In August 2018, the Chilean Executive Power proposed a tax reform bill that introduces a 10% tax rate on digital services provided by nonresidents to Chilean individuals (independent of where servers may be located). In October 2018, the Norwegian government gave a mandate to the Ministry of Finance to address how Norway should follow up the recent OECD and EU developments regarding taxation of multinational enterprises deriving income from digital business models. The ministry expects to issue a proposal for temporary domestic measures to tax digital businesses by the fall 2019.

Separate from the Finance Bill for 2019 (published on 30 December 2018), the French Prime Minister Edouard Philippe announced, during a press interview on 17 December 2018, that a tax on digital activity would apply in France as from 1 January 2019. This new tax, which might impact major digital actors, is not included in the Finance Bill for 2019 and should only be discussed before the French parliament in early 2019.

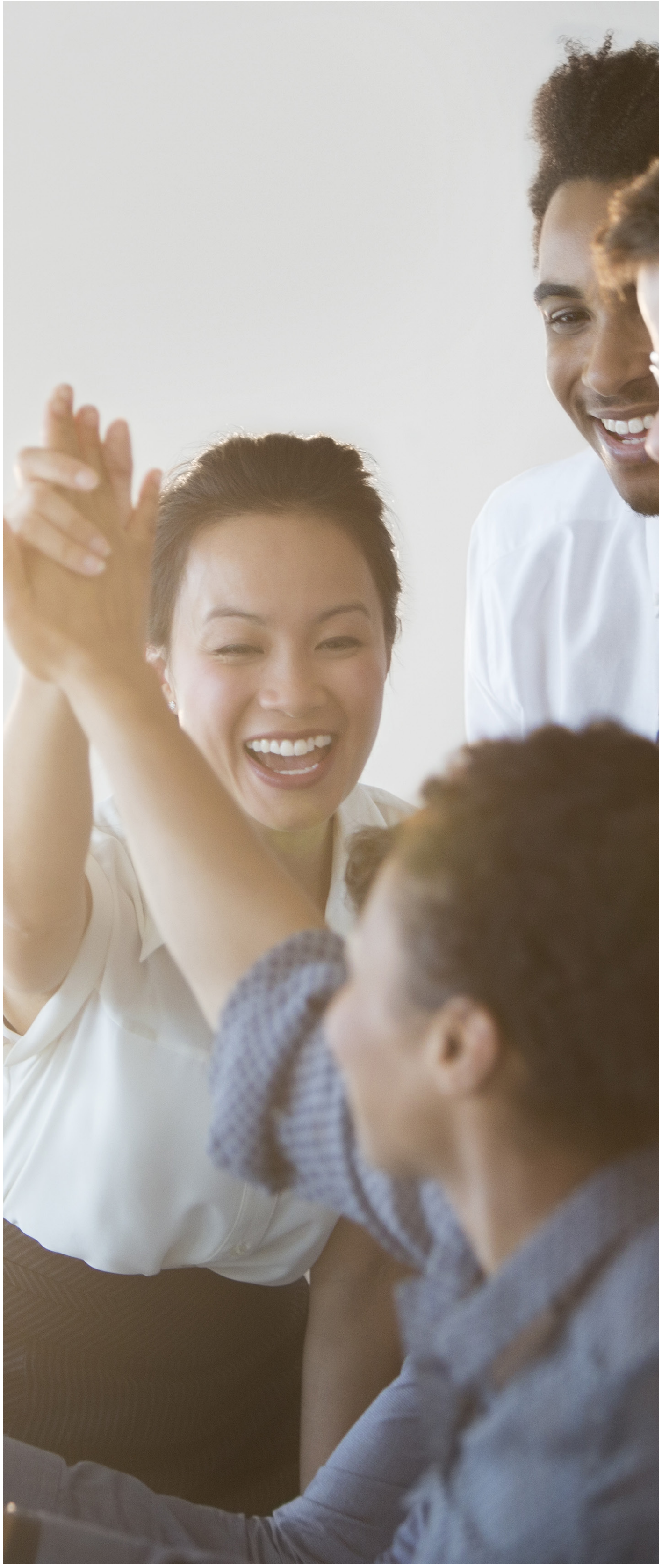
Harmful tax practices

Background

The OECD released its final report on Action 5 under its Action Plan on BEPS. The Final Report covers two main areas: (i) The definition of a "substantial activity" criterion to be applied when determining whether tax regimes are harmful (the nexus approach) and (ii) Improving transparency through a framework for the compulsory spontaneous exchange of information on certain rulings. Action 5 is one of the four BEPS minimum standards, i.e., BEPS recommendations that all members of the IF on BEPS are committed to comply with. The minimum standards are subject to a peer review process. In February 2017, the OECD issued the peer review documents on Action 5, which reflect the agreed approach to review compliance with the minimum standards. The terms of reference included in the Action 5 peer review documents contain four areas of review, namely information gathering process, the exchange of information, confidentiality of the information received, and statistics. Jurisdictions should keep statistics on the exchange of information under the transparency framework. This requires reporting on the number of rulings exchanged spontaneously and providing a list of the jurisdictions with whom the information was exchanged.

2018 year-end developments

On 15 November 2018, the OECD released an update to *Harmful Tax Practices — 2017 Progress Report on Preferential 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 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 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.



Country-specific developments

On 13 December 2018, Panama enacted legislation that amends the Panama Pacifico (PP) regime to comply with BEPS Action 5. On 25 October 2018, Panama enacted legislation that amends the Multinational Headquarters regime to comply with BEPS Action 5. Additionally, on 27 December 2018, Panama enacted legislation for calculating income subject to preferential tax treatment under an IP regime to comply with the nexus approach of BEPS Action 5. The French Finance Bill for 2019 has been adopted by the French parliament on 20 December 2018, signed by the French president on 28 December 2018 and published in the French Official Journal (*Journal officiel de la République française*) on 30 December 2018. Among others, this bill provides for an adjustment of the favorable tax regime applicable to patent-related income to comply with the nexus approach of BEPS Action 5. This modified regime applies to fiscal years beginning on or after 1 January 2019. In addition, the Swiss parliament approved the final draft of its tax reform, which foresees the replacement of certain preferential tax regimes with a new set of internationally accepted measures – the public vote should take place on 19 May 2019. The Polish president signed in November a bill which introduces an intellectual property (IP) regime based on which profits from qualifying IP rights will be taxed at a preferential 5% tax rate. The incentive is based on the OECD recommendations regarding the modified nexus approach, which intends to link the relief to the proportion of research and development in Poland.

On 22 November 2018, the Indian Tax Administration issued an instruction to the Indian tax authorities outlining the recommended approach to deal with templates received from foreign jurisdictions containing information with respect to certain taxpayer-specific rulings. The instruction provides a brief description of each type of ruling exchanged under Action 5, the significance thereof and the approach recommended to deal with such rulings in the taxation of residents in India.

Country-by-country (CbC) reporting

Background

The final report on Action 13 sets out a three-tiered standardized approach to transfer pricing documentation and introduces a new version of Chapter V of the OECD TPG (transfer pricing guidelines), covering documentation. The standardized approach consists of a local file, a master file and a CbC report. The CbC reporting (CbCR) requirements form one of the four BEPS minimum standards. Each of these minimum standards is subject to peer review in order to ensure timely and accurate implementation and thus safeguard the level playing field. On 1 February 2017, the OECD released the peer review documents on BEPS Action 13, which include the agreed terms of reference containing the evaluation criteria regarding the minimum

standard and the assessment methodology for the peer review process. The terms of reference in the Action 13 peer review documents focus on three key aspects of CbC reporting, namely, the domestic legal and administrative framework, the exchange of information framework, and the confidentiality and appropriate use of CbC reports. Since the three key aspects may be implemented at different times, the peer review follows a staged approach. The peer reviews consist of three phases structured into annual reviews, starting respectively in 2017, 2018 and 2019. The first annual peer review, which focused mainly on the domestic legal framework of each reviewed jurisdiction, was published on 23 May 2018. The second annual peer review was launched in April 2018 and is expected to be completed in 2019.

2018 year-end developments

During the second half of 2018, there has been ongoing and increasing activity around CbC reporting. In promoting the consistent and effective implementation of CbC reporting, the OECD released on 13 September 2018 additional guidance to give greater certainty to tax administrations and multinational enterprise (MNE) groups on the implementation and operation of BEPS Action 13. Accordingly, the existing guidance on the implementation of CbCR has been updated to address the following issues: (i) The treatment of dividends for purposes of "Profit (loss) before Income Tax," "Income Tax accrued (current year)" and "Income Tax paid (on cash basis)"; (ii) The use of shortened amounts in Table 1 of CbC reports; and (iii) The number of employees to be reported where the financial data of a Constituent Entity is reported on a pro rata basis. The guidance also includes a summary table of the existing interpretative guidance on cases of mergers, demergers and acquisitions. The guidance marks the eighth release by the OECD regarding practical questions that have arisen concerning the implementation and operation of CbCR, and it will continue to be updated with any further guidance that may be agreed by the IF on BEPS.

As of 15 January 2019, there are over 2,000 bilateral exchange relationships activated with respect to jurisdictions committed to exchanging CbC reports. These include exchanges between the 75 signatories to the CbC MCAA, between EU Member States under EU Council Directive 2016/881/EU and between signatories to bilateral competent authority agreements (CAAs) for exchanges under double tax conventions or tax information exchange agreements, including 45 bilateral agreements with the United States. The list of automatic exchange relationships that have been activated is available on the OECD website.

Jurisdiction specific developments

CbC reporting is the BEPS recommendation that has been implemented the most. By following this link, you can access an overview that summarizes of the jurisdictions that have adopted or are in the process of adopting CbCR rules, as well as those jurisdictions that are expected to implement CbC reporting in the near future.

During the second semester of 2018, several Jurisdiction adopted into their domestic legislation CbC reporting rules, e.g,. British Virgin Islands, Egypt, Hong Kong, Nigeria, Qatar and Tunisia. Also, Saudi Arabia introduced draft rules to implement CbC rules. Argentina amended its existing CbC rules, while Bulgaria proposed the introduction of master file and local file requirements. Many countries issued during the period under review guidance in order to provide further clarifications for the compliance with the domestic legislation on CbC reporting, such as Argentina, Belgium, Colombia, Greece, Luxembourg, Malaysia and Singapore. Also, three additional countries were added to the list of signatories of the MCAA during the second half of 2018: Andorra, Peru and San Marino. The US signed a CAA for the exchange of CbC reports with seven jurisdictions during the second semester of 2018: Austria, Bulgaria, Croatia, France, Gibraltar, Hungary and Japan.

Mutual agreement procedure (MAP)

Background

The OECD recognized that the actions to counter BEPS must be complemented with actions that ensure certainty for taxpayers. To that end, 1 of the 15 actions to address BEPS calls for effective dispute resolution mechanisms. The Action 14 report contains a commitment by countries to implement a minimum standard to ensure that they resolve treaty-related disputes in a timely, effective and efficient manner, and it aims to strengthen the effectiveness and efficiency of the MAP process. All members of the IF on BEPS commit to the implementation of the Action 14 minimum standard and to have their implementation reviewed by their peers.

In October 2016, the OECD released the peer review documents (i.e., the Terms of Reference and Assessment Methodology) on Action 14, which form the basis of the MAP peer review and monitoring process under BEPS

Action 14. The Terms of Reference translate the minimum standard approved into a basis for peer review, consisting of 21 elements complemented by 12 best practices. The Assessment Methodology establishes detailed procedures and guidelines for a two-stage approach to the peer review and monitoring process. Stage 1 involves the review of a member's implementation of the minimum standard based on its legal framework for MAP and the application of this framework in practice. Stage 2 involves the review of the measures taken by the member to address any shortcomings identified in its Stage 1 peer review. In light of the above, the OECD has also released a schedule for Stage 1 of the peer review and a questionnaire for taxpayers. Up to date, the OECD has released the Stage 1 peer review reports for the first four batches, and it has gathered input from the taxpayers for the next two batches.

2018 year-end developments

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. 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. 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.

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, Mainland China, Hong Kong, Indonesia, Papua New Guinea, Russian Federation and Saudi Arabia). The OECD also invited taxpayers to submit their input related to their experiences in these jurisdictions, via an electronic questionnaire, by 13 December 2018.

The fifth batch of Stage 1 peer review was released on 15 January 2019.

In October 2018, the OECD released its annual publication on the 2017 MAP statistics. For 2017, the report includes statistics from all OECD members and most of the members of the OECD IF 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.

Additionally, the OECD added new and updated some of the existing MAP profiles of the members of the IF 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. As agreed under BEPS Action 14, all members of the IF on BEPS commit to implementing 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.

Country-specific developments

In November 2018, Department of Federal Revenue of Brazil (RFB) published new MAP Normative Instruction (NI) 1,846/18, which 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. At the end of 2018, the Belgian tax authorities will start a pilot project, called the Cooperative Tax Compliance Program. While not specifically addressing MAP, this program could facilitate future MAP discussions for companies involved. It 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.

On a bilateral level, new tax treaties have been signed in the period under review which contain a number of treaty-based recommendations from the BEPS project contained in Action 14. For example, the newly signed tax treaties between Mainland China and Congo and between Croatia and Japan provide 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. The treaty between Japan and Spain, signed in October 2018 adds that for any unresolved issued under the treaty, the MAP provision be submitted to arbitration if the person so requests.

MLI

Background

The final report on Action 15, *Multilateral convention to implement tax treaty-related measures to prevent BEPS*, explores the technical feasibility of an MLI to implement the treaty-related measures developed during the course of the BEPS project and to amend bilateral tax treaties. To that end, the MLI was developed and agreed in November 2016 by approximately 100 jurisdictions, including OECD member countries, G20 countries, and other developed and developing countries. Each provision under the MLI (Articles 3 to 17) first reflects the BEPS measures as developed during the BEPS project with certain modifications. However, the MLI is structured in a way so as to provide flexibility for contracting jurisdictions to implement (parts of) the MLI based on their needs. The MLI is open for signature, by any interested jurisdiction, as of 1 January 2017.

As of 15 January 2019, 86 jurisdictions have signed the MLI. At the time of signature, signatories submitted a list of their tax treaties in force that they designate as covered tax agreements (CTAs), i.e., to be amended through the MLI. Together with the list of CTAs, signatories also submitted a preliminary list of their reservations and notifications (MLI positions) in respect of the various provisions of the MLI. The definitive MLI positions for each jurisdiction will be provided upon the deposit of its instrument of ratification, acceptance or approval of the MLI. As of 15 January 2019, 18 jurisdictions have deposited their instrument of ratification with the OECD.

The MLI will enter into force for a jurisdiction 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 its instrument of ratification with the OECD. With respect to a specific bilateral tax treaty, the measures will only enter into effect after both parties to the treaty have deposited their instruments of ratification, acceptance or approval of the MLI and a specified time has passed. The specified time differs for different provisions. The first modifications to bilateral tax treaties entered into effect on 1 January 2019.

2018 year-end developments

On 14 November 2018, the OECD released *Guidance for the development of synthesised texts* to facilitate the interpretation and application of tax treaties modified by the MLI. Synthesized text refers to a single document showing the text of specific tax treaties covered by the MLI (i.e., CTAs) 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 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 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.

Country-specific developments

In September and December 2018, Saudi Arabia and Qatar signed the MLI, bringing the total number of signatories to 85. Also, eight additional jurisdictions deposited their instrument of ratification with the OECD during the period under review: Australia, France, Japan, Israel, Lithuania, Malta, Singapore and Slovak Republic. Many other jurisdictions have taken steps domestically for the ratification process of the MLI, such as Belgium, Burkina Faso, Ireland, Kuwait and Norway. Moreover, Austria, Japan, Poland and the United Kingdom have been issuing synthesized texts of the MLI during the second half of 2018.

EU BEPS-related developments in review

A review of EU activity related to BEPS in 2018 year-end

Overview

At the level of the EU, the BEPS Action Plan is also being mirrored by comparable initiatives designed to achieve "fairer, simpler and more effective corporate taxation" within the internal market. The EU has been actively involved in the G20/OECD's BEPS project since its outset with the aim to help Member States take consistent action against base erosion and profit shifting practices. Thus, the EU is instrumental in driving the implementation of BEPS forward in many respects, especially for the implementation of the BEPS non-minimum standard measures.

Since the OECD's issuance of the BEPS final reports, there has been a deluge of EU developments in the area of taxation related to BEPS. The following analysis serves to summarize the latest EU initiatives against the background of the OECD BEPS project.

Digitalization

Background

On 21 March 2018, the European Commission issued two proposals for new directives that will deliver new ways to tax digitalized forms of business activity. The commission's proposals focus on a two-phased approach: an interim solution, referred to as the digital services tax (DST), and a longer-term Council directive laying down rules relating to the corporate taxation of a significant digital presence (SDP). The DST proposal, which will apply only until the SDP proposal has been implemented, is for a gross revenues (i.e., turnover) tax, set at a uniform rate of 3% across all EU Member States. The SDP proposal focuses on a new concept of digital PE, along with revised profit attribution rules.

2018 year-end developments

In 2018, the finance and economic affairs ministers of the EU Member States discussed the short-term solution of the DST proposal during their informal Economic and Financial Affairs Council (ECOFIN) meetings. At the meeting of September 2018, the council supported the implementation of the short-term solution of the DST as soon as possible. Also, a new proposed position held by France and Germany suggested a "sunset clause" making the DST a temporary levy valid until an agreement has been reached at an international level.

Also, in October 2018, the European Council Legal Service issued an opinion on the European Commission's DST. The DST proposal was presented as an interim measure based on Article 113 of the Treaty on the Functioning of the European Union (TFEU), which covers the harmonization of indirect taxes. Under this article, there are three categories of taxes that can be harmonized among EU Member States: turnover taxes, excise duties and other forms of indirect taxation. According to the opinion, the DST does not fit the definition of any of these three categories, and thus the appropriate legal basis for the DST should be Article 115 of the TFEU, which provides the legal basis for the adoption of general directives that have a direct effect on the establishment or functioning of the EU internal market.

During the next ECOFIN meeting in November 2018, the ministers discussed the DST proposal again, and they concluded that 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 that would be subject to the future tax. On the sunset clause, all Member States agreed that the directive should expire once there is a comprehensive approach to taxing the digital economy at the OECD level. According to the announcement of the Austrian Minister of Finance, Hartwig Löger, at the end of the ECOFIN meeting of November 2018, the presidency wanted to achieve concrete results by the end of 2018 and to reach an agreement at the Council meeting on 4 December 2018.

Nonetheless, on the ECOFIN meeting of 4 December 2018, the ministers did not reach an agreement, but they discussed two new key documents: (i) A DST compromise text containing the elements that the Austrian Presidency says have the most support from Member States and (ii) A joint declaration by the French and German delegations, which was put forward to the ministers, in which they invite the European Commission and the Economic and Financial Affairs Council to amend and refocus their draft directive for a DST to a tax base referring to the provision of advertisements only, on the basis of a 3% tax on turnover. The Austrian presidency recommended that the Council working group continues working on the basis of the latest presidency compromise text as well as the elements proposed in the Franco-German declaration, with the aim of reaching an agreement as soon as possible. Pierre Moscovici, the European Commissioner for Economic and Financial Affairs, Taxation and Customs, is reported as mentioning a March time frame. Any agreement, importantly, would come after an anticipated January 2019 communication from the OECD on digital taxation.

Country-specific developments

In 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.

In November 2018, the United Kingdom 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 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%. The digital services tax is proposed to apply from April 2020. The consultation runs until 28 February 2019. 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 will be agreed. Also, the Czech Ministry of Finance published an online statement regarding its position on digital taxation. According to the statement, as there is no consensus on the EU DST directive nor on introduction of a long-term measure, the Czech Republic supports technical discussions on refining the DST as a short-term approach.

ATAD

Background

The Anti-Tax Avoidance Directive (ATAD) I and II are intended to provide for a uniform legislative implementation of some of the OECD BEPS recommendations. The agreed-upon ATAD text establishes a minimum standard with respect to five areas that relate to Actions 2, 3, and 4 of the BEPS project: interest deductibility limitation, a general anti-abuse rule (GAAR), CFC rules, hybrid mismatches and exit taxation. The ATAD is under implementation process by many Member States, and some of its measures are expected to be transposed into domestic law of more Member States in 2018. The ATAD prescribes that Member States shall adopt and publish the laws and regulations necessary to comply with the rules by 31 December 2018 at the latest, and the ATAD should apply as of 1 January 2019. In relation to exit taxes, Member States are granted a delay of one year. Regarding hybrid mismatches, Member States will have until 1 January 2020 to transpose the rules into national laws and regulations (1 January 2022 for the implementation of reverse hybrid mismatches).

2018 year-end developments

On 7 December 2018, a notice from the EU Commission on the measures that are equally effective to the interest limitation rules in Article 4 ATAD was published in the *Official Journal of the European Union*. According to Article 11(6) ATAD, Member States that have national targeted rules for preventing BEPS risks at 8 August 2016, which are equally effective to the interest limitation rule set out in the ATAD, may apply these targeted rules until the end of the first full fiscal year following the date of publication of the agreement between the OECD members on a minimum standard with regard to BEPS Action 4, but at the latest until 1 January 2024. To that end, Member States should have communicated to the EU Commission before 1 July 2017 all information necessary for evaluating the effectiveness of the national targeted rules for preventing BEPS risks. The commission considered the domestic rules of France, Greece, Slovakia, Slovenia and Spain, as notified by the Member State concerned, to be equally effective to the ATAD interest limitation rules. As per Article 11(6) ATAD, these Member States may apply these rules at the latest until 1 January 2024.

Country-specific developments

During the second half of 2018, there was activity in the EU for the implementation of the ATAD. Several Member States published their draft bills to implement the proposed ATAD measures and to align their existing rules with ATAD standard: Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Slovenia, Spain and Sweden.

In the annex of this sub-report there is a chart listing Member States that their domestic rules meet the ATAD requirements, that have implemented the relevant rules or they have not done so yet. The chart illustrates some high-level information on the rules in each Member State.

Mandatory disclosure rules (MDRs)

Background

On 25 May 2018, the Council of the EU formally adopted the directive amending Directive 2011/16/EU with respect to the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. The adopted directive requires "intermediaries" such as tax advisors, accountants and lawyers that design and/or promote tax planning arrangements to report transactions and arrangements that are considered by the EU to be potentially aggressive. If there are no intermediaries that can report, the obligation will shift to the taxpayers. Following the reporting of the arrangements, the information about the arrangements will be automatically exchanged between Member States. The content of the directive corresponds to that agreed by the ECOFIN on 13 March 2018. Member States shall apply the new reporting requirements from 1 July 2020, but such requirements will cover arrangements where the first step of implementation begins after the entry into effect of the directive, i.e., on 25 June 2018, being 20 days after publication of the directive into the *Official Journal of the European Union* on 5 June 2018. The first information shall be reported by 31 August 2020 and exchanged by 31 October 2020.

Country-specific developments

In summer 2018, the Italian Ministry of Economy and Finance launched a public consultation on the legislative decree that would transpose in Italy the EU MDRs. The draft legislative decree includes, among others, a list of defined terms, who needs to disclose information, what information should be disclosed and when, and for how long that information needs to be stored by the taxpayer or intermediary. Comments on the draft legislative decree could be sent through the public consultation website by 28 September 2018. Also, the Finnish Ministry of Finance announced that it will begin preparing legislation to implement the MDR directive into national law. The directive should be implemented by 31 December 2019.

On 14 November 2018, the Polish president signed a bill incorporating several changes to the Polish tax legislation. Among others, the bill introduces MDR legislation in Poland with a wider scope and earlier reporting requirements in comparison to what is required by the directive. More specifically, the Polish MDR legislation 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. It also includes earlier reporting requirements in comparison to what is required by the directive. Under the Polish MDR legislation, the cross-border tax schemes implemented from 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 came into force as of 1 January 2019. Since Poland is an early adopter of the law, all the arrangements concluded between 25 June 2018 and 31 December 2019 affecting Poland and other group entities will be reported in Poland this year (so other countries will not need to report these arrangements).

EU black list and harmful regimes

Background

On 5 December 2017, the Council of the EU published a listing of uncooperative jurisdictions for tax purposes (EU list), comprising 17 jurisdictions that were deemed to have failed to meet relevant criteria established by the European Commission. The listing criteria are focused on three main categories: tax transparency, fair taxation and implementation of anti-BEPS measures. The EU's Code of Conduct Group (COCG) should continue dialogue and monitoring the actual implementation of the commitments made by these jurisdictions and should recommend at any time to update the list of non-cooperative jurisdictions for tax purposes based on any new commitment taken and on the implementation of these commitments. Furthermore, the council also asked the COCG to prepare a progress report on this matter before summer 2018.

2018 year-end developments

During the second half of 2018, there were changes to the EU list. The finance and economic affairs ministers of the EU Member States agreed that a de-listing is justified in the light of an expert assessment of the commitments made by the listed jurisdictions to address deficiencies identified by the EU. Currently, five jurisdictions remain on the EU list (American Samoa, Guam, Samoa, Trinidad and Tobago, and the US Virgin Islands).

In July 2018, the Council of the EU published an overview of the preferential tax regimes examined by the COCG since its creation in March 1998. The overview is divided in three parts: (i) Preferential regimes of EU Member States (including Gibraltar with regard to the United Kingdom), (ii) Dependent or associated territories of EU Member States to which EU treaties do not apply (as of the date of notification of the regime), and (iii) Other jurisdictions (now covered by the EU listing exercise). The overview concludes that the COCG has examined 638 preferential regimes (including 280 during the period 1998–99), 254 of which were deemed harmful. In December 2018, the council published an update of this overview wherein the COCG concluded that it has examined as of the date of this latest update 663 preferential regimes in total, 263 of which were deemed harmful and have been (or are being) rolled back.

On 20 November 2018, the Council of the EU published a report from COCG that encompasses the work of the COCG in the second half of 2018 under the Austrian Presidency of the Council. The first part of the report provides an update and revision of the mandate of the Code of Conduct and discusses among others the standstill and rollback notifications of new preferential tax measures that were launched in mid-November 2018. 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's conclusions of 5 December 2017. 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 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 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.

Conclusions

By providing the reader with an overview of updates in the current and future G20/OECD and EU work related to BEPS, this report shows that this is a critical moment in many areas of activity, including in the area of the digital economy and the exchange of tax information around the world. The report also demonstrates the swift and geographically comprehensive progress being made on the implementation of BEPS. The report further affirms the actions of IF on BEPS members that have made significant commitments to change their tax rules.

The international tax environment has never been more dynamic with the combined impact of BEPS, MLI, ATAD, US tax reform, and the shift in attitude of tax authorities and other stakeholders across the globe. Coupled with the increased transparency and the ever-increasing amount of information being exchanged between tax authorities (tax rulings, financial account information, CbC reports, among others), it is pivotal for businesses to consider and understand the implication of the current environment to their operations.

Businesses are recommended to consider putting in place or increasing their efforts to assess, quantify, plan for and comply with change at both multilateral and national levels.

Annex

ATAD implementation overview as of 15 January 2019

Annex

ATAD implementation overview as of 15 January 2019

✔ Already implemented/embedded in domestic law, i.e., domestic rule is fully aligned with ATAD standard and no further action/amendments are expected

✓ Already embedded in domestic law but not fully aligned with ATAD standard, i.e., existing rule should be amended (even if slightly) published draft law when the tick mark is in circle

✗ Not implemented and/or no existing domestic rule

( ) Draft law published

A Passive income approach

B Non-genuine arrangement approach

? Unclear/no information

Year: Year by which the ATAD measure shall be applicable from

Disclaimer

This material has been prepared for general information and discussion purposes only and is not intended, and should not be relied upon, as accounting, tax or other professional advice. The information contained hereafter is based on tax legislation, its rules and regulations, and thus, it may be modified or changed at any time by a country's administrative, judicial or legislative authorities, which may have a significant effect on the conclusions contained hereunder. This material includes only high-level information, so please refer to a country advisor for specific and detailed advice.

	GAAR (2019)	Interest limitation rule (2019/2024*) *extension possible under Art 11(6)						CFC rule (2019)		Exit tax (2020)		Hybrids (2020)		Reverse hybrids (2022)	
	Implementation status	Implementation status	Effective date	De minimis rule	Grandfathering	Group ratio rule	Carry forward and/or back	Implementation status	CFC income approach	Implementation status	Effective date	Implementation status	Effective date	Implementation status	Effective date
Austria	✔	✗	?	–	–	–	–	✔	A	✔	Already in force	✓	1 January 2020	✗	
Belgium	✔	✔	1 January 2020*	Yes	Yes	No	CF	✔	B	✔	Already in force	✔	Already in force	✔	Already in force
Bulgaria	✔	✔	Already in force	Yes	No	No	CF	✔	A/B	✓	1 January 2020	✓	1 January 2020	✗	1 January 2020
Croatia	✔	✔	1 January 2019	Yes	No	No	Yes	✔	A	✗	1 January 2020	✗	1 January 2020	✗	1 January 2020
Cyprus	(✓)	(✗)	?	Yes	Yes	Yes	CF	(✗)	B	✗	1 January 2020	✗	1 January 2020	✗	1 January 2020
Czech Republic	(✓)	(✗)	?	Yes	Yes	No	CF	(✗)	A	(✗)	1 January 2020	(✗)	1 January 2020	✗	1 January 2020
Denmark	(✓)	(✓)	?	Yes	No	No	Yes	(✓)	A	(✓)	1 January 2020	(✓)	1 January 2020	(✓)	1 January 2020
Estonia	(✓)	(✗)	?	Yes	No		Yes	(✓)	B	(✓)	Already in force	✓	1 January 2020	✗	1 January 2020
Finland	✔	✔	Already in force	Yes	Yes	Yes	Yes	✔	-	✓	1 January 2020	✗	1 January 2020	✗	1 January 2020
France	✔	✔	1 January 2019	Yes	No	Yes	Yes	✓	?	✔	Already in force	✓	1 January 2020	✗	1 January 2020
Germany	✓	✓	?	–	–	–	–	✔	?	✔	Already in force	✓	Already in force	✗	1 January 2020
Greece	✓	✓	1 January 2024	Yes	No	No	Yes	✓	A	✓	1 January 2020	✓	1 January 2020	✗	1 January 2020
Hungary	✔	✔	Already in force	Yes	Yes	Yes	Yes	✔	B	✗	1 January 2020	✓	1 January 2020	✗	1 January 2020
Ireland	✔	✓	?	–	–	–	–	(✗)	B	✔	Already in force	✗	1 January 2020	✗	1 January 2020
Italy	✔	✔	Already in force	Yes	Yes	No	CF	✔	A	✔	Already in force	✔	1 January 2020	✔	1 January 2020
Latvia	(✓)	✔	Already in force	Yes	No	No	No	✔	B	✗	1 January 2020	✔	Already in force	✗	1 January 2020
Lithuania	✔	✔	Already in force	Yes	Yes	Yes	Yes	✔	A	✗	1 January 2020	✓	1 January 2020	✗	1 January 2020
Luxembourg	✔	✔	Already in force	Yes	Yes	Yes	Yes	✔	B	✔	1 January 2020	✓	1 January 2019 and 2020	✗	1 January 2020
Malta	✔	✔	Already in force	Yes	Yes	No	Yes	✔	B	✔	1 January 2020	✓	1 January 2020	✗	1 January 2020
Netherlands	✔	✔	Already in force	Yes	No	No	Yes	✔	B/A	✔	Already in force	✗	1 January 2020	✗	1 January 2020 or 2022
Poland	✔	✔	Already in force	Yes	No	No	Yes	✔	A	✔	Already in force	✓	1 January 2020	✗	1 January 2020
Portugal	✓	✓	?	–	–	–	–	✓	?	✓	1 January 2020	✗	1 January 2020	✗	1 January 2020
Romania	✔	✔	Already in force	Yes	No	No	CF	✔	A	✔	Already in force	✓	1 January 2020	✗	1 January 2020
Slovakia	✔	✔	1 January 2024	No	No	No	No	✔	B	✔	Already in force	✔	Already in force	✔	Already in force
Slovenia	✔	✓	1 January 2024	–	–	–	–	✔	A	✗	1 January 2020	✗	1 January 2020	✗	1 January 2020
Spain	✔	✓	1 January 2024		No	No	Yes	(✓)	A	(✓)	1 January 2020	✓	1 January 2020	✗	1 January 2020
Sweden	✓	✔	Already in force	Yes	No	No	Yes	✔	B	✓	1 January 2020	✔	Already in force	✔	Already in force
United Kingdom	✔	✔	Already in force	Yes	No	Yes	Yes	(✓)	B	(✓)	1 January 2020	(✓)	1 January 2020	✗	?

*A proposal has been introduced in parliament that proposes to bring forward the entry into force of the rule to 1 January 2019.

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