

## The Latest on BEPS - 11 February 2019

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### OECD

On 29 January 2019, the OECD issued a press release (the Press Release) and a Policy Note (the Policy Note) in relation to its work on *Addressing the Tax Challenges of the Digitalisation of the Economy*. The long-foreshadowed documents were issued shortly before the OECD's latest *Tax Talks Webcast*, which also covered the same issue, in addition to other topics.

The Press Release set out how the OECD believes that the international community has made important progress in this area and has agreed to continue working multilaterally towards achievement of a new consensus-based, long-term solution in 2020.

Renewed international discussions, it says, will focus on two central pillars identified in the Policy Note which was released after the Inclusive Framework on BEPS (BEPS IF)'s 23-24 January meeting, which brought together 264 delegates from 95 member jurisdictions and 12 observer organizations.

Importantly, the Policy Note describes that the BEPS IF recognizes that what is being proposed may go far beyond the taxation of highly digitalized business models, also affecting a much wider group of enterprises with cross-border business operations, for instance those with marketing intangible profits but limited risk distribution structures in market jurisdictions. Additionally, the Policy Note describes that *these proposals would lead to solutions that go beyond the arm's-length principle*.

See EY Global Tax Alert, [OECD's new insights describe growing support on comprehensive changes to international tax policy, beyond digital](#), dated 29 January 2019.

Also on 29 January, the OECD released *Harmful Tax Practices - 2018 Progress Report on Preferential Regimes* (the [2018 Progress Report](#)), approved by the BEPS IF. The purpose of this document is to provide an update to the [2017 Progress Report](#) and to report the results of the review of all Inclusive Framework members' identified preferential tax regimes.

In 2017, commitments were made in respect of more than 80 regimes to be made compliant with the BEPS Action 5 minimum standard. In 2018, jurisdictions have, in almost all cases, delivered on these commitments, while the total number of regimes reviewed since the start of the BEPS project is now 255. The 2018 results also show that all Intellectual Property (IP) regimes are, with one exception, either abolished or amended to comply with the nexus approach.

The 2018 Progress Report also contains annexes containing substantive updates on the Forum on Harmful Tax Practices (FHTP) framework, including the new standard for substantial activities requirements within no or only nominal tax jurisdictions, interpretive guidance on the application of existing factors for assessing regimes, and recommendations on the data points and process for carrying out the monitoring of the grandfathering for non-IP regimes.

Finally, the 2018 Progress Report sets out next steps for the FHTP in continuing to address harmful tax practices.

See EY Global Tax Alert, [OECD releases 2018 Progress Report on Preferential Regimes under BEPS Action 5](#), dated 30 January 2019.

The OECD conducted, on 29 January, its eleventh Tax Talk webcast (Tax Talk) wherein members of the OECD Centre for Tax Policy and Administration discussed various updates on the OECD's international tax work. The webcast agenda included the following topics: (i) Tax and digitalization, (ii) BEPS implementation, and (iii) Corporate tax statistics.

On the topic of tax and digitalization, the speakers summarized the relevant developments since the issuance of the final report on BEPS Action 1, while discussing in more detail the policy note that was released on the same day of the Tax Talk and which identifies two central pillars around which the renewed international discussions on digital taxation will be focused. Furthermore, the speakers discussed the progress that has been made in the implementation of the four BEPS minimum standards. On BEPS Action 5, the 2018 Progress report on harmful tax regimes, also released

on the same day of the Tax Talk, shows that countries are taking seriously their commitments and they are amending their regimes in order to comply with BEPS Action 5. It was announced that the first peer review report of BEPS Action 6 will be released in February 2019 and it will include results for 116 jurisdictions. In the context of BEPS Action 13, the speakers highlighted that more than 80 countries already have adopted Country-by-Country (CbC) reporting (CbCR) rules, and that more than 7,000 CbC reports were filed in 2016. On Action 14, the speakers announced that the stage one review of the fifth batch of peer review reports is approved and will be published soon (14 February 2019). Lastly, during the Tax Talk it was announced that in early 2020 the corporate tax rates statistics will also include CbC reporting statistics.

The OECD also announced on 29 January that Ireland deposited its instrument of ratification, acceptance or approval of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI) - bringing the total number of deposits to 19. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, Ireland confirmed its MLI positions, but it added two additional tax treaties (Ghana and Kazakhstan) to its list of covered tax agreements (CTAs) and it removed two tax treaties (Germany and Switzerland) from its list of CTAs. The MLI will enter into force for Ireland on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by Ireland of its instrument of ratification, acceptance or approval, i.e., on 1 May 2019.

## European Union

On 4 February 2019, the Council of the European Union (EU) published [a set of letters](#) seeking commitments on the replacement by some jurisdictions of harmful preferential tax regimes with measures of similar effect. The letters which have been signed by the EU Code of Conduct Group (COCG) were sent on 1 February 2019 to Barbados, Belize, Curaçao, Mauritius, Saint Lucia and Seychelles. With these letters, which are part of the work around the list of non-cooperative jurisdictions of 5 December 2017 (the "blacklist"), the EU seeks a commitment from the relevant jurisdictions to abolish or amend their harmful regimes by 31 December 2019.

## United Nations

In January 2019, the [Report](#) on the Seventeenth Session of the Committee of Experts on International Cooperation in Tax Matters (Committee), which was held by the United Nations (UN) on 16-19 October 2018 in Geneva, Switzerland, was released. The report describes a number of substantive issues related to tax cooperation in tax matters that were discussed during the session. Among others, the session addressed: (i) tax consequences of the digitalized economy; (ii) a possible update of the UN Practical Manual on Transfer Pricing for developing countries; (iii) a possible update of the Manual for the negotiation of bilateral tax treaties between developed and developing countries; (iv) software-related payments as royalties; and (v) dispute avoidance and resolution.

According to the Seventeenth Session report, the presenters discussed the work of the Subcommittee for the taxation on the digitalization of the economy, and provided background information on the relevant developments at the international and European level. Some members stressed that the Subcommittee should focus on the question of the allocation of taxing rights, and it was suggested that a solution to the difficulties of taxing new business models could be found within the context of the United Nations Model Double Taxation Convention between Developed and Developing Countries, such as by allocating taxing rights to the market jurisdiction on the basis of what the UN had already recommended with respect to royalties and payment for services. Various suggestions were made, including a “significant economic presence” or “digital permanent establishment” test. The question that would then need to be addressed, however, would be how to attribute business profits in such a case. According to the report, many members referred to the work already done by the OECD, but opinions differed on whether that work necessitated that the Committee act quickly or adopt a “wait and see” approach. It is mentioned in the Report that it was suggested that the Subcommittee could prepare a decision tree that would identify the various issues, the risks that they presented and the possible ways of addressing them.

Regarding the mutual agreement procedure (MAP) discussions, the progress on the work on dispute avoidance and resolution since the last meeting of the Committee was described. The Subcommittee on Dispute Avoidance and Resolution met in Vienna in July 2018. Following that meeting, the Secretariat worked on the preparation of a revised draft version of the chapter on MAP of the proposed handbook on dispute resolution and avoidance.

The preliminary draft of the chapter was presented to the Committee for discussion and guidance, with a view to preparing a final draft of the chapter for final discussion at the next session.

## Austria

On 25 January 2019, the decree on the application of the controlled foreign companies (CFC) regime was published in the *Official Gazette* of Austria. The CFC regime was introduced upon the implementation of the EU Anti-Tax Avoidance Directive (ATAD) with effect from 1 January 2019. Among others, the decree provides guidance on the notion of low-taxed income, the exception from CFC rules for foreign entities that derive only one third or less of their income from the listed harmful income categories and the notion of control over a foreign entity and substance requirements. The decree is generally applicable as from the beginning of the application of the CFC regime (1 January 2019).

## Belgium

On 31 January 2019, the Belgian Federal Parliament adopted the law on fiscal, anti-abuse, financial and various other provisions. The entry into force of the interest limitation rule under the EU ATAD was brought forward to 2019 (financial years starting on or after 1 January 2019) instead of 2020 as initially scheduled. For more information, see EY Global Tax Alert, [The Latest on BEPS](#), dated 14 January 2019.

On 23 January 2019, two law proposals on the digital economy were submitted to the Belgian Federal Parliament. Like the two recent EU proposals for Directives on the digital economy, the Belgian law proposals focus on a two-phased approach: an interim solution, referred to as the Digital Services Tax (DST) and a longer-term solution, referred to as the Significant Digital Presence (SDP). The first proposal intends to introduce a 3% DST on digital revenues until the SDP solution has been introduced. Digital taxable revenues are those stemming from: (i) the placing on a digital interface of advertising targeted at users of that interface; (ii) making available a multi-sided digital interface to users that allows them to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users; or (iii) transmission of data collected about users and generated from users' activities on digital interfaces. Companies will be subject to the DST if they exceed the thresholds of €750 million worldwide and €50 million within the EU.

The second proposal intends to introduce the concept of digital permanent establishment (PE) into domestic law. Three criteria are used to determine the digital footprint of a business in Belgium: (i) revenues from supplying digital services (more than €7 million); (ii) the number of users of digital services (more than 100,000); or (iii) the number of contracts for a digital service (more than 3,000). The proposed rules for allocating profits to an SDP are built on the current framework applicable to PEs.

## Chile

On 31 October 2018, the Chilean Internal Revenue Service (IRS) extended the scope of the transfer pricing report (Form 1907), including additional information regarding the CbCR notification. According to the amendments, three new fields were added to the Form 1907 which require the taxpayer to report: (1) whether the group to which the taxpayer belongs must submit a CbC report; (2) which entity of the group is obliged to submit the report and its country of residence; and (3) the country code where the CbC report is submitted.

See EY Global Tax Alert, [Chilean IRS modifies annual transfer pricing form](#), dated 6 February 2019.

## Czech Republic

On 30 January 2019, the Czech Senate returned the draft law implementing (among other things) the EU ATAD I & II to the lower chamber of the Parliament with several amendments (not related to ATAD measures). To become law, the current draft proposal must now be adopted by the lower chamber (either the amended version with a simple majority or the original version with an absolute majority vote) and then signed into law by the President. The Czech Ministry of Finance already stated that it is not willing to accept the proposed amendments. Considering the Ministry's position, the Senate's proposed amendments are likely to be rejected. The draft law was supposed to be effective as of 1 January 2019 but its effectiveness is postponed due to the legislative delays.

## Hong Kong

On 23 January 2019, the Hong Kong Inland Revenue Department announced that effective from the taxable year 2018, Hong Kong taxpayers are required to disclose certain

related-party information and confirm their compliance with transfer pricing documentation requirements in their profits tax return.

Required disclosure includes the confirmation of whether: (1) there have been any transactions with nonresident associated persons; (2) an advance pricing arrangement has been concluded; or (3) the taxpayer belongs to a multinational enterprise group that has a CbCR filing obligation in Hong Kong or elsewhere. If any of above three conditions are affirmed by the taxpayer, the taxpayer would be required to provide further information.

See EY Global Tax Alert, [Hong Kong requires taxpayers to disclose transfer pricing information in income tax return](#), dated 1 February 2019.

## Mauritius

On 22 January 2019, the Mauritius Revenue Authority (MRA) published [Guidelines](#) on the appropriate use of information contained CbC reports. According to the Guidelines, the information obtained through CbC reports shall be appropriately used by the MRA during a transfer pricing audit and for these purposes, appropriate use is restricted to: (i) high level transfer pricing risk assessment; (ii) assessment of other BEPS-related risks; and (iii) economic and statistical analysis, where appropriate. Further, the Guidelines provide instances of inappropriate use and consequences of non-compliance with the appropriate use requirements. The MRA commits to restrict access to CbC reports and to put in place adequate measures to ensure effective control and monitoring of the use of CbCR information to ensure appropriate use. Also, the MRA will review the issued Guidelines, and the procedures put in place to ensure appropriate use of CbCR data, on an ongoing basis, and make changes that are considered desirable as appropriate.

## Poland

On 9 January 2019, the Polish Ministry of Finance published the 2005 synthesized texts of the New Zealand - Poland Double Tax Convention, displaying the modifications made to the treaty by the MLI. The MLI entered into force for Poland on 1 July 2018 and for New Zealand on 1 October 2018. The provisions of the MLI will have effect with respect to the New Zealand - Poland Double Tax Convention on: (i) 1 January 2019 for taxes withheld at source in both jurisdictions; and (ii) 1 April 2019 with respect to all other taxes levied in both jurisdictions.

## Singapore

On 21 December 2018, Singapore deposited the Instrument of Ratification of the MLI, becoming the 17th country to do so. The MLI will enter into force for Singapore on 1 April 2019.

See EY Global Tax Alert, [Singapore ratifies Multilateral Convention to implement BEPS-related measures](#), dated 7 January 2019.

## Sweden

On 1 February 2019, the Swedish Ministry of Finance released a memorandum regarding a law proposal extending the scope of the current hybrid mismatch rules. Under this proposal, the current provisions, which are applicable since 1 January 2019, will: (i) extend the targeted hybrid mismatch situations; (ii) include types of expenses other than interest expenses; and (iii) cover structured arrangements with third parties. The law proposal is expected to enter into force on 1 January 2020.

## United States

On 29 January 2019, a United States (US) treasury official spoke at a meeting of the DC Bar, outlining the involvement of the US to date in discussions on the digital economy and setting out further views in regard to the US' position on many of the issues under debate. The treasury official stated that the US is engaged in the OECD process "out of the very deep concern that the longstanding international consensus around the allocation of taxing jurisdiction is breaking down." This is highlighted, he said, by the accelerating trend of unilateral actions by various countries over the past five years. The official noted that there is currently broad political dissatisfaction around the world with the tax planning outcomes that are possible under the existing international consensus and that the unilateral measures in response are highly politicized. As such, he said, the process is no longer a purely technical exercise. The US therefore hopes, he said, that with increased involvement, a broad political consensus can be built at the OECD level as to how taxing jurisdiction can be allocated between different countries.

See EY Global Tax Alert, [US Treasury official's remarks outline scope of US involvement and input into the OECD discussion on international taxation beyond digital](#), dated 1 February 2019.

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EYG no. 000348-19Gbl

1508-1600216 NY  
ED None

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