25 February 2019

Global Tax Alert

The Latest on BEPS - 25 February 2019

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OECD

On 19 February 2019, 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 eighth batch of jurisdictions (Brunei Darussalam, Curaçao, Guernsey, Isle of Man, Jersey, Monaco, San Marino and Serbia) and invites taxpayers to submit their input related to their experiences in these jurisdictions, via an electronic questionnaire, by 19 March 2019. The exercise is part of the process of the mutual agreement procedure (MAP) peer review and monitoring process that the OECD launched in December 2016 under Action 14 of the BEPS project in relation to more effective dispute resolution mechanisms. Business taxpayers are encouraged to take this opportunity to submit their views. The OECD will continue to launch peer reviews of further batches of jurisdictions and publish peer review reports in accordance with the assessment schedule of peer reviews published by the OECD in October 2016.

On 14 February 2019, the OECD released the fifth batch of peer review reports relating to the implementation by Estonia, Greece, Hungary, Iceland, Romania, Slovak Republic, Slovenia, and Turkey of the BEPS Action 14 minimum standard.

Overall, the reports conclude that the majority of these jurisdictions meet most or almost all of the elements of the Action 14 minimum standard. Iceland meets more than half of the elements of the Action 14 minimum standard, and Romania meets less than 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. The Stage 2 peer review of the fifth batch is scheduled to commence in October 2019.

See EY Global Tax Alert, *OECD releases fifth batch of peer review reports on BEPS Action 14*, dated 18 February 2019.

Building a better working world

Also on 14 February, the OECD released the first peer review report (the report) relating to the compliance by members of the Inclusive Framework on Base Erosion and Profit Shifting (IF on BEPS) to the minimum standard on BEPS Action 6 for prevention of treaty abuse. The report covers 116 jurisdictions and information available as of 30 June 2018 (cut-off date).

Overall, the report concludes that a large majority of the IF on BEPS members have begun to translate their commitment on treaty shopping into actions and are now in the process of modifying their treaty network. According to the report, the peer review shows the efficiency of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI) in implementing the treaty-related BEPS measures, and it is by far the preferred tool of the IF on BEPS members for implementing the minimum standard. By the cut-off date, 82 jurisdictions had some agreements that were already compliant with the minimum standard or were subject to a complying instrument. Once the complying instrument (i.e., the MLI or a protocol/treaty) takes effect, the agreements will come into compliance with the minimum standard.

The minimum standard on treaty shopping requires jurisdictions to include two components in their tax agreements: an express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, and one of three methods of addressing treaty shopping. Of the three methods, the vast majority of the jurisdictions have chosen to implement a Principal Purpose Test.

See EY Global Tax Alert, *OECD releases first annual peer review report on BEPS Action 6*, dated 15 February 2019.

On 13 February 2019, the OECD issued a public consultation document (consultation document) seeking public comments on possible solutions identified to address the tax challenges arising from the digitalization of the economy.

The publication of the consultation document was discussed in the 29 January 2019 Policy Note published by the IF on BEPS, following the agreement of the now 128-strong members of the IF on BEPS to examine proposals involving two pillars. One pillar would focus on the allocation of taxing rights and a second pillar would address BEPS issues. Importantly, the consultation document sets out more detail on the proposals within both pillars than was previously known. The consultation document also notes that the impact of these proposals is not limited to digital business models only, and would impact any business models utilizing intangible assets.

The OECD notes that the proposals included in the consultation do not represent the consensus views of the IF on BEPS, the OECD's Committee on Fiscal Affairs (CFA) or their subsidiary bodies. It is important in this regard to note that the current proposals may continue to be revised or added to. In that regard, they represent a current snapshot of what is being discussed by OECD member countries.

The consultation document describes the proposals discussed by the IF on BEPS at a high level, and seeks comments from the public on a number of policy issues and technical aspects. The specific questions posed by the OECD on each proposal are listed in full in the consultation document. The comments provided will assist the IF on BEPS in preparing a solution for its final report to the G20 leaders in 2020. That final report will be preceded by an update to that group in 2019.

Given the intention for the consultation to inform policy makers, the consultation is open for three weeks and interested parties are invited to send their comments to the OECD no later than 1 March 2019.

See EY Global Tax Alert, *OECD opens public consultation on addressing tax challenges arising from digitalization of the economy: time-sensitive issue impacting all multinational enterprises*, dated 14 February 2019.

The OECD announced on 19 February that it extended the comment period for the public consultation document on the possible solutions to the tax challenges of digitalization to 6 March 2019 (from 1 March as noted above). This extension aims to ensure that all stakeholders are given the full opportunity to provide feedback on the relevant consultation document. The public consultation meeting remains scheduled for 13-14 March 2019 and the deadline for registration to attend the public consultation remains 1 March 2019.

On 12 February 2019, the OECD announced that Guernsey deposited its instrument of ratification, acceptance or approval of the MLI – bringing the total number of deposits to 20. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, Guernsey confirmed its MLI positions, but it removed the tax treaty with Qatar from its list of Covered Tax Agreements. The MLI will enter into force for Guernsey 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 Guernsey of its instrument of ratification, acceptance or approval, i.e., on 1 June 2019.

On 11 February 2019, Armenia became the 128th member to join the BEPS Inclusive Framework. As a new BEPS member, Armenia committed to comply with the BEPS minimum standards, which are contained in Action 5 (countering harmful tax practices), Action 6 (preventing treaty abuse), Action 13 (transfer pricing documentation) and Action 14 (enhancing dispute resolution). Armenia will also participate on an equal footing with the members of the Inclusive Framework on the remaining standard setting, as well as the review and monitoring of the implementation of the BEPS package.

Recently, the OECD updated the list of signatories of the Multilateral Competent Authority Agreement on the exchange of Country-by-Country (CbC) reports (CbC MCAA). According to this latest update, the Bahamas signed the CbC MCAA on 10 December 2018. The total number of jurisdictions that have joined the CbC MCAA is now 77.

Belgium

On 8 February 2019, the Belgian Tax Authorities released an addendum to the circular letter 2017/C/56 containing additional guidance on the transfer pricing documentation penalty regime (circular 2019/C/14). The determination of the penalty depends on the nature of the violation. In the case of a violation independent from the will of the taxpayer, there is no penalty (basket A infringements). In the case of an infringement without the willful intent to harm or to commit fraud, the penalty ranges from €1,250 up to €25,000 as from the second violation until the fifth and following (basket B infringements). In the case of a violation with the willful intent to harm or to commit fraud (including deliberate filing of incomplete or incorrect returns), the penalty for the first violation is €12,500 and for the second violation and following €25,000 (basket C infringements). Penalties in respect of basket B apply as of 19 July 2018 and as of 8 January 2018 for penalties in respect of basket C infringements.

Colombia

On 27 December 2018, the Ministry of Finance issued Decree 2442 which inter alia prescribed the deadline to submit the transfer pricing (TP) obligations (Local file, Master file, TP return, CbC reporting (CbCR) Notification and CbC report) for fiscal year 2018. According to the Decree, the Local file, Master file, TP return and CbCR Notification must be filed between 9-22 July 2019. The CbC report must be filed between 10-23 December 2019. The specific filing deadlines are determined based on the last digit of the taxpayer identification number.

Iceland

On 14 February 2019, the OECD released the fifth batch of peer review reports relating to the implementation of the BEPS minimum standard under Action 14 on improving tax dispute resolution mechanisms. Iceland was among the assessed jurisdictions in the fifth batch.

Overall the report concludes that Iceland meets most of the elements of the BEPS Action 14 minimum standard. In the next stage of the peer review process, Iceland's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored.

See EY Global Tax Alert, *OECD releases Iceland peer review report on implementation of BEPS Action 14 minimum standard*, dated 20 February 2019.

On 30 January 2019, the Icelandic Ministry of Finance and Economic Affairs launched a public consultation on a draft law related to CbCR. Comments were requested by 13 February. Further to the feedback received from the OECD, Iceland prepared a draft law to change the threshold of the CbCR which is currently denominated in ISK to €750 million. The draft law also introduces CbCR obligations for surrogate parent entities. The obligation to submit a CbC report is not available when a surrogate company is obligated to submit a CbC report in another state provided that the following conditions are met: (i) The State of the surrogate parent company sets the same requirements for CbC reports as in Iceland; (ii) At the end of the fiscal year, an agreement is in place with the competent authority of the home state of the surrogate company that provides for automatic exchange of information of CbC reports on tax returns; (iii) The home state of the surrogate parent company has not informed the Director of Internal Revenue that a systemic failure exists, which means that the Icelandic tax authorities do not receive CbC reports; (iv) A CbC report is submitted to the Directorate of Internal Revenue by the competent of the surrogate parent's home state; (v) A consolidation company has informed the competent authority of the home state that it is a surrogate parent company in accordance with its national rules on such notifications; (vi) A consolidated company domiciled in Iceland delivers information to the Director of Internal Revenue identification and tax resident of a substitute parent company.

A consolidated multinational group with taxable domicile in Iceland shall, not later than the end of the fiscal year of the multinational group, notify the Director of Internal Revenue whether the company is the parent company of the whole group or a surrogate parent. A company, with a tax domicile in Iceland, which is part of a multinational group and is neither a parent company of a total group nor a substitute parent company, shall by before the end of the fiscal year notify the Directorate of Internal Revenue which company in the group submits a CbC report and in which country the company is resident.

Ireland

On 19 February 2019, the Irish Department of Finance launched a public consultation on the reform of transfer pricing rules. This reform includes (i) the implementation of the OECD 2017 Transfer Pricing Guidelines; (ii) the removal of the grandfathering period for arrangements made before 1 July 2010; (iii) the extension of transfer pricing rules to small and medium sized enterprises and non-trading transactions; (iv) the introduction of documentation requirements; and (v) the application of transfer pricing rules to branches. Interested parties should provide their comments between 18 February 2019 and 2 April 2019.

Japan

On 1 January 2019, the MLI entered into force for Japan. Following the deposit of the instrument of ratification by Ireland on 29 January 2019, the MLI will have effect on the tax treaty between Japan and Ireland as detailed below. The tax treaty with Ireland is the tenth tax treaty for Japan to which the MLI will apply (the other nine tax treaties are the Japanese tax treaties with Australia, France, Israel, New Zealand, Poland, Singapore, Slovakia, Sweden and the United Kingdom).

Provisions of the MLI that apply to the Treaty include, among other things, the provisions regarding income derived by or through an entity or arrangement that is treated as fiscally transparent, the preamble language describing the intent of the Contracting Jurisdictions that the tax treaty will not create opportunities for non-taxation or reduced taxation, the provisions that deny the benefits under the tax treaty where the principal purpose or one of the principal purposes of any arrangement or transaction was to obtain those benefits (i.e., principal purpose test), the provisions regarding corresponding adjustments to taxation in accordance with the arm's-length principle and the provisions regarding arbitration for resolving a case of taxation not in accordance with the provisions of the tax treaty.

The provisions of the MLI will have effect with respect to (1) 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 2020, and (2) all other taxes levied by that Contracting Jurisdiction, for taxes levied with respect to taxable periods beginning on or after 1 November 2019. The MAP provisions shall have effect for a case presented to the competent authority of Japan or Ireland on or after 1 May 2019, except for cases that were not eligible to be presented as of that date under the tax treaty between Japan and Ireland prior to its modification by the MLI. Further, the arbitration provisions will have effect with respect to (1) cases presented to the competent authority of Japan or Ireland on or after 1 May 2019, and (2) cases presented to the competent authority of Japan and Ireland prior to 1 May 2019 to which the competent authorities agree to apply the arbitration provisions.

See EY Global Tax Alert, *Japan and Ireland submit instruments of ratification for MLI*, dated 14 February 2019.

Jersey

On 2 January 2019, the Director of International Tax announced that the CbCR notification should be submitted through the Jersey Taxes Office automatic exchange of information (AEOI) portal. Entities required to submit CBC notifications will need to apply for a CBC registration through the AEOI portal. Only one registration is required per multinational enterprise group.

Luxembourg

On 14 February 2019, the Luxembourg Chamber of Deputies approved the MLI. Upon publication of the law in the Official Journal, Luxembourg will need to deposit its instrument of ratification of the MLI with the OECD. The MLI will enter into force for Luxembourg 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 12 February 2019, the Dutch House of Representatives (Tweede Kamer) passed the bill for adoption of the MLI. Before the bill becomes law, it must also be adopted by the Dutch Senate (voting scheduled for 5 March 2019). The bill ratifies the MLI and confirms the preliminary reservations and notifications in respect of the various provisions of the MLI submitted to the OECD in 2017, with the exception of the position with regard to Article 12 (Artificial Avoidance of Permanent Establishment Status through Commissionnaire Arrangements and Similar Strategies). The Dutch Government will make a reservation not to apply Article 12 until there is more clarity on the profit allocation to permanent establishments or until an effective dispute resolution mechanism has been established with a sufficient number of other MLI signatories. Once the ratification process is completed, the Netherlands will need to deposit its instrument of ratification of the MLI with the OECD. The MLI will enter into force for the Netherlands 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.

See EY Global Tax Alert, *Dutch House of Representatives approves MLI*, dated 15 February 2019.

Russia

On 7 February 2019, the Russian Government approved the MLI. The MLI has now been sent to the lower chamber of Parliament (State Duma) for further approval. Once the ratification process is completed, Russia will need to deposit its instrument of ratification of the MLI with the OECD. The MLI will enter into force for Russia 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.

On 30 January 2019, the Ministry of Finance published Guidance on the MAP. Among others, the Guidance includes general information on the provisions of the tax treaties which allow for MAP, the jurisdictions with which Russia can conduct MAP, and the competent authority responsible for MAP in Russia, i.e., the Ministry of Finance. According to the Guidance, there is no special form for the MAP request to be submitted to the competent authority. Also, the Guidance highlights that the time limits for submitting the MAP request are established by the relevant provisions of the applicable tax treaties. For most tax treaties concluded by Russia, this time limit is up to three years. The Guidance is available in Russian and English.

Slovak Republic

In December 2018, the Slovak Ministry of Finance issued updated Guidance regarding transfer pricing documentation (TP documentation). The 2018 updated Guidance recognize three types of TP documentation: (i) full-scope, (ii) basic, and (iii) simplified TP documentation. Significant changes were made in respect of criteria for determining the type of documentation that taxpayers are requested to prepare, as well as the content of each type of documentation.

The full TP documentation includes a Master File and a Local File. Such documentation is required for: (i) Significant cross-border transactions of taxpayers that maintain books in accordance with International Financial Reporting Standards (IFRS); (ii) Cross-border transactions, where the annual value of the transaction or group of interrelated transactions exceeds €10 million; (iii) Significant transactions where the related counterparty is a resident of a non-treaty jurisdiction; (iv) Transactions with respect to which taxpayers request for obtaining an advance pricing agreement or corresponding cross-border TP adjustment; (v) Transactions with respect to which a request for initiation of a MAP has been filed for the relevant tax period; and (vi) Significant cross-border transactions of taxpayers utilizing tax incentives in the relevant tax period.

The basic TP documentation contains a simplified Master File and Local File. Such documentation is required, if the above conditions for the full TP documentation are not met, for: (i) Significant cross-border transactions of taxpayers whose total revenues for the relevant period exceed €8 million; (ii) Cross-border transactions, where the annual value of the transaction or group of interrelated transactions exceeds €1 million; (iii) Significant domestic transactions of taxpayers utilizing tax incentives in the relevant tax period; and (iv) Insignificant transactions where the related counterparty is a resident of a non-treaty jurisdiction.

The simplified TP documentation should be prepared on a designated form, which is included in the Annex of the Guidance, providing a high-level overview of transactions with related parties. Such documentation is required, if the above conditions for the full or basic TP documentation are not met, for: (i) Significant transactions of taxpayers who are obliged to have their accounts subject to statutory audit or are part of a consolidated group; (ii) Significant transactions of individuals with business income; (iii) Significant transactions where the related counterparty is a Slovak tax resident; (iv) Significant transactions of taxpayers with direct or indirect participation of the State or municipality, who are not part of a consolidated group; and (v) Insignificant transactions of taxpayers utilizing tax incentives in the relevant tax period.

For purposes of the TP documentation, significant transaction is a transaction that meets characteristics of significance under the Slovak Accounting Standards or IAS/IFRS.

Where none of the three types of TP documentation is required, the taxpayer's obligation should be fulfilled by completing a table in the corporate income tax return form showing aggregated values of related party transactions for the relevant tax period.

The 2018 Guidance applies to taxable periods beginning after 31 December 2017. However, Slovak taxpayers submitting the TP documentation prior to 30 June 2019 can still submit the TP documentation based on the requirements of the previous version of the Guidance.

Spain

On 13 February 2019, the Spanish Parliament voted against the 2019 State Budget Bill (the Budget Bill) proposed by the Spanish Council of Ministers on 11 January 2019. On 15 February 2019, the Spanish President called for elections to take place on 28 April 2019.

The Budget Bill proposed the introduction of relevant changes to the Spanish corporate income tax (CIT) Law by introducing measures aimed at increasing the State's tax revenues, such as the reduction of the participation exemption regime for dividends, capital gains to 95% of the qualifying income, and the introduction of an Alternative Minimum Tax (AMT) for CIT purposes and the rejection may imply that these measures will not be approved in the short term.

Apart from the Budget Bill, bills proposing implementation of a Financial Transaction Tax and a Digital Services Tax were presented to the Spanish Parliament for approval and it is not expected that the Government will be able to pass them given the limited time until the elections take place.

See EY Global Tax Alert, *Spanish Parliament rejects 2019 State Budget Bill; Government calls for elections*, dated 15 February 2019.

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EYG no. 000657-19Gbl

1508-1600216 NY
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