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Global Tax Alert

The Latest on BEPS – 17 June 2019

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OECD

On 11 June 2019, the OECD conducted its twelfth Tax Talk wherein the experts from the Centre for Tax Policy and Administration discussed various updates on the OECD's international tax work. The webcast agenda included: (i) the OECD tax report to G20 Finance Ministers; (ii) the workplan for resolving the tax challenges arising from the digitalization of the economy; and (iii) next steps.

On 10 June 2019, the Platform for Collaboration on Tax (PCT) – a joint initiative of the International Monetary Fund (IMF), OECD, United Nations (UN), and the World Bank Group (WBG) – released the final PCT Progress Report for 2018–2019 (the report). The report provides updates on the PCT's main work plan, which consists of three main work streams: (i) coordination of capacity development activities; (ii) analytical activities; and, (iii) outreach activities. The report also discusses how the IMF, OECD, UN, and WBG are working to enhance their cooperation on tax and next steps. According to the report, going forward, the PCT plans to provide updates on an annual basis to its governing bodies and interested stakeholders. Moreover, the PTC will continue to develop toolkits on BEPS and related international tax matters. A toolkit is a resource that provides a single point of reference for developing countries on complex issues, thereby reducing the risk of incoherency in advice and guidance. The PCT will publish this year the final version of the Offshore Indirect Transfers toolkit, which

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was first released for consultation in 2017. The PCT also anticipates the release for public consultation, in 2019, of the following toolkits: (i) Implementing Efficient and Effective Transfer Pricing Documentation Regimes; (ii) Tax Treaty Negotiation; and (iii) BEPS Risk Assessment.

On 8-9 June 2019, the G20 Finance Ministers and Central Bank Governors meeting in Fukuoka, Japan concluded with the issuance of a communiqué on key topics discussed at the meeting. This meeting will be followed by the G20 Leaders' Summit in Japan at the end of the month.

In advance of the meeting, the OECD and other multilateral bodies issued several tax-related documents for the ministers' consideration. The most significant of these documents is the *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy* (the Workplan), which was agreed to by the Inclusive Framework on BEPS and released by the OECD on 31 May 2019.

The communiqué welcomed the progress on addressing the tax challenges of digitalization and endorsed the Workplan and its two-pillar approach. It also indicated the intention of the G20 countries to redouble their efforts toward a consensus-based solution to be reflected in a final report in 2020.

See EY Global Tax Alert, *G20 Finance Ministers and Central Bank Governors welcome progress on addressing the tax challenges arising from digitalization and reiterate commitment to final solution by 2020*, dated 11 June 2019.

On 8 June 2019, the OECD published on its website the text of the *Third Annual Progress Report of the OECD/G20 Inclusive Framework on BEPS* (the Progress Report). The Progress Report is also included as annex 2 of the OECD's Secretary-General Report that was provided to the G20 Finance Ministers meeting in Fukuoka, Japan on 8-9 June 2019. The Progress Report describes the progress made to deliver on the mandate of the OECD/G20 Inclusive Framework, covering the period from July 2018 to May 2019. The Progress Report contains three parts: Part 1 focuses on the highlights of the work on addressing the tax challenges of the digitalization of the economy; Part 2 describes the progress in respect to the peer reviews of the BEPS minimum standards; and Part 3 describes other key developments. The Progress Report also contains two annexes providing information on the membership of the Inclusive Framework on BEPS (Annex A) and a list of the BEPS Actions with a guide to where this work is done within the OECD (Annex B).

According to the progress report, the combined effect of the BEPS Actions has brought increased coherence, transparency, and substance to the international tax rules, and their implementation has produced tangible results. Among other things, the Progress Report mentions that 255 preferential tax regimes have been reviewed under Action 5, over 21,000 tax rulings have been exchanged among members of the Inclusive Framework, and Jurisdiction continue to introduce Country-by-Country (CbC) reporting. As per the Progress Report, almost 80 Inclusive Framework members have introduced a CbC reporting filing obligation into law, and around 25 additional Inclusive Framework members currently have draft legislation to introduce an obligation in the near future. Further, the first aggregated and anonymized statistics prepared from data collected on CbC reports have now been prepared by Inclusive Framework members and provided to the OECD for processing. The statistics are being provided for CbC reports relating to reporting fiscal years beginning between 1 January 2016 and 1 July 2016. Also, regarding the work to support the effective use of CbC reports by tax administrations, the Progress Report mentions that the OECD Forum on Tax Administration (FTA) has undertaken a number of initiatives to support tax administrations in using CbC reports and prevent their misuse, i.e., CbCR risk assessment workshops, Handbook on the Effective Use of CbC Reports in Tax Risk Assessment, International Compliance Assurance Programme (ICAP), Comparative Risk Assessment initiative (CoRA), and Tax Risk Evaluation and Assurance Tool (TREAT).

The progress report recalls that peer reviews of the BEPS minimum standards are an essential tool to ensure the effective implementation of the BEPS package. First results were available for Action 5 in 2017, for Action 13 and Action 14 in 2018, and the first results for Action 6 were published this year. The OECD will continue with peer review process and will continue with its annual Peer review of the transparency framework on Action 5, will launch the next peer review of Action 6 in the first semester of 2019, will continue with its schedule of reviews for Action 14 and expects to complete the second annual peer review of the implementation of Action 13 in summer 2019 – the second review will consider implementation of the minimum standard by almost 120 Inclusive Framework members, compared with 95 jurisdictions in the first peer review.

Also on 8 June, the OECD published on its website the *OECD/IMF 2019 Progress Report on Tax Certainty* (the report). The report is also included as annex 3 of the

OECD's Secretary-General Report that was provided to the G20 Finance Ministers meeting in Fukuoka, Japan on 8-9 June 2019. Following an initial report in 2017 and an update in 2018, the G20 Leaders reiterated the importance of this issue, noting their continued support for enhanced tax certainty. The Buenos Aires Action Plan called for the OECD and the International Monetary Fund (IMF) to report to Finance Ministers and Central Bank Governors in 2019 on progress made on tax certainty. The report, which was prepared jointly by the IMF and OECD, provides an update on the work on tax certainty issues and highlights that this remains a priority issue for taxpayers and tax administrations. According to the report, the current debates around the international tax agenda, and in particular how to address the tax challenges arising from digitalization, necessarily have a tax certainty angle, and the IMF and the OECD will continue to take forward the work on these fronts. The report identifies a set of practical approaches, and solutions to enhance tax certainty and it also discusses initiatives that aim to improve tax certainty in developing countries. The report mentions that the work on tax certainty covers a wide variety of issues, notably a shifting focus from dispute resolution to dispute prevention, the demand and need for improvements to the integrity, efficiency and accountability of tax administrations, work on ensuring that the tax rules are as clear and administrable as they can, and improvements in the quality of the tax system to minimize economic distortions while ensuring predictability, fairness and simplicity.

On 29 May 2019, the OECD announced that the United Arab Emirates (UAE) had deposited its instrument of ratification, acceptance or approval of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (the MLI) – bringing the total number of jurisdictions to 26. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, the UAE confirmed its MLI positions without any change. The MLI will enter into force for the UAE 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 the UAE of its instrument of ratification, i.e., on 1 September 2019.

In May 2019, the OECD released additional exchange relationships that have been activated under the Country-by-Country Multilateral Competent Authority Agreement (CbC MCAA). Currently, together with the exchange relationships under the European Union (EU) Council Directive 2016/881/EU and the bilateral competent authority agreements for exchanges under Double Tax Conventions or Tax Information Exchange Agreements, there are over 2,100 automatic exchange relationships established among jurisdictions committed to exchanging CbC reports. The full list of automatic exchange relationships that are in place and an update on the implementation of the domestic legal framework for CbC reporting (CbCR) in jurisdictions are available on the OECD website. With this update, Anguilla and Turks and Caicos Islands have been included on the list of countries that have activated for the first-time exchange relationships for CbCR. Anguilla activated 34 new exchange relationships and Turks and Caicos Islands activated 49 new exchange relationships.

European Union

On 12 June 2019, the Council of the European Union published an updated overview of the preferential tax regimes examined by the Code of Conduct Group (COCG) (Business Taxation) 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 (UK)); (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). Among others, the overview shows the new preferential tax measures enacted by the end of 2018 and the decisions reached for a number of regimes (e.g., the COCG found that the Intellectual Property regimes in France, Poland and Lithuania are not harmful).

On 7 June 2019, the Committee of the Permanent Representatives of the Governments of the Member States to the European Union recommended to the ECOFIN Council to endorse, on 14 June 2019, the ECOFIN Report to the European Council on tax issues (the report) with a view to its transmission to the European Council (20-21 June 2019). The report provides an overview of the progress achieved in the Council during the term of the Romanian Presidency, as well as an overview of the state of play of the most important dossiers under negotiations in the area of taxation.

According to the report, the Romanian Presidency devoted particular attention to digital taxation, value added tax (VAT), excise duties, and the revision of the EU list of non-cooperative jurisdictions for tax purposes. During the Romanian Presidency, the Council discussed among others the proposal for a Digital Services Tax Directive and digital taxation in the international context, adopted

Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes, and reached a general approach on the VAT e-commerce implementing package.

The report also mentions the work of the Romanian Presidency on the Common (Consolidated) Corporate Tax Base initiative. Among others, the Romanian Presidency initiated a debate on how to tackle the overlap between the Anti-tax Avoidance Directive (ATAD) and Common Corporate Tax Base (CCTB) in respect of anti-tax avoidance rules. Also, the Romanian Presidency facilitated discussions on the technical implications that a possible extension of the CCTB scope to all corporate income taxpayers would have on the CCTB proposal as a whole. In particular, the Presidency suggested to explore exemptions from CCTB rules for certain specific sectors such as shipping, mining or forestry, and/or specific rules for small to medium-sized enterprises.

On 27 May 2019, the Council of the European Union published a report from the Code of Conduct Group (COCG) that encompasses the work of the COCG in the first half of 2019 under the Romanian Presidency of the Council. The report is divided into five parts; (i) Background; (ii) General aspects; (iii) Standstill and rollback review processes; (iv) COCG guidance notes; and (v) The EU list of non-cooperative jurisdictions for tax purposes. The report also includes four annexes: (i) Compliance of EU Member States with the COCG Guidance on standstill and rollback (2000) (Annex 1); (ii) Analysis of past EU guidelines on transfer pricing issued in the light of the OECD BEPS reports on Actions 8-10 (Annex 2); (iii) Graphic on the status of the EU list of non-cooperative jurisdictions (Annex 3); and (iv) Technical guidance on substance requirements for collective investment funds (Annex 4).

Among others, the report mentions that in 2016, the Council "invited the European Commission to investigate the need for revising past EU guidelines on transfer pricing issues in the light of OECD BEPS report on *Aligning Transfer Pricing Outcomes with Value Creation* (Actions 8-10) and to advise the COCG as appropriate. As per the report, the COCG concluded that the misalignment between past EU guidelines on transfer pricing issues and OECD BEPS reports on Actions 8-10 is of limited impact and consequently there is no necessity for revising the respective pre-BEPS JTPF reports. Given the absence of contradictions, possible practical concerns in dealing with these topics should instead be resolved by interpreting these reports in line with the OECD Transfer Pricing Guidelines (TPG) 2017, where those are relevant. For example, when it comes to a functional analysis on the assumption of risk and how this is attributed, it would be necessary that Member States rely on the guidance on remuneration for DEMPE functions under the post-BEPS OECD TPG.

Regarding the EU list of non-cooperative jurisdictions, the report states that the COCG agreed to recommend to the Economic and Financial Affairs Council (ECOFIN) meeting of 14 June 2019 the de-listing of Dominica following its compliance with criterion 1.1. Furthermore, the report recalls that the ECOFIN Council agreed in 2018 to extend the geographical scope of the EU listing exercise to Argentina, Mexico and Russia in 2019, as well as to Azerbaijan, Guyana, Kazakhstan, Kuwait, Lebanon, Moldova, New Zealand and Ukraine in 2020. Moreover, during the incoming Presidency (Finland), discussions on further coordinated defensive measures against non-cooperative jurisdictions in the tax area will resume.

Furthermore, the assessment to list non-cooperative jurisdictions is made using the agreed criteria which relate to tax transparency (criterion 1), fair taxation (criterion 2), and the implementation of OECD BEPS measures (criterion 3). On criterion 2.2 ("Existence of tax regimes that facilitate offshore structures which attract profits without real economic activity"), the report mentions that the COCG mandated its Chair to initiate a dialogue with the OECD FHTP on a possible alignment of its new standard on no or only nominal tax jurisdictions (approved by the Inclusive Framework at the end of 2018) and EU's criterion 2.2 with a view to establishing a single global standard in this field. The COCG also agreed to send a letter to all jurisdictions that have enacted sufficient legislation on criterion 2.2 requesting them to communicate to the COCG any new legislation or guidance that they may adopt in the future related to substance requirements and related transparency aspects. Furthermore, the report recalls that the Council had acknowledged that further work was needed to define acceptable economic substance requirements for collective investment vehicle (CIV) funds under criterion 2.2 and invited the COCG to provide further technical guidance to the jurisdictions concerned by mid-2019. Annex 4 of the report provides the said technical guidance on the specific economic substance requirements for CIV funds, which are complementary to but also distinctive from and apply in addition to the requirements for fund management activities. More specifically, the guidance details the four pillars against which the COCG has agreed to scrutinize CIV legislation in relevant jurisdictions (namely, Bahamas,

Bermuda, British Virgin Islands, and Cayman Islands): (i) Legislative and Administrative Framework for CIVs' Authorization and/or Registration; (ii) Legislative and Administrative Framework for CIVs' Supervision and Rules' Enforcement; (iii) Legislative and Administrative Framework regarding Valuation, Accounting and Auditing of CIVs; and (iv) Depositary rules.

Australia

On 27 May 2019, the Australian Taxation Office (ATO) and the New Zealand Inland Revenue Department (IRD) released an administrative approach under which they jointly determine that where an eligible dual resident company reasonably self-determines its place of effective management to be located in Australia or New Zealand, the company will be deemed to be a resident of that jurisdiction for treaty purposes. This administrative concession is available for companies that satisfy the eligibility criteria that can be found on the ATO website. This administrative approach will only be implemented between Australia and New Zealand at this stage.

Colombia

On 22 May 2019, the Colombian Tax Authority issued Administrative Regulation no. 34 of 2019 which, among other things, provides the procedure, content, and technical specifications for filing the transfer pricing return corresponding to tax year 2018. Also, the Administrative Regulation provides the procedure for the submission of the CbCR notification for reporting fiscal year 2019. Accordingly, if a constituent entity is required to file Form 120 (a specific transfer pricing form), the CbCR notification will be submitted within that Form. Otherwise, a constituent entity will need to download a specific form from the Tax Authority's website and send it via email to preciostransferencia@dian.gov.co with the subject "Notificación – Informe País por País." The notification due date is due between 9-22 July 2019. The specific notification deadline is determined based on the last digit of the taxpayer identification number.

Also on 22 May, the Colombian Tax Authority issued Administrative Regulation no. 33 of 2019 which provides the procedure for the submission of the master file and local file in Colombia for tax year 2018. Among others, the Administrative Regulation: (i) provides the information to be included in the master file and local file; (ii) includes the official forms that should be used for the submission (Form 1729 V-7 for local file and Form 5231 V-2 for master file) and technical specifications; and (iii) introduces an electronic signature instrument (*Instrumento de Firma Electrónica*, IFE) for filing the master file and local file.

France

On 21 May 2019, the French Senate adopted with amendments the bill introducing a digital services tax and modifying the corporate income tax reduction path (*projet de loi portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés*). The bill had been adopted by the National Assembly on 9 April 2019. Among others, the amendments included by the Senate relate to the digital services tax and introduced substantial differences compared to the version previously adopted by the National Assembly. Yet, this draft bill, as amended by the Senate, will be reviewed by a mixed-joint commission on 26 June 2019 before it returns to the National Assembly, which might substantially revisit all the amendments included by the Senate.

Latvia-Hong Kong

On 27 May 2019, Hong Long and Latvia signed an agreement for the automatic exchange of CbC reports. The agreement became effective on that same date. According to the Agreement, each Competent Authority will annually exchange on an automatic basis the CbC reports received from each reporting entity that is tax resident in either Hong Kong or Latvia, provided that, on the basis of the information provided in the CbC report, one or more constituent entities of the reporting entity's multinational enterprise (MNE) group are tax resident in the jurisdiction of the other Competent Authority, or are subject to tax with respect to the business carried out through a permanent establishment situated in the jurisdiction of the other Competent Authority. CbC reports should be exchanged no later than 15 months after the last day of the MNE group's fiscal year to which the CbC report relates.

Mongolia

In March 2019, the Mongolian Parliament approved a comprehensive tax reform package. The new tax rules are effective on 1 January 2020 and require the Cabinet, Ministry of Finance and Mongolian Tax Authority (MTA) to release a number of implementing guidelines. Among others,

the tax package introduces the following measures: (i) a general anti-avoidance rule (GAAR) that provides the taxing authority a mechanism to deny tax benefits of transactions or arrangements considered not to have any commercial substance or purpose other than to generate a tax benefit; (ii) a 30% EBITDA (earnings before interest, tax, depreciation and amortization) rule restricting the amount of related party interest that is deductible; (iii) an endorsement of the 2017 OECD TPG in domestic tax law and the introduction of severe administrative penalties for failure to comply with transfer pricing documentation requirements; and (iv) the BEPS Action 13 three-tiered transfer pricing documentation approach consisting of a local file, mater file and a CbC report.

With respect to the CbC reporting, all Mongolian tax resident constituent entities that are ultimate parent entities (UPEs) of an MNE group with annual consolidated group revenue equal to or exceeding MNT1.7 trillion or approx. US$630 million have to prepare a CbC report for financial years starting on or after 1 January 2020. Unless a surrogate parent entity (SPE) is appointed, any other entity of the group that is resident in Mongolia will have to prepare and submit the CbC report if the UPE is not resident in Mongolia and any of the following conditions are met: (i) it is not obliged to file a CbC report in its country of residence; (ii) there is not a sufficient and qualifying exchange of information instrument between Mongolia and that jurisdiction in place; or (iii) the jurisdiction has been notified regarding a systematic failure to exchange the information. The CbC report should be submitted within the 12-month period after the last day of reporting fiscal year. Failure to submit the CbC report will trigger a penalty of 4% equal to related party transaction value. Moreover, a Mongolian constituent entity will need to notify the tax authorities whether it is the UPE or SPE by 10 February following the end of the reporting fiscal year. If it is neither a UPE nor an SPE, it will have to inform the tax authorities of the identity of the UPE or SPE along with its tax residency by 10 February following the end of the reporting fiscal year.

Furthermore, a master file must be maintained by every Mongolian constituent entity for transactions occurring on or after 1 January 2020 if its revenue exceeds MNT6 billion for the preceding tax year or for foreign invested companies irrespective of size. A local file needs to be prepared and maintained by every taxpayer in Mongolia for transactions occurring on or after 1 January 2020 for companies or group with annual turnover of more than MNT6 billion for the preceding tax year or foreign invested companies irrespective of size. The master file and local file should be available to the tax authority by 10 February following the year end. Failure to submit the master file and local file triggers a penalty of 3% of respective related party transaction value.

See EY Global Tax Alert, *Mongolia reforms its key tax legislation*, dated 7 June 2019.

New Zealand

On 4 June 2019, the New Zealand Government released *Options for taxing the digital economy*: a discussion document on the design of a possible DST. The discussion document emphasizes a commitment to ensuring everyone pays their fair share of tax, including multinationals in digital businesses. It states achieving this will require changes to the current tax rules in one of two ways: (i) The first option would be to apply a separate DST to certain digital transactions. A DST would tax 2% to 3% of the gross turnover of certain highly digitalized businesses that are attributable to the country; or (ii) The other option would be to change the current international tax framework. Countries have been discussing different ways of achieving this at the OECD.

While the Government would prefer an internationally agreed multilateral approach through the work currently underway at the OECD, it will "seriously consider" a unilateral DST at a flat rate of 2% to 3% if insufficient progress is made at the OECD during the remainder of 2019. The Discussion Document also indicates that the Government would look to repeal any DST if and when the OECD's international solution is implemented.

See EY Global Tax Alert, *New Zealand Government to "seriously consider" a Digital Service Tax*, dated 5 June 2019.

Poland

On 30 May 2019, statements from the Polish Government, dated 19 April 2019, regarding the applicability of the MLI to the tax treaties concluded with Finland and Ireland were published in Poland's *Official Gazette*.

The statements include the reservations and notifications made by Finland and Ireland in relation to the application of the articles of the MLI on the respective tax treaties concluded with Poland.

On 15 May 2019, statements from the Polish Government, dated 5 April 2019, regarding the applicability of the MLI to the tax treaties concluded with Malta and Singapore were published in Poland's *Official Gazette*.

The statements include the reservations and notifications made by Malta and Singapore in relation to the application of the articles of the MLI on the respective tax treaties concluded with Poland.

United States

On 23 May 2019, the Internal Revenue Service (IRS) updated the website that includes an up-to-date listing of the jurisdictions with which the United States (US) Competent Authority has entered into a Competent Authority Agreement (CAA) for the automatic exchange of CbC reports and the jurisdictions that are in negotiations for a CAA. In this update, the IRS included the date from which the CAA with India is operative (i.e., 29 April 2019). In addition, on 13 June 2019, the IRS added Cyprus to the list of countries with which the US is in negotiations for a CAA for the automatic exchange of CbC reports. The IRS is in the process of negotiating CAAs with another four countries and is expected to update this database as other agreements are concluded.

On 22 May 2019, the US Treasury Department issued final regulations under Internal Revenue Code Section 956 (TD 9859) (the Final Regulations). Consistent with the proposed regulations published on 5 November 2018 (the Proposed Regulations), the Final Regulations generally reduce a US shareholder's Section 956 amount with respect to a controlled foreign corporation (CFC) by the Section 245A deduction that would be allowed if the US shareholder received a dividend from the CFC. In many instances, this will result in corporate US shareholders of CFCs with investments in US property having no Section 956 inclusion. The Final Regulations apply to a CFC's tax years beginning on or after 22 July 2019. Consistent with the Proposed Regulations, however, taxpayers may apply the Final Regulations to tax years beginning after 31 December 2017, provided that the taxpayer and its related US persons consistently apply the Final Regulations to all their CFCs.

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