The Latest on BEPS - 28 January 2019

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OECD

On 24 January 2019, the OECD announced that Papua New Guinea signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the MLI) on 23 January 2019. At the time of signature, Papua New Guinea submitted a list of its tax treaties in force that it would like to designate as Covered Tax Agreements (CTAs), i.e., treaties to be amended through the MLI. Together with the list of CTAs, Papua New Guinea also submitted a preliminary list of its reservations and notifications in relation to the CTAs (MLI positions) in respect of the various provisions of the MLI. The definitive MLI positions for Papua New Guinea will be provided upon the deposit of its instrument of ratification, acceptance or approval of the MLI. As part of the options contained in the MLI, jurisdictions may opt into mandatory binding arbitration, an element of BEPS Action 14 on dispute resolution. Papua New Guinea opted in for mandatory binding arbitration.

Also on 24 January, 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, Panama signed the CbC MCAA on 24 January 2019. The total number of jurisdictions that have joined the CbC MCAA is now 76.

On 18 January 2019, the Faroe Islands and Greenland joined the BEPS Inclusive Framework, bringing the total number of jurisdictions to 127. As new BEPS members, they 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). They 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.

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Building a better working world

On 15 January 2019, the OECD released the 2018 Corporate Tax Statistics (the database). The database provides internationally comparable statistics and analysis from around 100 countries worldwide on four main categories of data: (i) corporate tax revenues; (ii) statutory corporate income tax (CIT) rates; (iii) corporate effective tax rates; and (iv) tax incentives related to innovation. The database is intended to assist in the study of corporate tax policy and expand the quality and range of statistical information available for analysis under the BEPS Action 11 (measuring and monitoring BEPS). The database will continue to be updated annually and future editions will also include aggregated and anonymized statistics of data collected under country-by-country reporting (CbCR) which will allow "backward-looking" assessment of effective tax rates actually paid by companies.

European Union

On 17 January 2019, the European Union (EU) Presidency released a state of play document containing the Presidency's compromise proposal on public CbCR. The 2019 Presidency compromise text was issued in preparation of a Working Party on Company law meeting on 24 January 2019, and it is based on the December 2017 Presidency compromise proposal and delegation's comments. The 2019 Presidency compromise text does not contain substantial changes from the December 2017 proposal (for further background information on the December 2017 proposal, see The Latest on BEPS, dated 12 March 2018).

On 15 January 2019, the Romanian Presidency of the Council of the EU published its program. According to the released program, the Romanian Presidency commits among others to work on the proposals on the taxation of the digital economy, while considering the possibility of finding an internationally agreed solution. Also, it will work on updating the EU list of non-cooperative jurisdictions following the evaluation of the commitments made by third countries. The program is available on the official website of the Romanian Presidency.

Caribbean

Recently, in common with certain other jurisdictions, legislation addressing economic substance requirements has been enacted in the Bahamas, Bermuda, the British Virgin Islands and the Cayman Islands. Although each jurisdiction has enacted its own specific rules, as a general matter, the rules require that entities within the scope of the law that carry on specified activities must ensure that certain key functions (core income generating activities) are generally carried on in the territory. In addition, the activities must be carried on with adequate economic substance with regard to premises, people and expenditure, appropriate to the activity in question. Disclosure and reporting is also provided for, and rules are set out to address default and penalties for non-compliance. As with other jurisdictions, further guidance and regulations are expected in the coming months.

See EY Global Tax Alert, *EU-identified low/no corporate income tax jurisdictions enact new substance requirements: implications for the financial services sector*, dated 21 January 2019.

Austria

On 10 January 2019, the Austrian Government announced its plan to introduce a new digital tax, with a focus on fair taxation of the digital economy. According to the announcement, a 3% tax on internet advertising revenue for all groups with worldwide revenues of at least €750 million and Austrian revenues of at least €10 million will be introduced. At the moment this is only an announcement of the Austrian Government; a legislative bill has not been published. Enactment of the new provisions is subject to future legislative action.

See EY Global Tax Alert, *Austria announces new digital tax*, dated 15 January 2019.

In December 2018, the Austrian Ministry of Finance published the synthesized text of the Austrian tax treaties with Israel, Lithuania, Poland, Serbia, Slovak Republic and Slovenia as modified by the MLI which entered into effect on 1 July 2018. The synthesized text reflects the agreement reached between the relevant authorities of both Austria and these jurisdictions on how the treaties should be impacted by the MLI.

Costa Rica

On 29 November 2018, a discussion draft on a Resolution that intends to amend the current resolution regulating the information that companies based in Costa Rica need to report for the purpose of automatic exchange of CbC reports in accordance with OECD's BEPS Action 13, was published in the *Official Gazette*. According to the notice, reporting obligations would only apply to multinational entities or groups. As stated in resolution N° DGT-R-001-2018, CbCR obligations also apply to local groups and entities.

Estonia

On 12 December 2018, the Estonian Parliament adopted the bill that implements the EU Anti-Tax Avoidance Directive (ATAD) in Estonia. The Law introduced, as of 1 January 2019, the interest limitation rule based on earnings before interest, taxes, depreciation and amortization (EBITDA) and it amended the existing general anti-abuse rule (GAAR) and controlled foreign company (CFC) rules. The entry into force of the exit tax was postponed by the Parliament until 1 January 2020. The Ministry of Finance also intends to implement hybrid mismatch rules as of 1 January 2020.

Finland

On 14 January 2019, the Finnish Tax Authorities published a white list of jurisdictions for CFC purposes. The white list includes the non-European Economic Area (EEA) jurisdictions which have an adequate exchange of information agreement with Finland and with which the exchange of information can also be sufficiently implemented. As of 1 January 2019, CFCs carrying on substantive economic activities supported by staff, equipment, assets and premises are excluded from the scope of the CFC legislation in Finland. With respect to CFCs located in a non-EEA state, Finland and the country in which the CFC is located must have agreed on adequate exchange of information and the exchange of information must also be sufficiently implemented in practice, and the CFC must derive its income mainly from industrial production activities carried out in its state of residence, as further specified under the provisions.

France

On 21 January 2019, the French Directorate of Tax Legislation launched a public consultation on the interpretation of certain tax measures introduced with the Finance Bill for 2019 in order for the French tax authorities to prepare their related guidelines. The main tax measures that are subject to consultation are the changes to the interest limitation rules to comply with the EU ATAD, the amendments to the French tax consolidation regime in order, in particular, to ensure its compatibility with the EU legislation and the adjustment of the favorable tax regime applicable to patent-related income to comply with the nexus approach of BEPS Action 5. The consultation runs until 15 February 2019.

On 28 December 2018, France published an updated list of jurisdictions that: (i) have introduced CbCR requirements; and (ii) have concluded a competent authority agreement on the automatic exchange of CbC reports with France. French constituent entities of foreign multinational enterprise (MNE) groups whose Ultimate Parent Entity is tax resident in a country included in the list are not subject to local filing in France. For years starting on or after 1 January 2017, the new jurisdictions included are Argentina, Costa Rica, Gibraltar, Iceland, Isle of Man, Israel, Liechtenstein, Malaysia, Russia, Singapore and Uruguay. With this update, there are in total 55 jurisdictions included on the list.

On 20 December 2018, the French Parliament approved the Finance Bill for 2019, which has been published on 30 December 2018. The Finance Bill includes amendments to the interest limitation rule and implementation of the GAAR in an effort to comply with the EU ATAD. The new rules apply as of 1 January 2019.

See EY Global Tax Alert, *French Parliament approves Finance Bill for 2019*, dated 21 December 2018.

On 17 December 2018, the French Prime Minister Edouard Philippe announced during a press interview 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.

Hong Kong – Guernsey

On 9 January 2019, Hong Kong and Guernsey signed an agreement (Agreement) on the Exchange of CbC Report. According to the Agreement, each Competent Authority will annually exchange on an automatic basis the CbC report received from each Reporting Entity that is resident for tax purposes in its jurisdiction with the other Competent Authority, provided that, on the basis of the information provided in the CbC report, one or more Constituent Entities of the MNE group of the Reporting Entity are resident for tax purposes 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. Such CbC report is to be exchanged no later than 15 months after the last day of the fiscal year of the MNE group to which the CbC report relates.

Japan

On 1 January 2019, the MLI entered into force for Japan. Following the deposit of the instrument of ratification by Singapore on 21 December 2018, the MLI will have effect on the tax treaty between Japan and Singapore as detailed below. The tax treaty with Singapore is the ninth tax treaty for Japan to which the MLI will apply (the other eight tax treaties are the Japanese tax treaties with Australia, France, Israel, New Zealand, Poland, Slovakia, Sweden and the United Kingdom).

Provisions of the MLI that apply to the Treaty include, among other things, 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 October 2019. Further, the arbitration provisions will have effect with respect to: (1) cases presented to the competent authority of Japan or Singapore on or after 1 April 2019, and (2) cases presented to the competent authority of Japan and Singapore prior to 1 April 2019 to which the competent authorities agree to apply the arbitration provisions.

See EY Global Tax Alert, *Japan and Singapore tax treaty: Instruments of ratification for Multilateral Instrument submitted*, dated 17 January 2019.

Latvia

On 28 November 2018, Latvia introduced Master and Local file requirements in line with BEPS Action 13. The Master file should be submitted within 12 months after the end of the reporting fiscal year if (i) controlled transactions exceed €15 million in the reporting fiscal year or ii) turnover exceeds €50 million and controlled transactions exceed €5 million in the reporting fiscal year. In the case that controlled transactions exceed €5 million in the reporting fiscal year but are below €15 million and the turnover does not exceed €50 million, the Master file should be prepared within 12 months after the end of the reporting fiscal year and should be submitted within one month after request. The Local file should be submitted within 12 months after the end of the reporting fiscal year if controlled transactions exceed €5 million in the reporting fiscal year. In the case that controlled transactions exceed €250,000 but do not exceed €5 million, the Local file should be prepared within 12 months after the end of the reporting fiscal year and should be submitted within one month after request. The new requirements apply to related party cross-border transactions carried out in the financial year starting on or after 1 January 2018. The tax administration has the right to impose on the taxpayer a penalty of up to 1% of the amount of the controlled transaction (for which transfer pricing documentation is required) that has to be reported in the taxpayer's revenue or expense for the reporting period, but not more than €100,000.

On 15 June 2017, Latvia adopted the draft amendments to its tax law, introducing CFC provisions in line with the EU ATAD. Latvia opted for option B of the ATAD, imposing an obligation on Latvian taxpayers to pay tax on non-distributed income of its CFCs derived by from non-genuine arrangements. The new rules entered into force in Latvia on 1 January 2019.

Lithuania

On 31 December 2018, the Lithuanian Ministry of Finance approved a new set of rules, introducing new transfer pricing (TP) requirements into domestic legislation in order to be aligned with the OECD Transfer Pricing Guidelines. The new set of rules includes: (i) a Master file reporting obligation for entities operating directly in Lithuania or through a permanent establishment if their turnover exceeds €15 million in the previous year before the year in which the controlled transaction takes place and (ii) a Local file reporting obligation if the turnover exceeds €3 million in the previous year before the year in which the controlled transaction takes place. In general, a Local file is not required if the value of a controlled transaction or the sum of controlled transactions during the financial year does not exceed €90,000 (additional criteria also apply) per related party. Both TP requirements must be prepared by the 15th day of the sixth month following the end of the financial year. Non-compliance with

the new TP documentation requirements will trigger a penalty ranging between €1,820 and €5,590 for a first violation and between €3,770 and €6,000 for a repeat violation. The new TP rules took effect for transactions from 1 January 2019.

Portugal

On 17 January 2019, the Portuguese Government (by means of a Resolution of the Council of Ministers) approved a Law proposal aimed at transposing to the Portuguese local legislation the provisions of the Council Directive (EU) 2016/1164 of 12 July 2016 (the ATAD I). The draft law should now be subject to the Portuguese Parliament approval followed by the signature of the President of the Republic and corresponding publication.

Qatar

On 28 November 2018, the Qatari Ministry of Finance (MoF) published a circular providing further guidance on the implementation of the CbCR obligations. The circular indicates that only ultimate parent entities resident in Qatar are required to submit notifications for 2017 which will be due 12 months after the reporting year end (e.g., by 31 December 2019 for the financial year ended 31 December 2018). For all other constituent entities resident in Qatar, the CbCR and notification deadlines are postponed to a later date to be determined in due course by the Qatari competent authority.

Subsequent to this development, the MoF issued a letter on 19 December 2018 which exempts ultimate parent entities resident in Qatar from filing notifications and the CbC report for 2017 provided that the MNE group has submitted before 31 December 2018 a CbC report through its surrogate parent entity in a jurisdiction that requires CbCR that is in line with the Ministerial Decision No. 21 of 2018.

Spain

On 25 January 2019 the Spanish Digital Services Tax (DST) bill was published in the *Congress Official Gazette*. The proposed DST is in general in line with preliminary draft bill released on 23 October 2018, but has been partially amended after the draft bill has been subject to public consultation. (For further details on the draft bill that released on 23 October 2018, see EY Global Tax Alert, *Spain releases draft bill on Digital Services Tax*, dated 25 October 2018).

Its main features are similar to the proposed Directive presented by the European Commission on 21 March 2018, with a rate of 3% on gross income derived from certain digital services for which user participation is essential for creating value: namely, targeted online advertising, online intermediation services and the sale of user data. Only companies with worldwide revenues of €750 million, with a total amount of taxable revenues obtained in Spain exceeding €3 million, would be subject to the DST.

By contrast to the draft, the following are also excluded from Spanish DST in the bill: (i) intra-group transactions when there is a direct or indirect participation of 100%, (ii) regulated financial services rendered by regulated financial entities, and (iii) income derived from the transfer of data by regulated financial entities.

The bill also included the following definitions: (i) regulated financial services are defined as financial services for which a regulated financial entity is authorized and (ii) regulated financial entity is defined as a financial services supplier that is subject to authorization, or registry, and supervision due to any domestic law or EU-harmonized measure to regulate financial services, including those financial services suppliers subject to supervision according to any non-EU rule that, according to a legal act by the EU, is considered as equivalent to EU measures.

The preamble of the bill states that the Spanish DST is conceived as a transitory measure which will apply until the EU Directive that addresses the same matter enters into force. The bill needs to go through the legislative procedure for approval by the Congress and Senate. If approved, the DST will come into force three months after it is published in the *Spanish Official Gazette*.

On 29 December 2018, the *Spanish Official Gazette* published Law 11/2018, amending the applicable rules on the disclosure of non-financial and diversity information in Spain. Among other things, certain Spanish entities will be required to disclose the following tax information on a country by country basis: (i) profits obtained, (ii) tax paid on those profits, and (iii) any public subsidies received. The disclosure is mandatory for medium-sized Spanish entities. This means entities meeting the following requirements: (i) their average number of workers employed during the year is greater than 500 and (ii) they are deemed as "companies of public interest" or they exceed during at least two consecutive years, two of the following three thresholds (a) their total assets amount to more than €20 million; (b) their annual net revenues

exceed €40 million; (c) their average number of workers exceeds 250. The information will have to be disclosed in the Annual Accounts of the Spanish entities and it will have to be published in the website of the company within six months of the end of the relevant financial year. The information should remain available for five years.

See EY Global Tax Alert, *Spain approves rules on tax information to be included in non-financial reporting*, dated 23 January 2019.

Sweden

On 15 January 2019, a proposed framework of rules was submitted to the Swedish Government for the implementation of the EU Directive (2018/822) on mandatory disclosure rules (MDR) in Sweden. The proposed Swedish legislation extends the scope of the reporting required under the Directive to include: (i) an extended definition of reportable tax arrangements to comprise not only cross-border but also domestic tax arrangements; and (ii) like the Directive, reporting will apply to cross-border arrangements where the first step of implementation takes place on or after 25 June 2018. However, domestic arrangements will only be subject to reporting where the triggering event has occurred after 30 June 2020. The proposal will be subject to consultation and therefore may be amended. However, if implemented as is, the Swedish MDR legislation will not have a wider scope compared to the EU rules with respect to the taxes that will be covered. In addition, the Swedish MDR will align with the EU rules regarding reporting deadlines. The legislation is anticipated to be finalized during 2019.

See EY Global Tax Alert, *Swedish Tax Committee proposes Mandatory Disclosure Regime*, dated 21 January 2019.

Switzerland

On 15 January 2019, the Swiss State Secretariat for International Finance published an updated version of the position paper released on 8 March 2018 which outlines the Swiss position on taxing the digitalized economy. The updated position paper states, among other things, that Switzerland does not currently intend to introduce interim measures such as the digital service tax proposed by the EU Commission.

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