Introduction

EY has been following the OECD/G20 Base Erosion and Profit Shifting (BEPS) project from its start. Since 2014, we have tracked developments inspired or driven by BEPS, both at the OECD and country level. In doing so, we have been issuing a biweekly newsletter that summarizes the BEPS-related developments of the covered period, and a yearly special edition that highlights and recapitulates the year in review. You can access the 2014 edition here and the 2015 edition here.

In October 2015, the OECD presented the final reports of the 15-point Action plan to tackle BEPS. The G20 Leaders endorsed these reports in November 2015, and although they are final, there is follow-up work that the OECD will undertake in the subsequent years. The presentation of these reports marks the end of the recommendation phase of the BEPS project and the commencement of the implementation phase. Now the ball is in the court of countries that need to consider which recommendations to implement and how to implement them. Since the beginning of the new phase, we have observed a proliferation of countries' BEPS-driven developments, signaling an increased interest on the topic, to the point that the OECD has designed an inclusive framework that allows non-OECD/non-G20 countries to participate on an equal footing in the follow-up work of the BEPS project.

Due to the increasing activity and growing interest in the subject, we will be issuing our BEPS in review special edition twice a year. The present edition covers the developments reported from January to June 2016, and maintains the structure followed by previous editions. However, due to the important level of activity at the European Union (EU) level, we have included a separate heading to address the BEPS-related activity in the EU.
Looking ahead

As part of the OECD follow-up work, and according to the OECD stakeholders’ input calendar, the OECD will release three discussion drafts in July and August. These discussion drafts, relating to Actions 2 (hybrids) and 4 (interest deductions), will address the elements of the design and operation of the group ratio rule, the approaches to address BEPS involving interest in the banking and insurance sectors and branch mismatch arrangements. Moreover, the OECD scheduled a public consultation on 7 July 2016 to discuss the request for input on the multilateral instrument to be developed under Action 15 that was released on 31 May 2016.
To date, there are 96 countries working on the design of the multilateral instrument in order to implement the tax treaty related BEPS measures on Actions 2 (hybrids), 6 (treaty abuse), 7 (permanent establishments) and 14 (dispute resolution) by modifying existing tax treaties. It is expected that the multilateral instrument will be open for signature by 31 December 2016.

Countries working on the design of the multilateral instrument

* Andorra, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belgium, Benin, Bhutan, Brazil, Bulgaria, Burkina Faso, Cameroun, Canada, Chile, China, Colombia, Costa Rica, Cote d’Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Fiji, Finland, France, Gabon, Georgia, Germany, Greece, Guatemala, Haiti, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kazakhstan, Kenya, Latvia, Lebanon, Liberia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Mongolia, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Philippines, Poland, Portugal, Qatar, Republic of Moldova, Romania, Russia, San Marino, Saudi Arabia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, South Korea, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Tanzania, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, Uruguay and Vietnam.

In addition to the above follow-up work, further work is expected on: the transfer pricing aspects of financial transactions, the attribution of profits to permanent establishments, the transactional profit split method, and the design of the threshold for application of the simplified approach for low-value adding intra-group services. Additional guidance on the implementation of the approach on hard-to-value intangibles and on the economically relevant characteristics for determining the arm’s length conditions for financial transactions is expected, and the OECD will develop the Terms of Reference and the Assessment Methodology of the Action 14 minimum standard.

Moreover, to boost global cooperation in tax matters, the OECD has joined efforts with the International Monetary Fund, the United Nations and the World Bank to produce concrete joint outputs and deliverables under an agreed work plan. As part of this joint effort, a set of toolkits for emerging countries will be developed. In November 2015, the first toolkit was released addressing tax incentives and it is expected that during 2016, toolkits on the indirect transfer of assets, transfer pricing comparability, transfer pricing documentation, and tax treaty negotiation capacity will be released. Later, in 2017-2018 the group will work on toolkits addressing base eroding payments, supply chain management, and BEPS risk assessment.
A review of the BEPS project is scheduled for 2020 where among other issues, the design and operation of the exclusion rule (i.e., interest expense incurred on specific third party loans meeting certain conditions) will be addressed, the 10%-30% corridor in the fixed ratio rule will be revisited, and a report reflecting the outcome of the continued work in relation to the digital economy will be produced.

Overview of BEPS activity during the first semester of 2016

At the request of the G20, the OECD designed and agreed to an inclusive framework that allows all countries to join the BEPS project as BEPS associates on an equal footing with the OECD and G20 countries on the remaining standard-setting under the BEPS project, as well as the review and monitoring of the implementation of the BEPS package.

The new framework was endorsed by the G20 at the Finance Ministers’ meeting in Shanghai on 26-27 February and the forum held its first meeting on 30 June-1 July 2016 in Kyoto, Japan. This agreed framework constitutes an important milestone in the BEPS project, bringing the number of BEPS associates from 44 to 84. To join the framework, the new BEPS associates committed to the comprehensive BEPS package and its consistent implementation. Another 20 countries will participate in the inclusive framework as invitees while they consider whether to commit to the implementation of the BEPS Package.

* Initial BEPS associates: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, China, Colombia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Saudi Arabia, Slovakia, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

* New BEPS associates: Angola, Aruba, Bangladesh, Benin, Brunei Darussalam, Bulgaria, Burkina Faso, Cameroon, Costa Rica, Congo, Croatia, Curacao, Democratic Republic of the Congo, Egypt, Eritrea, Gabon, Georgia, Guernsey, Haiti, Hong Kong, Isle of Man, Jersey, Kenya, Liberia, Liechtenstein, Lithuania, Malta, Monaco, Nigeria, Pakistan, Papua New Guinea, Paraguay, Romania, San Marino, Senegal, Sierra Leone, Seychelles, Singapore, Sri Lanka, and Uruguay.

* Invitees: Andorra, Cambodia, China, Cote d’Ivoire, Guinea-Bissau, Guyana, Jamaica, Macau, Madagascar, Malaysia, Mauritania, Mauritius, Myanmar, Panama, Peru, Sao Tome and Principe, Thailand, Togo, United Arab Emirates, Vietnam, and Zambia.
The latest on BEPS – 2016 mid-year review

Overview of EU activity during the first semester of 2016

On 28 January 2016, the European Commission (the EU Commission) released an anti-tax avoidance package that contained a number of legislative and non-legislative initiatives. It included: (i) the proposed European Union (EU) Anti-Tax Avoidance Directive (the ATA Directive); (ii) the proposed Directive implementing the automatic exchange of country-by-country (CbC) reports (CbCR Directive); (iii) a communication proposing a framework for a new EU external strategy for effective taxation (the External Strategy Communication); and (iv) a recommendation on the implementation of measures against tax treaty abuse (Recommendation Against Tax Treaty Abuse). The package also included the so called “Chapeau” Communication from the EU Commission to the EU Parliament and the Council of the EU outlining the political and economic rationale behind the individual measures and the Staff Working Document accompanying that communication.

In February 2016, the Dutch Presidency of the Council of the EU presented an EU-BEPS Roadmap (the Roadmap) outlining its plans for work in the field of BEPS. During its term, the Presidency committed to reach political agreement on the proposed ATA Directive and on the CbCR Directive. The Roadmap also addressed OECD BEPS issues in double taxation agreements, as well as other items, such as a proposed anti-abuse clause to be included in the Interest and Royalties Directive, a reform of the Code of Conduct Group (business taxation), guidance on hybrid permanent establishment (PE) mismatches in situations involving third countries, and changes to existing EU patent box regimes in line with the “modified nexus approach.”

The Roadmap outlined work items that the Member States have expressed a willingness to undertake in the medium term, including coordinating the EU’s work on transfer pricing with the OECD’s Action Plan recommendations regarding transfer pricing, developing EU guidance on the OECD’s Action 12 recommendations on disclosure of aggressive tax planning, and developing rules on the issuance of tax rulings.

A political agreement on the CbCR Directive was reached in May 2016 and on the ATA Directive in June 2016. Also in June 2016 the Council of the EU adopted conclusions endorsing the External Strategy Communication and the Recommendation Against Tax Treaty Abuse:

- With regard to the Communication on External Strategy, the Council agreed on establishing an EU list of third country non-cooperative jurisdictions and invited the Code of Conduct Group to start work on that list by September 2016 with a view to endorsing such a list in 2017.
- With regard to the Recommendation Against Tax Treaty Abuse, the Council welcomed the proposed provisions on a principal purpose test and PEs to be included in the bilateral tax treaties on EU Member States.

Action 1 – Digital economy

The final report on Action 1, Addressing the Tax Challenges of the Digital Economy, provided conclusions regarding the digital economy and recommended next steps to address the tax challenges presented by the evolving digital economy. Although, the Task Force on the Digital Economy (TFDE) analyzed a number of potential options (namely, a new nexus in the form of a significant economic presence, a withholding tax on certain types of digital transactions, and an equalization levy) to address the challenges of the digital economy, it did not recommend any of the above. For this reason, countries could introduce any of these three options in their bilateral tax treaties or in their domestic laws as additional safeguards against BEPS, provided they respect existing treaty obligations.

In light of the above, during the period under review there were developments from Turkey, Israel and India. The Turkish Government proposed an amendment to the Tax Procedures Law that would introduce the concept of an “electronic place of business.” An electronic place of business would be considered to exist when the internet, extended intranet, intranet or any similar telecommunication environment or device is used for commercial, industrial or professional activities. The Turkish Ministry of Finance would be allowed to assess tax liability for such place of business and hold its clients or intermediaries severally liable for that tax liability.

The Israeli Tax Authorities released a circular on the internet activity of foreign companies in Israel, from both income tax purposes, the circular focuses on instances in which the digital activity of a foreign company shall be taxable in Israel. It distinguishes between digital activity of a foreign company that resides in a treaty country and a foreign company that is not. For the latter, as no treaty protection is granted, taxation in Israel could apply in wider circumstances including in cases of so-called “significant
digital presence," even if only preparatory or auxiliary in nature and without any need for physical presence. In the case of a foreign company resident in a treaty country, a physical presence or dependent agent would still be required for taxing situations of significant digital presence. The circular provides the criteria for significant digital presence, including cases in which the online service is adjusted or fitted to Israeli users, for example, by using the Hebrew language, Israeli currency, and when there is high web traffic by Israeli users.

Lastly, India introduced an Equalization Levy in the Union Budget of 2016, and it was enacted as part of the 2016 Finance Act. The 6% Equalization Levy is chargeable on the gross payment, for specified digital services and facilities, received or receivable by a nonresident who does not have a PE in India. The effective date of the Equalization Levy provisions was 1 June 2016. The Central Board of Direct taxes of India published rules on the implementation of the Equalization Levy including manner of payment, the form for furnishing the annual statement of specified service, and forms for filing an appeal before the appellate authorities.

EU activity
The EU Commission agrees with the OECD’s view that the digital economy is in fact the whole economy and consequently ring fenced solutions are not appropriate. Therefore, the EU considers that no special action is needed, but it will monitor to see if general anti-avoidance measures are enough to address digital risks.

Action 2 – Hybrids
The final report on Action 2, Neutralizing the Effect of Hybrid Mismatch Arrangements, has two parts with detailed recommendations to address hybrid mismatch arrangements. Part I contains recommendations on domestic law rules to address hybrid mismatch arrangements, and Part II covers treaty issues and the OECD Model Tax Convention.

Regarding Part I, the United Kingdom (the UK) and Australia proposed to introduce domestic rules that are intended to implement the best practice recommendations in the OECD’s final report on Action 2. In the case of the UK, the Finance Bill 2016 included new rules to address hybrid mismatches which are due to take effect from 1 January 2017. The UK rules in some cases are broader than OECD recommendations, for example the scope of the rules were extended to include various cases where payments are made to or from a PE. In the case of Australia, the Government announced in the Federal budget for 2016-17 that Australia will implement the OECD rules to eliminate hybrid mismatch arrangements from the later of 1 January 2018 or six months following the date of Royal Assent of the enabling legislation.

In relation to part II, the multilateral instrument (MLI) that is being negotiated under the mandate on Action 15, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, will include, among the provisions to be implemented, the revision of Article 1 (Persons Covered) of the OECD Model Tax Convention to address fiscally transparent entities, and the measures to address issues with the application of the exemption method to relieve double taxation. Moreover, Chile and Uruguay included in a recently signed income tax treaty a rule determining the income from fiscally transparent entities or arrangements.

EU activity
The Dutch Presidency of the Economic and Financial Affairs Council (ECOFIN) managed to meet its ambitious task of reaching a political agreement on the ATA Directive. Agreement was reached following a silence procedure on 20 June 2016. The ATA Directive includes an anti-hybrid mismatch rule that targets hybrid entities and arrangements within the EU. Member States would have to put corresponding rules in effect as of 1 January 2019.

In addition, the ECOFIN called upon the EU Commission to come forward with a proposal on the hybrid mismatches involving third countries in line with the BEPS Action 2 recommendations by October 2016.

Action 3 – Controlled Foreign Company (CFC) rules
The final report on Action 3, Designing Effective Controlled Foreign Company Rules, provides recommendations in the form of “building blocks” with respect to the constituent elements necessary for effective CFC rules. The final report notes that the recommendations are designed to ensure that jurisdictions that choose to implement CFC rules will have rules that effectively prevent taxpayers from shifting income into foreign subsidiaries.

The Taiwanese Executive Yuan approved a proposal to revise the Income Tax Act to introduce CFC rules. Under the proposal, subsidiaries of Taiwanese companies in low-tax jurisdictions (i.e., jurisdictions with a corporate income tax rate lower than 11.9%), that are controlled by a Taiwanese enterprise and its related parties would be considered CFCs.
Taiwanese taxpayers would be required to include their pro-rata share of CFC income in their taxable income. Foreign subsidiaries with effective operations or those with earnings below a threshold prescribed by the Ministry of Finance would be exempt from the CFC rule. The losses of a CFC, if certified by a CPA, can be carried forward for up to 10 years and offset against CFC income. Earnings that have been taxed under the CFC rules would be exempt from corporate income tax when expatriated back to Taiwan. Additionally, the tax authority also plans to introduce CFC rules targeting individual shareholders’ overseas income. The Legislative Yuan plans to incorporate CFC rules into Taiwan’s Alternative Minimum Tax regulations as the anti-tax avoidance mechanisms for major individual shareholders whose shareholding percentage exceeds a certain threshold (e.g., 10%). This proposal is now under the Finance Committee’s examination of Taiwanese Executive Yuan and it is expected to be submitted to the Executive Yuan at the end of 2016.

In Ukraine, a working group was set up to prepare legislation aimed at counteracting BEPS practices. The group has already developed a first draft law to discuss the draft concept for implementation of key anti-BEPS recommendations in Ukraine and enhancing tax transparency, and among the key proposals is the introduction of CFC rules.

EU activity

The ATA Directive includes a provision on CFCs that follows the recommendations of the OECD BEPS Action 3 final report, giving countries the option to apply either a categorical or a substance approach when determining the CFC income to be taxed. The CFC rule would be triggered if the tax paid in the CFC country is less than half of the tax that would have been paid in the Member State applying the rule. EU Member States would have to put corresponding rules in effect as of 1 January 2019.

Action 4 – Interest deductions

The final report on Action 4, Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, recommends that countries implement a “fixed ratio” rule that would limit net interest deductions claimed by an entity (or a group of entities operating in the same country) to a fixed percentage (between 10% and 30%) of earnings before interest, taxes, depreciation and amortization (EBITDA). The final report also proposes a “group ratio” rule alongside the fixed ratio rule. This would allow an entity with net interest expense above a country’s fixed ratio to deduct interest up to the level of the net interest/EBITDA ratio of its worldwide group.

On 12 May 2016, the UK’s HM Treasury and HM Revenue & Customs (HMRC) released a consultation on the tax deductibility of corporate interest expense. This new consultation seeks input on the detailed design of new rules to limit the deductibility of interest expense that are closely aligned with the OECD BEPS recommendations under Action 4. Draft legislation is not yet available, and these new rules are expected be included in the Finance Bill 2017. The Government has confirmed that, from 1 April 2017, it will cap the amount of UK tax relief for net interest expense to 30% of taxable EBITDA calculated across the UK group. Alternatively, groups may elect for the interest restriction to be based on the net interest to EBITDA ratio for the worldwide group. The rules will include a de minimis allowance of £2 million net UK interest expense per annum and provisions for public benefit infrastructure. Disallowed interest can be carried forward indefinitely, while excess interest capacity can be carried for a maximum of three years. There is no provision for carry back. The Government has maintained its view that “grandfathering” is only needed in exceptional circumstances.

Action 5 – Harmful tax practices

Patent Boxes

The final report on Action 5, Countering Harmful Tax Practices More Effectively, addresses two main topics: on one hand, the agreement that the substantial activity requirement used to assess preferential regimes should be strengthened in order to realign taxation of profits with the substantial activities that generate them, and thus recommends use of the “nexus approach” in the context of Intellectual Property (IP) regimes; and on the other, the agreed framework covering all rulings that could give rise to BEPS concerns in the absence of compulsory spontaneous exchange.
In light of the above, there are countries introducing, amending or repealing their patent box regimes to comply with the minimum standard agreed on under Action 5. For instance, the Liechtenstein Government released a consultation report on proposed amendments to the tax legislation where it states that the Government intends to abolish the current IP box regime with a transitional period for existing IP boxes until the end of 2020.

India's Finance Bill 2016 proposes the introduction of a 10% (plus surcharges) concessional tax rate on gross basis for worldwide royalty income arising from the exploitation of patents developed and registered in India by Indian residents. Income eligible for this benefit includes royalties from a transfer of all or any rights of a patent, making available of any information concerning the working or the use of a patent, or use of any patent or rendering of any services in connection with the preceding activities.

In Switzerland, the Parliament approved the final bill on Corporate Tax Reform III, which among other things, provides for the mandatory introduction of a cantonal patent box in line with the modified nexus approach of the OECD. Moreover, certain preferential tax regimes and practices will be phased out and replaced with a new set of internationally accepted taxation measures in order to maintain and reinforce the fiscal attractiveness of Switzerland. The general aim is to bring the legislative changes into force on 1 January 2019.

The Hungarian Parliament passed a law that, inter alia, sets forth significant changes to the current Hungarian IP regime. Under the new set of rules, tax benefits would be available only in respect of qualifying IP income. The new definition of royalties covers a narrower circle of intangibles compared to the current regulations. Accordingly, royalties means profit from licensing the exploitation and use of patents and certain intellectual property under industrial property right protection and software protected by copyright, as well as profit from the classification of medicine for treating rare diseases, and the sales and in-kind contribution of these. The proportion of profit from the supply of goods and services that can be attributed to the above rights also qualifies as royalties (embedded IP). It is an important change that in the future the definition will be profit-oriented rather than revenue-oriented and that qualifying activities carried out by foreign branches (PEs) of a Hungarian entity can also qualify as research and development (R&D) costs. The old rules are grandfathered until 30 June 2021 - both from corporate income tax and local business tax perspectives - with respect to IP for which the Hungarian entity claimed benefits under the old regime prior to 30 June 2016. IP acquired or developed post 30 June 2016 should fall under the new regime, and there are also special transitional rules for IP acquired or developed in the first half of 2016 that may limit the application of the old regime. As of 2017, depreciation can be applied at 30% on leased patents (including by way of a license of exploitation and license of use), other intellectual property, know-how, trademarks, commercial names, trade secrets protected by industrial property rights, writing protected by copyright laws, and performances protected by neighboring copyrights.

The UK Finance Bill 2016 includes changes to the UK's patent box regime to ensure it is consistent with the nexus approach agreed under OECD BEPS Action 5, which links benefits to the level of R&D investment undertaken. The changes will apply from 1 July 2016, with a five year grandfathering period for groups who have already elected into the regime. Detailed computational rules govern groups with both grandfathered and non-grandfathered patents. This reform primarily overlays the nexus calculation onto the existing patent box regime, with no material changes to the conditions for accessing the regime.

In Portugal, the State Budget for 2016 grants the Portuguese Government a legislative authorization to amend the existing IP regime. This legislative authorization is intended to repeal the current regime with respect to patents, drawings and industrial models registered on or after 30 June 2016, which, under certain conditions, provides for a 50% exclusion from the tax base with respect to income derived from contracts for the transfer or temporary use of patents, industrial designs or models, as well as to income derived by the taxpayers from the infringement of industrial property rights. The new IP regime will apply to patents and other income derived from IP, which would be subject to a maximum limit proportional to the expenses incurred by the beneficiary of the IP (this limit may be increased to 30% in certain cases). Nevertheless, grandfathering rules apply and the current regime in force will continue to be applicable until 30 June 2021 to IP rights acquired before 30 June 2016.
In Luxembourg, the Parliament approved amendments to the IP tax regime to comply with the nexus approach under OECD BEPS Action 5. Luxembourg has terminated its current IP regime as of 1 July 2016. The new law provides for the internationally agreed five-year grandfathering period, but also includes a safeguard measure stating that the transitional period will expire on 31 December 2016 if the IP was acquired after 31 December 2015 from a related party and at the time of its acquisition was not already qualified for the Luxembourg IP regime or for a similar foreign IP regime.

Likewise, the Dutch Government opened a consultation to amend the Dutch innovation box regime. The proposed amendments would enter into force as of 1 January 2017 and would ensure that the Dutch innovation box regime is in line with the nexus approach. Substance requirements would apply to taxpayers benefitting from the regime in accordance with the OECD recommended modified nexus approach and to apply the Dutch innovation box regime, all taxpayers should first obtain an R&D certificate to demonstrate that they are actually undertaking qualifying R&D activities. The application of the Dutch innovation box regime for large companies will be limited to assets for which the Dutch taxpayer has been granted a patent or to intangible property assets over which the company has rights that are functionally equivalent to patents (e.g., plant breeders' right, medication for which a distribution license has been granted, and software).

EU activity
In 2014 all EU Member States agreed to align their IP regimes with the modified nexus approach. During the first semester of 2016 the Code of Conduct group continues to monitor the phasing out of existing regimes and the compliance of the new regimes with the requirements.

Exchange of information
Simultaneously, there are other countries paving the way for the automatic exchange of ruling information. For example, the Swiss Federal Council initiated the consultation on the revision of the Ordinance on International Administrative Assistance in Tax Matters. The revision defines, among others, the framework and the procedures for the exchange of information on advance tax rulings. The draft legislation is in line with the international standard as set by the OECD in the framework of its final report on Action 5. The consultation will run until 10 August 2016 and the revised legislation is scheduled to enter into force on 1 January 2017. Switzerland would then start to exchange ruling information from 1 January 2018 onwards. The spontaneous exchange of ruling information will be limited to the countries that have signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as developed jointly by the OECD and the Council of Europe. In addition, only information on tax rulings issued from 1 January 2010 and still applicable on 1 January 2018 would be exchanged. The Swiss authority will generally notify the Swiss taxpayer before the exchange takes place and the taxpayer will have the right to appeal.

The New Zealand Inland Revenue stated that during 2016, New Zealand would implement the new standard for the exchange of information between tax treaty partners concerning certain rulings. Specifically, the new standard will apply to rulings related to preferential regimes, cross-border unilateral advance pricing agreements (APAs), cross-border rulings giving unilateral downward adjustment to the taxpayer, PE rulings and related party conduit rulings. It has been agreed that information on rulings already issued on or after 1 January 2010 and still in effect as from 1 January 2014 will be exchanged. Similarly, Canada confirmed in its Federal Budget for 2016-17, the Government’s intention to implement the BEPS minimum standard for the spontaneous exchange of certain tax rulings. The Canadian Revenue Agency therefore will commence exchanging tax rulings in 2016 with other jurisdictions that have committed to the minimum standard.

Furthermore, the Competent Authority of India also has decided that all future unilateral APAs will contain a provision allowing the exchange of the high level details of each such APA with the competent authority of all countries in which associated enterprises of the Indian entity are located, including the immediate, intermediate and ultimate parent companies. The entire unilateral APA would only be shared if there were a good reason for the other country to see the entire document. For countries with the necessary legal basis, the exchange of the said information will take place from 1 April 2016 for future APAs and the exchange of already concluded APAs would be completed by 31 December 2016.

EU activity
Some EU Member States have started implementing the amendment to the Directive on Automatic Exchange of Information that mandates the exchange of summaries of rulings between the competent authorities in the EU. Sweden, Luxembourg, Germany and Slovenia have tabled draft laws to that effect.
Action 6 – Treaty abuse

The final report on Action 6, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, contains changes to the OECD Model Tax Convention and related changes to the Commentary to address the inappropriate granting of treaty benefits and other potential treaty abuse scenarios. It includes anti-abuse provisions that provide safeguards against the abuse of treaty provisions, a revision to the title and preamble of the OECD Model Tax Convention and tax policy considerations relevant to the decision to enter into a tax treaty with another country.

The final report had anticipated that follow-up work on this action item would be released during 2016. The OECD consequently released two discussion drafts and called for comments from the public. The first discussion draft dealt with the treaty residence of pension funds, and included changes to Articles 3 and 4 of the OECD Model Tax Convention and to the commentary on these articles, adding a definition to the term “recognized pension funds.” The OECD received over 100 pages of comments on this draft.

The second discussion draft sought input with respect to the treaty entitlement of non–collective investment vehicle (non-CIV) funds and included a number of specific questions related to concerns identified in comments received on previous discussion drafts related to the Action 6 report as to how the new provisions could affect the treaty entitlement of non-CIV funds as well as possible ways of addressing these concerns that were suggested in these comments or subsequently. The OECD received over 500 pages of comments on this draft.

Moreover, the MLI that is being negotiated under the mandate on Action 15, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, will include, among the provisions to be implemented, the minimum standard on treaty abuse (i.e., a Limitation of Benefits (LOB) clause supplemented with conduit rules, a Principal Purpose Test (PPT) or a combined approach with an LOB and PPT), introduction of a saving clause to make explicit that treaties do not restrict a State’s right to tax its own residents, and the specific anti-abuse rules (SAARs) related to certain dividend transfer transactions; transactions involving immovable property holding companies; situations of dual-resident entities; and treaty shopping using third-country PEs.

Some countries have introduced Action 6 recommendations in their treaty practice. In this respect, Germany and Japan signed a revised income tax treaty and a protocol that contains a combined approach with an LOB and PPT, Chile and Japan signed an income tax treaty and protocol including a PPT and more recently Chile and Uruguay signed a Double Tax Treaty (DTT) that also includes a combined approach with an LOB and PPT and its preamble contains a clarification that tax treaties are not intended to be used to generate double non-taxation.

Some other countries have implemented General Anti-Abuse Rules (GAARs) in their domestic law. For instance, Poland released new regulation that will come into force from 15 July 2016. The GAAR aims to prevent the creation and use of artificial legal arrangements to avoid payment of tax and is a very significant change in the Polish tax law. Likewise, the UK introduced a Targeted Anti-Abuse Rule (TAAR) for royalty payments in respect of connected party where arrangements have been put in place one of whose main purposes is to secure a benefit that is not in accordance with the object and purpose of the treaty, alongside supplemental changes to the definition of “royalty” and changes to the definition of when royalty payments are considered to have a UK source. These changes were included in the Finance Bill 2016 but have retroactive effect (for payments from 17 March 2016 for the TAAR, and for payments from 28 July 2016 for the supplemental changes).

Furthermore, Portugal has implemented a SAAR – which is a consequence of the transposition into the Portuguese tax law of the Council Directive (EU) 2015/121 of 27 January 2015 – on the participation exemption regime applicable to dividends received by a Portuguese company and on the withholding tax exemption regime applicable to dividends distributed by a Portuguese subsidiary to a nonresident parent company. These exemptions will not be applicable to the extent that it can be ascertained that there is an arrangement or series of arrangements which, having been put into place with the main purposes or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of eliminating the double taxation on dividends, are not deemed to be genuine, in view of all relevant facts and circumstances. For the purposes of this SAAR, an arrangement or a series of arrangements is not genuine to the extent that these are not put into place for valid commercial reasons and do not reflect the economic substance.
India has also codified detailed GAARs as part of its domestic tax laws. Although, the implementation of the GAAR provisions have been deferred a few times, based on current expectation it is slated to take effect from 1 April 2017 onwards. The Government is also expected to promulgate the relevant rules in this regard to ensure proper application of the GAAR provisions and to avoid ambiguity. Also, some of the recently concluded (new as well as amended) double taxation avoidance agreements (DTAAs) entered into by India does contain an LOB article. For example, the signed protocol to amend the India-Mauritius DTAA does contain an LOB article as well as the principal purpose test and activity test in order to claim the benefits of the DTAAs.

EU activity

**Domestic GAAR**

The ATA Directive includes a GAAR rule that Member States should apply when calculating the corporate income tax. It follows the structure of the GAAR already put in place in the EU Parent Subsidiary Directive.

**Treaty GAAR**

As part of its Anti-Tax Avoidance Package, the Commission issued a Recommendation Against Tax Treaty Abuse that was endorsed by the EU Council in June 2016. The recommendation proposes a specific modification of the PPT provision outlined in the OECD Action 6. In addition, the Council of the EU recognized that Member States are also free to use LOB clauses as elaborated in the Action 6 Report.

**Action 7 – PE status**

The final report on Action 7, *Preventing the Artificial Avoidance of Permanent Establishment Status*, proposes changes to the PE definition in Article 5 of the OECD Model Tax Convention to prevent the use of arrangements and strategies that are considered to enable a foreign enterprise to operate in another country without creating a PE. In particular, it includes changes with respect to the application of the PE definition to commissionaire arrangements and similar strategies, and the use of specific preparatory or auxiliary activity exemptions.

The MLI that is being negotiated under the mandate on Action 15, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties*, will include measures to address commissionaire arrangements and similar strategies, modifications to the specific activity exemptions under Article 5(4) of the OECD Model and the addition of an anti-fragmentation rule, and measures to address the splitting-up of contracts to abuse the exception in Article 5(3) of the OECD Model.

The Government of Australia introduced a Multinational Anti-Avoidance Law (MAAL) on 1 January 2016. The MAAL can deem to exist an Australian PE of a foreign principal that makes supplies directly to Australia customers if activities are undertaken by an associate or economically dependent entity in Australia in connection with the supply. The MAAL is an extension of the Australian general anti avoidance law and there must be a principal purpose to obtain an Australian or Australian and foreign tax benefit for the MAAL to apply.

Moreover, Chile and Uruguay signed a Double Tax Treaty (DTT) that includes a number of recommendations from the final report on Action 7, the PE provision under the DTT contains the two recommendations in Action 7 on the avoidance of PE status through the specific activity exemption, i.e., it makes all subparagraphs in Article 5(4) subject to the preparatory or auxiliary condition, and includes an anti-fragmentation rule. The treaty also follows the recommendations on Agency PE, including the new principal role test and a definition of a closely related enterprise. The PE provision also has a paragraph dealing with the splitting-up of contracts applicable to both the construction PE and the service PE clauses.

**EU activity**

As part of its Anti-Tax Avoidance Package, the Commission issued a Recommendation Against Tax Treaty Abuse that was endorsed by the EU Council in June 2016. The recommendation encourages Member States to make use of the proposed new provisions to Article 5 of the OECD Model Tax Convention in order to address artificial avoidance of PE status as drawn up in the final report on OECD BEPS Action 7.

**Actions 8-10 – Transfer pricing**

The final report on Actions 8-10, *Aligning Transfer Pricing Outcomes with Value Creation*, amends six of the nine chapters of the OECD Transfer Pricing Guidelines (OECD TPG). It provides new guidance on applying the arm’s length principle (revisions to section D of chapter I of the OECD TPG); comparability factors in transfer pricing, including location savings, assembled workforce, and Multinational Enterprise (MNE) group synergies (additions to chapter I); transfer pricing for commodity transactions (additions to
chapter II), and on low-value adding intragroup services (revisions to chapter VII). In addition, new versions of chapter VI addressing intangibles, and chapter VIII, covering cost contribution arrangements were included.

On 23 May 2016, the OECD Council took the formal step of adopting a recommendation to incorporate the guidance set out in the final reports on BEPS Actions 8-10 and 13 into the OECD TPG. Furthermore, the OECD Council adopted a Recommendation on BEPS measures related to Transfer Pricing, recommending that both the OECD member countries and non-member countries follow the guidance set out in the Actions 8-10 Report and the Action 13 Report.

The Finnish Tax Administration issued its opinion on how the changes to the OECD TPG, made on the basis of the BEPS project, will be applied for Finnish tax purposes. The Finnish tax authorities highlight the view that the Guidelines are treated as a source of interpretation for the domestic tax law provision on transfer pricing adjustments. Furthermore, the opinion highlights the tax authorities’ view that the amendments of the Guidelines only constitute specifications to already applicable interpretation principles previously included in the Guidelines. Accordingly, the Tax Administration views that the specifications to the Guidelines can be applied for Finnish tax purposes but also that the amendments can be applied retroactively. Similarly, the Swedish Tax Agency published on its website its non-binding view on the implementation of the OECD recommendations under BEPS Actions 8-10. Their position is that the Action 8-10 reports only clarify the arm’s-length principle and therefore are applicable in Sweden going forward as well as retroactively.

The Government of Australia announced in its Federal budget for 2016-17 that it will be amending Australia’s transfer pricing law to give effect to the OECD BEPS Report on Actions 8 to 10 with an effective start date of 1 July 2016. The budget also introduced a new “diverted profits tax” (DPT) that will be designed to encourage greater openness and cooperation with the Australian Taxation Office (ATO) to resolve transfer pricing disputes. The DPT will be effective from 1 July 2017 and will closely leverage aspects of the UK’s DPT regime. The DPT targets arrangements between related parties of large corporate groups that are designed to artificially avoid Australian tax. The proposed rules will levy Australian tax at a penalty rate of 40% on profits that (i) are subject to an overall level of tax in a foreign jurisdiction that does not exceed 80% of what the tax would otherwise be on those profits if derived in Australia; and (ii) have "insufficient economic substance," based on the ATO’s assessment of whether it is reasonable to conclude from available information that the relevant transaction was designed to secure the tax reduction.

Canada reaffirmed in its Federal Budget for 2016-17 that transfer pricing on intra-group transactions should reflect arm’s-length terms and the arm’s length principle as mandated by section 247 of the Income Tax Act. There is no proposed legislation in Budget 2016 relating to the revised OECD TPG on the application of the arm’s-length principle, but the Budget confirms that the revisions to the OECD TPG generally support the Canada Revenue Agency’s (CRA) current interpretation and application of the arm’s-length principle as reflected in its audit and assessing practices. These revisions are thus being applied by the CRA as they are consistent with current practices. The CRA will not be adjusting its administrative practices on low value-adding services as the BEPS project participants are still engaged in follow-up work on the development of a threshold for the proposed simplified approach. Similarly, the BEPS project is continuing to clarify the definition of risk-free and risk-adjusted returns for minimally functional entities. Canada will decide on a course of action with regards to both these measures after the outstanding work is complete. Likewise, the UK announced in its Budget for 2016-2017 that the Finance Bill 2016 would incorporate the latest version of the OECD’s TPG on 1 January of the transaction’s fiscal year must be used as a technical reference.

EU activity

In its EU-BEPS Roadmap published in February 2016 the Presidency of the Council of the EU invited the Code of Conduct Group to work on EU guidance on implementing the OECD BEPS conclusions on Actions 8-10. This work should take into account the work done in the EU Joint Transfer Pricing Forum.
**Action 12 – Disclosure of aggressive tax planning**

The final report on Action 12, *Mandatory Disclosure Rules*, makes a series of recommendations about the design of mandatory disclosure regimes. The objectives of such a regime are to increase transparency through providing early information to tax authorities, to deter the implementation of potentially aggressive schemes and to make early identification of promoters and taxpayers associated with abusive schemes that are considered to pose BEPS related tax risks.

The Australian Government announced that it will consult stakeholders on the implementation of the OECD BEPS recommendations on mandatory disclosure in the Australian context, taking into consideration the current disclosure rules. The consultation provides an outline of the OECD’s key recommendations, and the Government’s preliminary views in relation to those recommendations. Likewise, the UK Government has published amendments to the mandatory requirement contained in the draft Finance Bill clauses of December 2015, for certain businesses in the UK to publish their tax strategy as it relates to or affects UK taxation.

Alongside these amendments, HMRC has published draft guidance on the new rules. The revisions in Finance Bill 2016 have increased the scope of the legislation to now include certain PEs of overseas entities as well as companies and partnerships in the UK. Specifically, the measures will apply to all UK groups and subgroups that have a UK turnover of more than £200m and/or a relevant balance sheet total of more than £2b for the preceding financial year. In addition, businesses within the scope of CbC reporting (global turnover of more than €750m) are also included, regardless of the level of turnover or assets in the UK. The first period affected by the legislation will be the first financial year which begins after Royal Assent has been granted to Finance Bill 2016 (expected to be July 2016). The strategy must be published before the end of the financial year. After this, the strategy must be published annually and in any event no later than 15 months after the day on which the previous strategy was published unless the business falls out of the scope of the legislation.

**EU activity**

In the Council Conclusions adopted in June 2016 the Council of the EU has asked the EU Commission to consider a legislative initiative in light of the OECD BEPS recommendations on Action 12.

**Action 13 – Transfer pricing documentation**


On 27 January 2016, the OECD opened for signature the Multilateral Competent Authority Agreement (CbC MCAA) for the automatic exchange of CbC reports, pursuant to the OECD Convention on Mutual Administrative Assistance in Tax Matters. The MCAA requires each jurisdiction’s competent authority to provide a notification regarding the jurisdiction’s readiness and intentions with respect to CbC reporting, including that the jurisdiction has in place legislation to require CbC reporting for fiscal years beginning on or after the date of the notification. 31 countries signed the MCAA during the first signing ceremony. Following this ceremony, the OECD announced that Senegal and Bermuda had signed the CbC MCAA.

On 12 May 2016, the OECD held a second signing ceremony during the 10th plenary meeting of the OECD Forum on Tax Administration in Beijing, People’s Republic of China where six additional countries signed the CbC MCAA.
More recently, during the first meeting of the inclusive framework, the OECD held the third signing ceremony of the CbC MCAA where another five countries signed the said instrument.

* CbC MCAA signatories: Argentina, Australia, Austria, Belgium, Bermuda, Canada, Chile, China, Costa Rica, Curacao, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, India, Ireland, Israel, Italy, Japan, Liechtenstein, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Nigeria, Norway, Poland, Portugal, Senegal, Slovakia, Slovenia, South Africa, South Korea, Spain, Sweden Switzerland, United Kingdom, and Uruguay.

Moreover, the OECD released the standardized electronic format for the exchange of BEPS CbC reports. The released material encompasses the CbC XML Schema and a User Guide. The XML (extensible markup language) Schema is a commonly used data structure for electronically holding and transmitting information. The User Guide explains the information required to be included in the CbC XML Schema. With this material, the OECD aims to facilitate a swift and uniform implementation of CbC reports. While the CBC XML Schema has been primarily designed for use by tax authorities, taxpayers can also rely upon the CbC XML Schema for transmitting the CbC report to their tax authorities, provided the use of the Schema is mandated domestically.
CbC reporting has been one of the BEPS items of major attention. To date, 15 countries have introduced CbC reporting legislation, another 11 countries have released CbC reporting draft legislation and numerous countries have announced they will be implementing CbC reporting.

* Have implemented CbC reporting rules: Australia, Belgium, Denmark, France, India, Ireland, Italy, Japan, Mexico, Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States.

* Have draft CbC reporting rules: Austria, China, Finland, Germany, Norway, Russia, Slovenia, South Africa, Sweden, Switzerland and Turkey.

* Have announced CbC reporting rules: Canada, Jersey, Liechtenstein, and Pakistan.

EU activity

In May 2016, the EU reached political agreement on a CbCR Directive that will require all Member States to implement a CbC reporting obligation in line with the recommendations of OECD BEPS Action 13. Under the Directive, a multinational company will be obliged to file its CbC report with the tax authorities of the Member State where it is tax resident for fiscal years starting in 2016. With respect to secondary reporting, Member States were allowed a one-year reprieve: they may require taxpayers that are not ultimate parent entities to file a CbC report for fiscal years starting in 2016, but they are only obliged to do so for fiscal years starting in 2017.

On 12 April 2016, the EU Commission published a draft directive that, if adopted, would amend the existing EU Directive on disclosure of income tax information (the Accounting Directive). This legislative initiative is separate from the CbCR Directive adopted in May 2016. It would require large multinational companies operating in the EU to draw up and publically disclose reports on income tax information, including a breakdown of profits, revenues, taxes and employees. The information would be required to be reported separately for each Member State and each jurisdiction listed on a “Common Union list of certain tax jurisdictions,” and on an aggregated basis for the rest of the world. This draft directive has yet to go through the adoption process.
Action 14 – Dispute resolution

The final report on Action 14, Making Dispute Resolution Mechanisms More Effective, reflects the commitment of participating countries to implement substantial changes in their approach to dispute resolution. The final report contains measures aimed at strengthening the effectiveness and efficiency of the mutual agreement procedure (MAP) mechanism, such as specific actions to be taken by countries, suggested changes to legislation and administrative practices, and changes to the OECD Model Tax Convention and its Commentary. The main objectives of the measures are to allow taxpayers access to the MAP process when the requirements for taxpayers to access the MAP process are met; ensure that domestic administrative procedures don’t block access to the MAP process; and ensure that countries implement Article 25 of the OECD Model Tax Convention in good faith.

The MLI that is being negotiated under the mandate on Action 15, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, will include the changes to paragraphs 1 through 3 of Article 25 of the OECD Model, as well as the inclusion of paragraph 2 of Article 9 of the OECD Model.

In February 2016, the US Treasury Department released a revised US Model Income Tax Convention, which modifies the Mutual Agreement Procedure (Article 25) of the US Model Treaty to require that certain disputes between tax authorities be resolved through mandatory binding arbitration.

Moreover, Germany and Japan signed a revised income tax treaty and a protocol that allows for mandatory binding arbitration. Likewise, Chile and Japan signed an income tax treaty and a protocol that includes mandatory binding arbitration for mutual agreement procedures.

EU activity

In 2016, the EU completed a public consultation on improving double taxation dispute resolution mechanisms. The EU Commission is expected to propose amendments to the existing measures by the end of 2016.

Action 15 – MLI

The final report on Action 15, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, explores the technical feasibility of an MLI to implement the treaty-related measures developed during the course of the BEPS project and to amend bilateral tax treaties.

On 31 May 2016, the OECD issued a request for input on the MLI to be developed under BEPS Action 15. The MLI's main objective is to implement the tax treaty related BEPS measures by modifying existing bilateral tax treaties in a consistent and efficient manner. The instrument will include the BEPS recommendations on hybrids, treaty abuse, PEs and dispute resolution. Comments were invited on certain technical issues and questions related to the implementation of the treaty-related BEPS measures (though not on the scope or substance of the BEPS outputs), as well as on the development of a provision on mandatory binding arbitration within the mutual agreement procedure and were requested by 30 June 2016. A public consultation was held on 7 July 2016.

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