INTRODUCTION OF THE BEPS INITIATIVE AND INTERNATIONAL TAX NEWS

New tax measures by the OECD, the European Union and in 19 countries

INTRODUCTION

This seventh edition of the Fiscal Countdown deals with the new measures released in October by the OECD, the European Union and in 20 countries: Austria, China, Columbia, Ecuador, Finland, France, Hong Kong, Hungary, India, Malaysia, Mexico, The Netherlands, Poland, Panama, Russia, South Africa, Uruguay, the United Kingdom, the USA and in Vietnam. These measures shall impact your tax obligations on a short or mid-term basis.

OECD

The OECD published the BEPS Action 14 assessment schedule of peer reviews (the Schedule). The Schedule covers Stage 1 of the peer review process and catalogues the assessed jurisdictions into eight batches for review. The first batch is scheduled to be launched in December 2016 and comprises the review of Belgium, Canada, Netherlands, Switzerland, the United Kingdom and the United States. The assessment reports of the first batch would be published in the second half of 2017. The OECD also opened the possibility for business representatives to provide input into the peer review process through the completion of a questionnaire.

EUROPEAN UNION

The Legal Service of the Council of the European Union (EU) gave a written opinion on the legal basis of the proposal to amend the EU Directive on disclosure of income tax information (the Accounting Directive), better known as public Country-by-Country (CbC) reporting.

The Legal Service concluded that as the aim and content of the proposal relate to fiscal provisions and since the proposal directly affects the establishment and functioning of the internal market, the proposal must be based on Article 115 of the Treaty on the Functioning of the European Union (TFEU), instead of Article 50(1) TFEU. Consequently, this proposal would require unanimous consent by the Council of the EU in order to be adopted and not a qualified majority.

Further, the written opinion also addressed the provisions relating to the Common Union list of certain tax jurisdictions concluding that these need to be re-examined.

This opinion may have important consequences for the ongoing process with respect to public CbC reporting. If adopted, these amendments could lead to implications for both EU-headquartered and non-EU-headquartered undertakings with a net turnover exceeding €750 million. It would seem advisable to proactively monitor legislative developments at the EU-level and to assess the potential impact of information which has to be made public.
The ECOFIN of the European Union (EU) agreed on the criteria and the process for the establishment of an EU list of non-cooperative jurisdictions. The countries selected for screening will be assessed cumulatively under three criteria, namely:

1. tax transparency;
2. fair taxation;
3. and implementation of minimum anti-Base Erosion and Profit Shifting (BEPS) measures.

Screening is due to be completed by September 2017, so that the Council of the European Union can endorse the list of non-cooperative jurisdictions by the end of 2017. The non-cooperative jurisdictions may be confronted with defensive measures. Those defensive measures could be considered to be implemented in the tax as well as in the non-tax area.

The work on exploring defensive measures at the EU level against listed jurisdictions should be completed in due time.

The European Commission announced a new package of corporate tax reforms. The package includes three separate legislative initiatives, namely:

1. a two-stage proposal towards a Common Consolidated Corporate Tax Base;
2. a Directive on Double Taxation Dispute Resolution Mechanisms in the EU;
3. and amendments to the Anti-Tax Avoidance Directive agreed in June 2016, as regards hybrid mismatches with third countries.

**AUSTRIA**

The Ministry of Finance announced the issuance of a decree to transpose the Directive on Automatic Exchange of Information with respect to advance tax rulings under the amended Mutual Assistance Directive.

**CHINA**

To promote the development of technology advanced service companies (TASCs), China released Caishui [2016] No. 108 to extend the preferential tax treatment for TASCs to 10 more locations: Shenyang, Changchun, Nantong, Zhenjiang, Fuzhou (including Pingtan Pilot Zone), Nanning, Ürümqi, Qingdao, Ningbo and Zhengzhou.

The TASCs located in these locations may apply for the 15% reduced CIT rate (vs. 25%) and the employee education expense deduction limitation of 8% (vs. 2.5%) of total salaries and wages. This regime is effective from 1 January 2016 to 31 December 2018.

The SAT issued Bulletin No. 64; Effective from 1 December 2016. The new Bulletin governs the administration of advance pricing agreements (APAs) in China. The Bulletin puts taxpayers on notice that their unilateral APAs will be exchanged as agreed under the Action 5 final report. Moreover, China has put attentional focus on its Mutual Agreement Procedure (MAP) and APA processes and has recently added a new anti-avoidance division under the international tax department effective as of 1 September 2016.

China adopted a new administrative procedure that cancels the Ministry of Commerce (MOC) pre-approval requirement on processing trades, i.e., contract manufacturing and toll manufacturing concerns.

**COLOMBIA**

Colombia introduced a tax reform bill before the Congress. The bill proposes introducing a number of BEPS measures, inter alia, Controlled Foreign Company (CFC) rules (Action 3), recommendations on pricing commodities transactions (Actions 8-10), mandatory disclosure rules (Action 12), and the three-tiered approach on transfer pricing documentation (Action 13).

**ECUADOR**

The Ecuadorian Tax Authority has established new rules and conditions under which a country, jurisdiction or location may be considered a special tax regime to which the tax haven rules apply.

**FINLAND**

A law proposal implementing the Directive on Automatic Exchange of Information with respect to advance tax rulings under the amended Mutual Assistance Directive was presented. The proposed law is scheduled to become effective from 1 January 2017.
FRANCE

France introduced the Public CBCR effective Jan 1, 2018. The threshold for the simplified TP documentation was reduced from 400 Mio € down to 50 Mio € effective in 2016.

HONG KONG

The Government announced a consultation paper on measures to counter BEPS. As a member of the inclusive framework, Hong Kong is committed to implementing the BEPS minimum standards and thus the consultation paper focuses on the four actions containing minimum standards (Action 5, 6, 13 and 14) as well as measures of direct relevance to their implementation (Action 8-10 and Action 15). The Consultation paper proposes adopting the three-tiered approach to transfer pricing documentation developed as part of Action 13 from 2018. Moreover, Hong Kong is prepared to sign the multilateral instrument (MLI) in early 2017, but the effective date of each modified tax treaty will be determined at a later stage taking into account the timing of signature of the MLI by Hong Kong’s treaty partners and the progress of legislative implementation. The closing date of the consultation period is 31 December 2016 and relevant amendment bill(s) are expected in mid-2017.

HUNGARY

Hungary’s Prime Minister, Mr. Viktor Orban, announced the Hungarian Government’s intention to reduce the statutory corporate income tax rate to 9%. The tax cut is expected to take effect in 2017, and it is a significant change from the currently adopted progressive tax system whereby the first HUF500 million (approximately US$1.8 million) of taxable income is taxed at 10% while the excess is taxed at 19%.

INDIA

The Indian tax administration has acknowledged that some of the TP issues as addressed in the BEPS reports are in conformity with its long standing views, namely:

1. The broad objective of “aligning TP outcomes with value creation”
2. Giving importance to the Development, Enhancement, Maintenance, Protection and Exploitation (DEMPE) functions in respect of intangibles for remunerating the group entities of multinational enterprises (MNEs)
3. Testing of contractual allocation or contractual assumption of risk on the parameters of exercising control over risk and/or the financial capacity to bear the risk, and disregarding such contractual allocation or assumption of risk
4. Harmonizing contracts with the conduct of parties; identifying and accurately delineating the transaction by analyzing the economically relevant characteristics
5. Preventing the “cash box” entities from contributing to base erosion or profit stripping
6. Non-recognition of commercially irrational transactions that cannot be seen between independent parties

Accordingly, the Indian tax administration is of the view that Actions 8-10 should be utilized by both the transfer pricing officers (TPOs) and taxpayers in situations of ambiguity in interpretation of the law. However, India has not endorsed the guidance on low value adding intra group services and has not opted for the simplified approach.

Further, India has endorsed the three-tiered documentation regime comprising a Local File, a Master File and a Country-by-Country Report and has already carried out legislative changes in its domestic law.

MALAYSIA

Malaysia announced its 2017 budget (the Budget). Key proposals include significant changes to the withholding tax rules, a temporary reduction of corporate income tax rates in certain circumstances, penalty provisions for failure to submit Country-by-Country (CbC) reports, and an increase in stamp duty rate for transfer of real estate valued above RM1 million (approximately US$240,000). In addition, it is confirmed that the 6% Goods and Services Tax (GST) rate will be retained.

MEXICO

Mexican Tax Authorities published proposed regulations regarding the “additional information” that could be requested as part of the new transfer pricing obligations, which require Mexican taxpayers to submit a master file, local file and country-by-country (CbC) report. The proposed regulations seem to require taxpayers to provide more detailed information than contemplated in BEPS Action 13 and the Mexican Income Tax Law (MITL).

It is now clear that the “Mexican” master file may be different from the master file to be prepared by the head
office of the group, and that the information to be included in the local file exceeds the current requirements relating to the annual transfer pricing study. Also, it appears the final regulations may be issued before the end of 2016, which means taxpayers will be required to report information for calendar year 2016 in the transfer pricing filings due on or before 31 December 2017. Taxpayers should begin to gather the information for 2016 to ease compliance with the new filings.

THE NETHERLANDS

The Government announced its intention to sign the BEPS Multilateral Agreement. It was also announced that the Ad Hoc Group reached an agreement and the MLI; The latter could result in some key BEPS recommendations taking effect potentially in 2017 through significant changes to existing bilateral tax treaties, including new limitations on access to treaty benefits, lower thresholds to recognize a PE and, in some cases, new arbitration mechanisms for dispute resolution.

POLAND

Poland voted on a bill amending rules for the CIT exemption for close-ended investment funds, excluding certain types of income. Other funds (open-ended investment funds (FIO), special open-ended investment funds (SFIO) and similar foreign investment funds) will still enjoy full exemption.

PANAMA

Panama joined the Inclusive Framework of the Base Erosion and Profit Shifting (BEPS) Project of the Organization for Co-operation and Economic Development (OECD). The jurisdictions that join this Inclusive Framework participate as BEPS Associates in the Committee of Fiscal Affairs (CFA) of the OECD2 and its auxiliary entities, on equal terms. The Inclusive Framework currently consists of 87 member jurisdictions, all of which will have a chance to intervene on equal terms in all of the CFA’s meetings and its work teams on the BEPS project. Member jurisdictions of the Inclusive Framework will be able to work alongside the OECD and G20 countries on developing standards on BEPS-related issues and the implementation of monitoring processes. All member jurisdictions of the Inclusive Framework have committed to implementing the four minimum BEPS standards: (i) harmful tax practices (Action 5), (ii) treaty abuse (Action 6), (iii) country-by-country reporting (Action 13) and (iv) dispute resolution (Action 14).

Panama enacted Law No. 52, requiring offshore companies to keep accounting records and supporting documentation either in the local office of their resident agent or any other place within or outside of Panama.

Panama signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Convention) on 27 October 2016, the international legal framework to implement the Common Reporting Standard (CRS) and country-by-country reporting (CbCR).

Panama expands applicability of retaliatory measures against economic discrimination by other countries.

SOUTH AFRICA

The SARS released a public notice setting out record-keeping requirements with respect to “potentially affected transactions.” The Notice contains a schedule (the Schedule) that indicates to which taxpayers the Notice applies, and which records, books of account or documents are to be kept by such taxpayers. The Notice applies to years of assessment commencing on or after 1 October 2016. While there is some overlap between the information mentioned in the Schedule and information that is typically found in a transfer pricing documentation report, it is important to note that the Notice does not require taxpayers to include all information in a separate report. It is expected that specific transfer pricing documentation requirements, in line with the final recommendations in the final report on Action 13 (Transfer Pricing Documentation and Country-by-Country Reporting) of the OECD BEPS project will be released at a later stage.

URUGUAY

Uruguay signed, OECD Multilateral Competent Authority Agreement to automatically exchange financial accounts information under the Common Reporting Standard.

UNITED KINGDOM

The UK Finance Act 2016 received Royal Assent enacting legislation requiring certain businesses to publish their UK tax strategy publicly. Any multinational group with a turnover in excess of €750m and at least one UK subsidiary or a UK PE will be required to publish its UK tax strategy. There is no de minimis level in respect of the UK operations.

The legislation also gives the power for the UK Treasury to introduce regulations requiring the inclusion of a CbC...
report in the tax strategy. These regulations, if introduced, would effectively extend beyond what is envisaged under the OECD CbC reporting model, as they would require public disclosure. However, it is expected that the UK Treasury will only act to require public publication if an international consensus by way of an MLI is reached in this regard. In line with this understanding, the Finance Act 2016 does not set out a timeframe or detailed rules for public CbC reporting. It still remains uncertain as to what level of MLI will be required for the Government to consider implementing Public CbC reporting.

On 17 October 2016, the UK HM Revenue & Customs (HMRC) released updated guidance on Disclosure of tax avoidance schemes (DOTAS). The guidance supplements the DOTAS rules which determine whether arrangements relating to tax need to be disclosed, how to make the disclosure, how to notify HMRC of the disclosure etc. Under the rules, a tax arrangement may need to be disclosed even if HMRC is already aware of it or it is not considered to be avoidance.

A tax arrangement should be disclosed where:

- It will, or might be expected to, enable any person to obtain a tax advantage;
- That tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangement;
- It is a hallmarked scheme by being a tax arrangement that falls within any description (the “hallmarks”) prescribed in the relevant regulations.

The updated guidance included a number of changes which effectively broadened the scope of the rules.

Once a scheme has been disclosed, HMRC will normally assign a scheme reference number to the person who has made the disclosure and any co-promoters. This number must then be sent on to clients and, if appropriate, on again to further clients until the final user of the scheme has received it. The scheme user must report their use of the scheme to HMRC by including the number on their tax return or on form AAG 4. The disclosure of a tax arrangement, on its own, has no effect on the tax position of any person who provides it to HMRC. However, a disclosed tax arrangement may be rendered ineffective by Parliament, possibly with retrospective effect. Specific penalties are prescribed if a scheme is not disclosed accurately and at the right time.

USA

The US Internal Revenue Service (IRS) announced that US taxpayers seeking unilateral APAs with Mexico for their maquiladora operations will not be exposed to double taxation as long as the intercompany pricing is under the framework to which the US and Mexican competent authorities have agreed in advance.

The IRS has agreed to exchange summaries of unilateral Advance Pricing Agreements (APAs) in accordance with the recommendations under the OECD BEPS Action 5, Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance.

VIETNAM

A draft decree proposes to adopt the three-tiered approach to transfer pricing documentation developed as part of Action 13 (CbC reporting, master file and local file). Moreover, it is proposed that the total interest expense payable to a Vietnamese subsidiary’s related parties is limited to 20% of a Vietnam subsidiary’s earnings before tax, interest and depreciation expenses (EBITDA). The Draft Decree is expected to be finalized and approved by December 2016. If adopted, the Decree would apply from fiscal years starting on or after 1 January 2017.
ABOUT US

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* Mazars Law Firm

CONTACTS

Frédéric Barat
Partner, Mazars
Tel: +33 1 49 97 45 86
E-mail: frederic.barat@mazars.fr

Pascal Luquet
Associed Partner, Mazars Société d’Avocats
Tel: +33 1 49 97 48 32
E-mail: pascal.luquet@avocats-mazars.com

Frédéric Martineau
Associed Partner, Mazars Société d’Avocats
Tel: +33 1 49 97 36 40
E-mail: frederic.martineau@avocats-mazars.com