EU Parliament activities regarding transfer pricing documentation and transparency

While the tax world is focused on the 5 October 2015 release of the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) action item deliverables, the European Parliament is in the midst of a heated debate on significantly increasing tax-related transparency and reporting for companies doing business within the European Union (EU), in order to help curb tax evasion and to minimize unfair tax practices. Two EU parliamentary committees are particularly active in this respect: The Economic and Monetary Affairs Committee, and a specially organized Committee on Tax Rulings and Similar Measures in Nature and Effect, called the “TAXE” Committee. The specific activities of these two committees addressed in this Alert come in the wake of a Commission Action Plan for fair and efficient corporate taxation in the EU that was published on June 2015.

The EU Commission Action Plan sets to reform the corporate tax framework in the EU, in order to tackle tax abuse, ensure sustainable revenues and support a better business environment in the Single Market. It serves to build on the international reforms proposed by the OECD while considering how best to integrate the results of the BEPS project at EU level, as The EU has certain factors related to the unique elements of the Single Market and the single currency area (i.e. the Treaties that require that the fundamental freedoms – including the freedom of establishment) that need to be respected). Any reforms must therefore be tailored for the EU context and there is a need to fix inconsistencies on an EU-wide basis.

The EU Action Plan identifies five key areas for action:

(i) Re-launching the Common Consolidated Corporate Tax Base (CCCTB)
(ii) Ensuring fair taxation where profits are generated
(iii) Creating a better business environment
(iv) Increasing transparency
(v) Improving EU coordination

In addition, a map of non-cooperative tax jurisdictions has been published, in a move to reinforce the EU's response to external threats to Member States' tax bases.

The relevant Economic and Monetary Affairs Committee proposals include a legislative initiative procedure submitted on 4 September 2015, that regards "Bringing transparency, coordination and convergence to Corporate Tax Policies in the Union," and a consultation procedure encouraging “mandatory automatic exchange of information” that serves to amend EU Directive 2011/16/EU (the Directive regarding Administrative Cooperation and Mutual Assistance in the field of taxation) and to further enhance the exchange of information mechanism included in that Directive.

The legislative initiative procedure proposals go further than those of the EU Commission's Action Plan for fair and efficient corporate taxation and the OECD's BEPS Action Plan. It includes inter alia the following proposals:

(i) Requiring country-by-country reporting (CBCR) for multinational enterprises (MNEs) in all sectors based on the OECD CBCR data template, with full public disclosure (which is to be effectuated by amending the EU's Shareholder Rights Directive)

(ii) Implementation of a voluntary “Fair Taxpayer” label for companies that meet certain eligibility requirements

(iii) A requirement for Member States to report new tax relief or tax incentive measures that may have material impact on a MNE’s effective tax rate in another Member State

(iv) A requirement of automatic exchange between EU Member States for all corporate tax rulings, not just transfer pricing advance pricing agreements (APAs), and a requirement that countries publish a summary of rulings entered into with companies, that is publicly accessible

(v) Implementation of a mandatory common corporate tax base as of June 2016 within the EU for large MNEs

(vi) Assuring that patent box rulings in the EU Member States are based on a modified nexus approach (a requirement that benefits are directly linked with research and activities actually being performed)

(vii) Coordination of national controlled foreign corporation (CFC) rules to prevent too much diversity in these rules

(viii) Improving the coordination of tax audits in the EU Member States and ensure that there are more effective simultaneous tax audits

(ix) Introduce a common European Taxpayer Identification Number

(x) Making the process of entering into tax treaties more coordinated and assure that they are negotiated on behalf of the EU rather than per country (introduction of a common Union multilateral double tax agreement to replace bilateral agreements)

(xi) Introduce counter measures to companies that use tax havens and a common definition of “tax havens”

(xii) Adjust the permanent establishment (PE) definition and introduce a minimum substance threshold

(xiii) Prepare an analysis as to how the new OECD transfer pricing principles are to be applied within the EU

(xiv) Harmonize the definition of hybrid mismatches and prevent double non-taxation in case of the presence of such a mismatch

(xv) Decide on how to determine tax-related State Aid to provide more legal certainty to taxpayers

(xvi) Introduce an EU general anti-avoidance rule (GAAR) provision in the EU Merger Directive and the Interest and Royalty Directive

(xvii) Resolve dispute resolution not just with respect to double taxation but also with respect to double non-taxation.
The TAXE Committee proposal includes observations with respect to the harmful nature of certain tax rulings and an observed growing gap between statutory and effective tax rates for companies operating at a global level. The TAXE Committee's proposals also go further than those of the EU Commission's Action Plan for fair and efficient corporate taxation and the OECD's BEPS Action Plan. They include inter alia:

(i) Call on the EU Member States and EU institutions to continue to comply with and enforce State Aid rules and a commitment to maintain effective political scrutiny on this issue

(ii) Call on the Commission to adopt new guidelines to clarify what constitutes tax-related State Aid

(iii) TAXE Committee's opinion that implementation of CCCTB would help achieve the principles of the internal market

(iv) Call on the European Council to adopt by the end of 2015 the suggested amendments to the EU Directive 2011/16/EU (Administrative Cooperation and Mutual Assistance in the field of taxation) and enhance the exchange of information system included in that Directive

(v) Invitation to EU Member States to support and an encouragement to the Commission to promote Automatic Exchange of Information between tax administration as new global standard

(vi) Invitation for the EU Commission to consider that rulings would always be issued in cooperation with all involved countries and disclosed in country by country reporting by MNEs

(vii) Suggestion that tax audits should be carried out jointly

(viii) Opinion that all rulings, cross border and national rulings, should be subject to automatic exchange of information and controlled through a clearinghouse system

(ix) Call for a common EU approach to tax havens

(x) Call to make sure that outgoing financial flows are at least taxed once, for example by a withholding tax rather than leaving the EU untaxed

The above proposals are still subject to amendment proposals and where applicable, a vote in Parliament, after which they need to be considered by the EU Commission and it needs to be seen how the Commission will react to them and what proposals will be taken on by the Commission. Although it is hard to say what the outcome will be of the process, it is clear that the EU Parliament has signaled great urgency that the proposals be considered, taken on and implemented, even though they in general seem to go further than the OECD BEPS guidance does. The current expected time line for amendments, (plenary) discussion and vote on the proposals ranges from October 2015 (for the TAXE Committee proposal) to January 2016 (for the legislative initiative procedure of the Economic and Monetary Affairs Committee).
For additional information with respect to this Alert, please contact the following:

Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft, Munich
- Dr. Klaus von Brocke +49 89 14331 12287 klaus.von.brocke@de.ey.com

Ernst & Young Tax Consultants SCCRL / BCVBA, Brussels
- Herwig Joosten +32 2 774 93 49 herwig.joosten@be.ey.com

Ernst & Young LLP, Washington, DC
- Kenneth Christman +1 202 327 8766 kenneth.christmanjr@ey.com
- Monique van Herksen +1 202 327 6276 monique.vanherksen@ey.com
EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

© 2015 EYGM Limited.
All Rights Reserved.

EYG No. CMS786

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, or other professional advice. Please refer to your advisors for specific advice.

ey.com