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Global Tax Alert

News from Transfer Pricing

Austria publishes draft Transfer Pricing Documentation Law

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Executive summary

On 9 May 2016, the Austrian Ministry of Finance (MoF) published the draft of the *European Union (EU) Tax Amendment Act 2016*. The centerpiece of this proposal is the draft of the new *Austrian Transfer Pricing Documentation Law* (TPDL). The new law serves as the legal basis for Country by Country (CbC) Reporting in Austria, as developed by the Organisation for Economic Co-operation and Development (OECD)/G20 in the course of its Base Erosion and Profit Shifting (BEPS) project. However, the draft not only establishes the obligation to prepare a CbC report (country specific reporting of multinational groups (MNE groups) with a consolidated group turnover of at least €750 million), it also introduces a three-tier transfer pricing documentation approach. This approach requires local constituent entities with turnover generally exceeding €50 million (only turnover of the Austrian entity) to prepare a group wide Master File and a country-specific Local File.

The TPDL transforms the *Multilateral Competent Authority Agreement on the Exchange of Country by Country Reports*, signed by Austria on 27 January 2016, into Austrian domestic law. Moreover, the TPDL implements the legal requirements stipulated in the European Directive regarding mandatory automatic exchange of information in the field of taxation (2011/16/EU) into national law.

Besides the provisions governing the obligations for preparing and filing the CbC report, the Master File and the Local File (considering specific turnover thresholds), the draft also provides penalties for the non-filing or the incorrect filing of CbC reports.

According to the draft law, transfer pricing documentation has to be prepared for fiscal years starting from 1 January 2016.

This Alert provides an overview of the draft TPDL.

Detailed discussion

Documentation requirements in Austria

Currently the preparation and filing of transfer pricing documentation is not explicitly governed by Austrian domestic law. According to the Austrian Transfer Pricing Guidelines 2010, taxpayers are required to prepare transfer pricing documentation based on general accounting and filing obligations pursuant to the Austrian Federal Fiscal Code (FFC). Besides the Austrian Transfer Pricing Guidelines 2010, the OECD Transfer Pricing Guidelines and the EU Code of Conduct on transfer pricing documentation for associated enterprises in the European Union (2006/C176/01) serve as guidance for the preparation of transfer pricing documentation in Austria. In addition, so-called EAS information published by the MoF provides the opinion of the MoF regarding various topics related to transfer pricing documentation (e.g., EAS 3294 of 24 August 2012- Language of transfer pricing documentation).

Changed international framework

By publishing the draft of the TPDL, the MoF has reacted to the changed international framework. In that context, the explanatory statements published together with the draft law on one hand directly refer to the BEPS project initiated by the OECD/G20, and in particular to the report regarding BEPS Action 13. On the other hand, it is explicitly highlighted that the TPDL implements the proposal for a Council Directive amending Directive 2011/16/EU as regards the mandatory automatic exchange of information in the field of taxation and the Multilateral Competent Authority Agreement on the Exchange of CbC reports into Austrian national law.

Obligation to prepare transfer pricing documentation

The obligation to prepare transfer pricing documentation stipulated in the TPDL depends on the turnover generated by the MNE group or the local constituent entity:

- ▶ A CbC report has to be prepared if the total turnover generated by the MNE group stated in the consolidated annual financial statements of the previous fiscal year amounts to at least €750 million.
- ▶ The Master File and Local File have to be prepared by constituent entities resident in Austria if their turnover in the previous fiscal year exceeded €50 million or they received commission payments from other group entities of more than €5 million (e.g., sales agents or commissionaires; it seems that through this provision “downsizing-structures” shall be captured).
- ▶ Constituent entities resident in Austria that do not exceed the stipulated turnover or commission payments thresholds, have to file a Master File, if a group entity resident in another state is obliged to prepare a Master File according to the respective domestic law of its resident state.
- ▶ Furthermore, the TPDL clarifies that documentation obligations existing in addition to the TPDL (e.g., accounting and filing obligations according to FFC) are not affected by the TPDL.

Obligation to file a CbC report

Basically, if an MNE group’s ultimate parent entity is resident in Austria, it has to file a CbC report with the competent Austrian tax office. Moreover, the TPDL stipulates that a constituent entity resident in Austria that is not an ultimate parent entity, may act as a surrogate parent entity under specific circumstances and would consequently be obligated to file a CbC report in Austria (see below).

Every ultimate parent entity resident in Austria or every surrogate parent entity that has to file a CbC report in Austria is obligated to inform the competent tax office about its obligation to prepare a CbC report by the last day of the fiscal year, for which a CbC report is filed. Therefore, if the fiscal year of an entity is the calendar year, the competent tax office has to be informed by 31 December 2016.

A constituent entity resident in Austria has to act as a surrogate parent entity and file a CbC report in Austria, if one of the following conditions applies:

- ▶ The ultimate parent entity is not obligated to file a CbC report in its jurisdiction of tax residence.
- ▶ There is no Qualifying Competent Authority Agreement on the Exchange of CbC reporting in force with the ultimate parent entity's state of residence.¹
- ▶ There has been a systemic failure of the ultimate parent entity's state of residence (i.e., there is a qualifying agreement in place, but the exchange of information was suspended or the other contracting state failed to automatically transmit CbC reports).

The competent tax office has to officially designate by notice a constituent entity resident in Austria as the surrogate parent entity, if no other Austrian constituent entity has notified its competent tax office that it will act as a surrogate parent entity by the last day of the fiscal year covered by the CbC report.

The competent tax office does not have to officially designate a constituent entity resident in Austria as the surrogate parent entity if another constituent entity of the MNE group, which is not resident in Austria, acts as a surrogate parent entity and in addition the following conditions are met:

- ▶ The resident state of the surrogate parent entity requires filing of the CbC report.
- ▶ By the time the CbC report is due, a qualifying agreement between the responsible authorities is in effect.
- ▶ There is no systemic failure regarding the exchange of information.
- ▶ The surrogate parent entity has timely informed its state of residence about its obligation (by the last day of the fiscal year that the CbC report covers).
- ▶ The competent tax office received information about the identity and the residence of the surrogate parent entity by the last day of the fiscal year for which a CbC report is to be filed.

Content of the CbC report

The CbC report enables tax authorities to get an overview of the global allocation of the income, the taxes paid and the business activities of MNE groups. To ensure a standardized reporting format, the MoF attached three tables (Appendices 1-3) to the TPD, as templates for the CbC report. These tables correspond to the tables provided in the OECD report on BEPS Action 13 and the EU directive on the automatic exchange of information.

Content of the Master File and the Local File

The draft law does not yet define the exact content of the Master File and the Local File. It is just stipulated that the Master File has to provide comprehensive information on the whole group and the Local File has to provide specific information on the business activities and transactions of the local constituent entity. The draft law enables the Finance Minister to issue a regulation further determining the content of the documentation. It can be expected that the content of the documentation determined by the regulation will be close to the content prescription recommended by the OECD report on BEPS Action 13.

Deadline

The CbC report has to be filed electronically with the competent tax office within 12 months after the end of the respective fiscal year (via FinanzOnline). Both the Master File and the Local File have to be submitted upon request of the competent tax office within 30 days after the constituent entity files its tax return.

The required documentation (Master File and Local File as well as the CbC report) generally has to be prepared for fiscal years starting from 1 January 2016. In cases where a constituent entity acts as a surrogate parent entity, the submitted information can refer to fiscal years starting from 1 January 2017.

Language

According to the draft law, the entire documentation has to be prepared in a language officially permitted for tax proceedings (typically German). At the same time the law stipulates that the documentation is also accepted as filed in time, if it is prepared in English. However, the tax authorities can obligate the taxpayer to submit a certified translation of the required documents not prepared in the official language, at the expense of the taxpayer.

Penalties

If the CbC report is not filed in time due to gross negligence or intent, or the required items in the table in appendices 1 to 3 of the law are not or incorrectly filed, the draft law stipulates penalties of up to €25,000 for gross negligence and up to €80,000 for intent. While penalties are to be imposed, legal prosecution (by courts) for such financial law offenses is excluded by the law.

Transmission of the CbC report to foreign authorities

Basically, CbC reports filed by ultimate parent entities and surrogate parent entities resident in Austria with the competent tax office are annually transmitted to the states of the constituent entities listed in the respective CbC report. The transmission is performed at the latest 15 months after the last day of the fiscal year covered by the CbC report. The first transmission will at the latest be conducted within 18 months after the last day of the fiscal year, beginning on or after 1 January 2016.

Endnote

1. A qualified agreement obliges the contracting states to automatically exchange CbC reports. Until now the following states have signed the Multilateral Competent Authority Agreement on the Exchange of Country by Country Reports (Source: OECD website, status: 12 May 2016): Australia, Austria, Belgium, Bermuda, Canada, Chile, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, India, Ireland, Israel, Italy, Japan, Liechtenstein, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Nigeria, Norway, People's Republic of China, Poland, Portugal, Senegal, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, United Kingdom.

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