The latest on BEPS – 2017 in review
A review of OECD and country actions in 2017
Through our series of Global Tax Alert articles, The latest on BEPS, EY has tracked developments related to the OECD/G20 BEPS project since the beginning of 2014. Based on the content of these Alerts, there is a database maintained of BEPS-related developments. There also is an interactive tool that, through the use of interactive maps and other visualizations, allows users to browse and filter this content by date, geographical location and the related BEPS Action. The interactive tool is part of our BEPS website at ey.com/beps.

Overview

EY has been reporting on the OECD/G20 Base Erosion and Profit Shifting (BEPS) project from its outset. Since 2014, we have tracked developments inspired or driven by BEPS, both at the OECD and country level. This process includes 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. Past editions are available through the following links: 2014 edition, 2015 edition, 2016 mid-year edition and 2016 end-year edition.

Entries per action (January 2014–December 2017)

1,218 entries in total
The Organisation for Economic Co-operation and Development (OECD) is an intergovernmental economic organization founded in 1960 to stimulate economic progress and world trade. The mission of the OECD and of its member countries around the globe is to “promote policies that will improve the economic and social well-being of people around the world” by providing “a forum in which governments can work together to share experiences and seek solutions to common problems.”

On this base and with a focus on the aforementioned mission, in February 2013, the OECD gave birth to a project called Base Erosion and Profit Shifting (BEPS). The BEPS project has been defined by the OECD itself as tax-avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations.

In October 2015, the OECD presented the final reports of its 15-Action plan to tackle BEPS. In short, the package of BEPS measures has three broad objectives. It aims to improve the coherence of international tax rules (Actions 2–5), reinforce its focus on economic substance (Actions 6–10) and ensure a more transparent tax environment with an effective implementation (Actions 12–14). The G20 Leaders endorsed these reports in November 2015, and although the reports are final, there is follow-up work that the OECD has been undertaking with respect to certain BEPS action items and will continue to undertake in subsequent years. After a request from the G20 Leaders, the OECD established the Inclusive Framework on BEPS in January 2016 so that all interested non-G20 countries and jurisdictions, including developing economies, can work together for a timely implementation of the BEPS package.

Even though these measures are not legally binding and constitute soft law, countries that are part of the BEPS inclusive framework are committed to the consistent implementation of the BEPS minimum standards. Since the beginning of the implementation phase, there has been a proliferation of countries’ BEPS-driven developments, and the OECD has designed this inclusive framework that allows non OECD/non-G20 countries to participate on an equal footing in the follow up work of the BEPS project. Recognizing that the key element of the work ahead is the monitoring implementation, members of the Inclusive Framework developed a monitoring process for the four minimum standards (namely Actions 5, 6, 13 and 14) which will ensure that all members will comply with those standards.
The report is structured in the following way. Each Action is split into three parts. The first part discusses the OECD developments during the period under review and situates the continuous guidance and work of the OECD toward the implementation of the relevant measures. Part of each Action will include references to specific country developments during 2017 with respect to each Action point. This section of the report poses that the countries are currently adopting new measures in line with the OECD recommendations and are moving actively toward their implementation. After the main OECD and country developments, there is a separate heading addressing the EU BEPS-related activity. A brief description is also made to the work of the United Nations, as that is another group that has started to show increased activity in the last few months.

**Looking ahead**

As of the beginning of January 2018, 110 jurisdictions in total have committed to the implementation of the BEPS outputs through either their original participation in the BEPS project or their membership in the Inclusive Framework on BEPS Implementation. During 2017, 18 jurisdictions joined the Inclusive Framework (IF) of BEPS, namely Bahamas, Barbados, Belize, Botswana, British Virgin Islands, Cayman Islands, Djibouti, Malaysia, Maldives, Montserrat, Oman, Qatar, Saint Kitts and Nevis, Thailand, Trinidad and Tobago, Turks and Caicos Islands, Vietnam and Zambia. This reflects the continuous interest on and growth of the IF, which since its creation in January 2016, has welcomed 77 non-OECD/G20 countries.
A comprehensive package of measures has been agreed upon the BEPS project. Countries are committed to this comprehensive package and to its consistent implementation. Actions 5, 6, 13 and 14 contain BEPS minimum standards. Each of these minimum standards is subject to peer review in order to ensure timely and accurate implementation and thus safeguard the level playing field. The first annual peer review reports on Action 5 have been released, and in 2018’s peer review, the efforts by each assessed jurisdiction to address any shortcomings identified in the 2016 peer review report will be monitored, and more jurisdictions will be included into the assessment. The process on Action 6 will begin in 2018 with the objective of concluding a first report on the implementation of the minimum standard for the January 2019 meeting of the IF on BEPS. Regarding Action 13, the peer reviews will consist of three phases structured into annual reviews starting, respectively, in 2017, 2018 and 2019. Each year’s review process will culminate in the production of an annual consolidated report on the outcomes of the peer reviews. Finally, according to the schedule, peer review reports on Action 14 related to other batches of countries will be released during 2018. Based on the assessment schedule, stage 1 peer reviews will be launched in 2018 for the fifth batch (Estonia, Greece, Hungary, Iceland, Romania, Slovak Republic, Slovenia and Turkey), sixth batch (Argentina, Chile, Colombia, Croatia, India, Latvia, Lithuania and South Africa) and seventh batch (Brazil, Bulgaria, China, Hong Kong, Indonesia, Papua New Guinea, Russia and Saudi Arabia).

The digitalization of the economy and the measures to cope with the challenges that it may create are high on the agenda for the year to come, with many coordinated actions to be expected. At the IMF/WB Spring meeting in Washington in April 2018, an interim report on implications for taxation of digitalization will be presented to the G20 Finance Ministers. The report is currently being drafted under public consultation with business, civil society and academia. Furthermore, the Action 13 country-by-country (CbC) reporting requirements have already been implemented by a number of countries, with the first exchange of reports expected by June 2018. Like in many other aspects of international taxation, CbC reporting may have an immediate impact on the scrutiny of international cooperation. The transparency measures will lead an increased risk of taxable presence in various jurisdictions through the information collected and exchanged and will provide tax authorities with tools for levying taxes. The four BEPS minimum standards will continue to be subject to peer review to ensure timely and accurate implementation and thus safeguard the level playing field.

The Multilateral Instrument (MLI) may enter into force as early as April 2018, as it is expected that one more country will move to ratification in early 2018. With respect to a specific bilateral tax treaty, the measures will enter into effect only after both parties to the treaty have deposited their instrument of ratification, acceptance or approval of the MLI and a specified time has passed. The specified time differs for different provisions. For example, for provisions relating to withholding taxes, the entry into force date is 1 January of the following year after the last party has notified the OECD of its ratification. It is possible that the changes made as a result of being a party to the MLI would be effective in 2019, but some tax treaties may be affected as early as sometime in 2018. There will be a second signing ceremony that will likely occur around the fourth plenary meeting of the IF on BEPS (expected in January 2018). From the IF on BEPS, only the US is not likely to sign the MLI. This leaves 42 other BEPS members that may be considering signing the MLI in the second signing ceremony (in addition to any non-BEPS members).

Finally, the European Anti-Tax Avoidance Directive (ATAD) complements and reinforces the OECD’s BEPS project, and it enshrines certain BEPS measures in EU law by creating a solid framework for Member States to deliver on their BEPS commitments in a coordinated way. The ATAD is under implementation process by many Member States, and some of its measures are expected to be transposed into domestic law of Member States in 2018. Among the Member States, France, Germany, Greece, Italy, Romania, Slovakia, Spain and the United Kingdom have already taken actions toward implementation, and more countries will follow in 2018 and beyond. In general, the General Anti-Avoidance Rule (GAAR) is the measure implemented the most, as in most jurisdictions a similar rule that meets the requirements of the Directive already exists.

By early 2018, European Commission is expected to issue legislative actions aiming at ensuring fair taxation for both digital and non-digital companies. It remains to be seen which options mentioned in the conclusions will be taken into account by the Commission and whether the concept of “virtual permanent establishment” and other amendments to the rules on transfer pricing and profit attribution will be explored.
In light of the above, it is undeniable that global tax rules are changing, and they are changing rapidly year by year. In 2018, numerous changes and reforms of domestic and international corporate tax law are expected to be implemented, with the aim of making the international corporate tax system more robust to BEPS. This new environment requires businesses to stay informed and consider operational and financing structures, identify communications strategies and assess their tax strategy, all with the aim of developing a tax framework that is sustainable for the future.

Review of country developments by Action

Action 1
The final report on Action 1, *Addressing the Tax Challenges of the Digital Economy*, considers the direct and indirect tax challenges created by increased digitalization and provides an evaluation of the options to address these challenges. The report does not recommend any of the options analyzed and leaves it up to the individual countries to introduce any of them as additional safeguards against BEPS. Work in the area of Action 1 is still begin carried by the OECD, and a report reflecting the continued work is expected to be produced by 2020.

Until the end of 2017, there was a deluge of new developments in the area of digitalization. In September, the OECD, seeking input with respect to the tax challenges raised by digitalization and the potential options to address these challenges, invited stakeholders to submit their comments on the relevant topic, and one month later, the comments received on this request were published on the OECD website. As a second part of the consultation, a physical meeting was held by the OECD at the University of California, Berkeley, on 1 November.

In September, the Austrian Ministry of Finance published the so-called “Schelling-Plan,” announcing its goal to address rapidly the challenges raised by the digitalization of the economy starting by renegotiating the double-tax treaty with Ireland and introducing the concept of a digital/virtual permanent establishment (PE). A few months before that, the Thai Revenue Department released draft legislation imposing tax on foreign e-commerce business operators under which a foreign company operating its business through electronic media and meeting one of the three conditions laid down in the legislation would be deemed to be conducting business in Thailand and subject to Thai income tax. The draft legislation was opened for comments from stakeholders, and it is expected that the draft legislation will be refined and released again for comments.

Another development in 2017 is included in the Italian budget law for 2018 (the Law). The Law introduces a new “tax on digital transactions related to the performance of services carried out through electronic means” rendered by both resident and nonresident enterprises to Italian businesses different from Italian PEs of nonresidents. “Services carried out through electronic means” shall be those supplied through the internet or an electronic network, the nature of which makes the performance completely automatic, with minimum human intervention and for which the information technology component is essential. The aforementioned services are to be identified by a specific decree to be issued by the Minister of the Economy and Finance at a later date (the Law refers to 30 April 2018). The tax would apply at a 3% rate on the amount of the consideration paid in exchange for the performance of the services above, net of value-added tax, and regardless of where the transaction is concluded. The tax is due by the buyers of the services above unless the supplier declares in the invoice that it has not reached the threshold of 3,000 transactions in the calendar year. The tax is settled by the buyer by the 16th day of the month following the payment of the consideration and is not creditable against Italian income tax. The Web tax should be applicable starting 1 January 2019. The Law also replaces the domestic definition of PE with the definition provided by BEPS Action 7, adding a new example in the defined list of paragraph 2. Under the new provision, a significant and continuous economic presence in the territory of the State set up in a way that it does not result in a substantial physical presence in the same territory may constitute a PE. This implies the possibility of a PE presence even in the case where a company does not have a physical presence in the Italian territory to the extent other factors may indicate a significant presence (e.g., revenues or number of customers).

Furthermore, on 7 December 2017, the final version of the Amendment to the Income Tax Act was approved by the National Council of the Slovak Republic and is anticipated to be effective as of 1 January 2018. The Amendment extends the current definition of a fixed place creating the PE in Slovakia and would also cover regular mediation of transport and accommodation services provided even through a
digital platform. To that end, the Amendment includes a new definition of a digital platform, one that represents a hardware or software platform required to create and administer applications.

A lot of activity has also been noticed in the indirect sector during the period under review. In the second half of the year, to support the coherent implementation of simplified registration-based collection regimes, guidance was released for implementing the collection of value-added tax (VAT) and goods and services tax (GST) on cross-border sales. In this regard, Australia and Taiwan added several amendments to their legislation to implement the collection of VAT and GST on cross border sales. Under the recent Australian tax law amendments, GST will be levied from 1 July 2018 on suppliers of low-value goods (i.e., value of less than AU$1,000) imported into Australia. Foreign suppliers selling e-commerce services to Taiwanese individual purchasers (with annual e-commerce sales revenue over NTD480,000 (US$16,000)) must register for business and pay VAT directly or indirectly through appointment of a tax-filing agent.

EU activity

At the European level, on 16 September 2017, the finance and economic affairs Ministers of the European Union Member States discussed the challenges of the existing tax rules in the digital world economy at their informal Economic and Financial Affairs Council (ECOFIN or the Council) meeting in Tallinn, Estonia. Ahead of the informal meeting, the Finance Ministers of France, Germany, Italy and Spain sent a letter to the Estonian Presidency of the European Union proposing an equalization levy that would be levied on the turnover generated in Europe by digital companies. Accordingly, the best way the Ministers thought these challenges should be carried out – in the short term, at least – would be through an equalization levy, while a solution focusing on the Estonian suggestion of the adoption of a digital PE concept would also be studied by the European Commission as a longer-term model. The Ministers agreed to focus on the development of new digital tax rules and to try to reach a common understanding at the next ECOFIN meeting in December. Following the ECOFIN meeting, a number of other Member States showed public support for an equalization levy, and French President Macron said in a speech that 19 Member States were in support. One month later, the European Commission launched a consultation on the fair taxation of the digital economy; the consultation closed on 3 January 2018. The contributions to the consultation and a report on the feedback received will be published in the first quarter of 2018.

On 5 December 2017, the ECOFIN of the EU agreed on EU input to discussions at the international level on “digital taxation.” The conclusions adopted at the meeting will serve as a reference for further work on the subject at the EU level. ECOFIN took the view that an appropriate nexus in the form of a virtual PE, together with any necessary corresponding amendments to the rules of transfer pricing and profit attribution, which would take into account where value is created in the different business models of the digital economy, should be explored. The Council called on the Commission to assess thoroughly all options mentioned in the conclusion with a view to legislative proposals expected early in 2018 and suggested close cooperation with the OECD and other international partners.

During the same meeting, the EU has also agreed on new rules to simplify VAT compliance obligations for e-commerce in goods to support the digital economy by accelerating growth for online businesses, in particular startups and small and medium enterprises. The changes will progressively come into force by 2021.

UN activity

Another organization that showed interest in the digital debate during 2017 is the United Nations. The UN’s Committee of Experts on International Cooperation in Tax Matters met in Geneva during 17–20 October and, a few weeks before the meeting, published a report that summarizes some of the unilateral measures taken by countries around the world in relation to taxing the digital economy, since the beginning of the BEPS project.
**Action 2**

The final report on Action 2, *Neutralizing the Effects of Hybrid Mismatch Arrangements*, contains detailed recommendations in two parts addressing hybrid mismatch arrangements. Part I recommendations include modifications to the domestic law provisions aimed at neutralizing mismatches such as deduction/non-inclusion (D/NI), double deduction (DD) and indirect D/NI. Part II deals with changes to be made to the OECD Model Convention and the tax treaty issues in the context of Action 2. Part II focuses on recommendations on treaty issues.

With respect to Part I on domestic law modifications, and as part of further follow-up work by the OECD, a report on *Neutralizing the Effects of Branch Mismatch Arrangements* was released on 27 July 2017. This report identifies and analyzes five basic types of branch mismatch arrangements giving rise to three following mismatch outcomes, namely D/NI, DD and indirect D/NI. Further, the report notes that branch mismatch rules may also arise both directly and indirectly through a taxpayer’s investment through a transparent structure such as a partnership. A series of recommendations is included in the report, as well as a call for a one-off adjustment to neutralize the mismatch outcomes of the basic types of branch mismatch arrangements.

The New Zealand Government introduced the legislative details on a previously announced international tax reform package on 6 December. The Taxation (Neutralising Base Erosion and Profit Shifting) Bill, which will be effective for income years beginning on or after 1 July 2018, includes, among others, new and detailed rules to counter hybrid mismatch arrangements. Another country that took actions within its domestic law in line with Action 2 is Australia. On 24 November 2017, Australia’s Treasurer released draft legislation to address hybrid mismatch measures. The hybrid mismatch rules will apply to payments made on or after the day six months following the date of Royal Assent, while the earliest likely start date will be in the second half of 2018. The hybrid mismatch rules will apply to a wide range of arrangements, including interest, royalties, asset value declines, and inventory and services payments.

**Multilateral Instrument (MLI)**

Articles 3–5 of the MLI contain provisions recommended in part II of Action 2 addressing, respectively, fiscally transparent issues, dual-resident entities, and measures to address issues regarding the application of the exemption method to relieve double taxation. For a detailed description of the MLI provisions, see EY Global Tax Alert “Signing by 68 jurisdictions of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS highlights impacts for business to consider,” dated 14 June 2017. With respect to transparent entities, 64% of the total number of MLI signatories have reserved the right to not apply Article 3 to their covered tax agreements (CTAs), while in contrast 36% did not make any reservation with respect to Article 3.

**Article 3 - Transparent Entities**

![Reserve the right](36%)

![Did not reserve](64%)

Sixty percent of the signatories reserved the right for Article 4, on dual-resident entities, not to apply to their CTAs. Forty percent of signatories did not make such reservation and thus would like this article to apply in place of or in absence of such a provision in their CTAs.
In addition, 42% reserved the right to not apply to their CTAs the provision of Article 5 regarding the application of methods for elimination of double taxation. From the remaining 58%, which did not reserve the right for Article 5 to be applicable to their CTAs, the majority chose to apply none of the options mentioned in the relevant article; while a considerable number of countries chose option C, six countries opted for option A, and no country has so far chosen option B.

Countries are implementing the recommendations on a bilateral level as well. For example, the tax treaties of Argentina-Brazil and Denmark-Japan have been amended to contain, among others, treaty-based recommendations from BEPS Action 2.

**EU activity**

To address major corporate tax reform across the EU, the Council of the European Union adopted the Directive amending the ATAD on 29 May 2017. This Directive, known as ATAD 2, extends the scope of ATAD to hybrid mismatches involving third countries (i.e., non-EU countries) and encompasses forms of hybrid mismatches not covered by ATAD as hybrid PE mismatches, hybrid transfers, imported mismatches and dual-resident mismatches. The content of ATAD 2 corresponds to that agreed by ECOFIN on 21 February 2017.
Actions have been noticed during 2017 by some Member States toward the implementation of the recommended anti-hybrid rules, in line with ATAD and BEPS Action 2. In summer 2017, the Swedish Government published a memorandum proposing important changes in the corporate taxation area, part of which is the introduction of anti-hybrid provisions and contemplates to further introduce such provisions in order to fully implement the ATAD and BEPS Action 2. The new anti-hybrid rules have been proposed to be implemented on 1 July 2018. Similarly, new anti-hybrid measures have been introduced by the Amendment to the Slovak Income Tax approved in December 2017 to be effective in January 2018. On 22 December 2017, the Belgian Parliament adopted the corporate tax reform, which was announced during the summer and transposes the anti-hybrid measures of the ATAD into Belgian domestic law. The Ministry of Finance in cooperation with the Cyprus Tax Department opened a public consultation on the proposed amendments in the Cyprus tax legislation implementing all the measures of the ATAD on 12 July 2016 and, as this was amended on 21 February 2017, inviting interested parties to submit their comments and suggestions until 8 December 2017. The transposition of ATAD is expected to amend the Cyprus tax system significantly.

Action 3

OECD BEPS Action 3, Designing Effective Controlled Foreign Company Rules, sets out recommendations to strengthen the rules for the taxation of those corporations. The OECD has noticed that the existing controlled foreign company (CFC) rules do not correspond to the new business international environment and are not sufficient in combating BEPS. Hence, Action 3 deals with strengthening CFC rules and provides recommendations for the design of those rules in the form of six building blocks, meaning that jurisdictions are not obliged to implement the recommendations as minimum standards, but they may choose to do so. The six building blocks are (1) definition of a CFC, (2) CFC exemptions and threshold requirements, (3) definition of income, (4) computation of income, (5) attribution of income and (6) prevention and elimination of double taxation.

In March, Japan enacted the 2017 tax reform bill that inter alia modifies the Japanese Controlled Foreign Company rules; more specifically, the bill repeals the 20% test for a foreign subsidiary to be treated as a tax haven subsidiary, and it broadens the scope of the passive income caught by the Japanese CFC rules. The Taiwanese Government published the CFC implementation rules in September, through which a new definition of CFC has been introduced, as well as a requirement for Taiwanese taxpayers with CFCs to provide detailed information for their organizational structure, ownership percentage in CFCs and financial returns. Furthermore, South Africa published in summer 2017 a draft bill that proposes that CFC rules be adjusted so that a foreign company held through a nonresident trust or foundation that is consolidated into a South African parent company in terms of International Financial Reporting Standards be deemed to be a CFC. This proposal was promulgated into law on 18 December 2017.

EU activity

One out of the five legally binding ATAD measures is the CFC rules that have to be implemented as a minimum standard by the Member States, meaning that countries can introduce a more stringent law domestically, but the countries have to adopt at least the minimum standard described by the ATAD. To that end, during the period under review, many European countries published draft bills and public consultations for implementation of, among others, the CFC rules as proposed by the ATAD. The main measure included in the bill amending the Income Tax Act in Slovakia, which was approved by the Slovak National Council on 7 December 2017, is the introduction of CFCs in line with the ATAD recommendations as of 1 January 2019. In December 2017, the Belgian Parliament adopted the corporate tax reform that amends, among others, the rules on CFCs whereby non-distributed profits realized by a CFC that constitutes an artificial construction are added to the tax base of the Belgian parent if the CFC is held for at least 50% and is subject to tax at a rate below 12.5%. To avoid double taxation, the Belgian parent is granted a participation exemption upon distribution of the previously taxed CFC income.

Action 4

The final report on Action 4, Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, recommends a common approach to tackle BEPS involving interest and equivalent payments. The report recommends a fixed ratio rule that would restrict an entity’s net interest expense to a fixed percentage of its EBITDA (earnings before interest, taxes, depreciation and amortization), along with a group ratio rule allowing an entity in a highly leveraged group to deduct net interest expense in excess of the amount permitted under the fixed ratio rule.
At the beginning of 2017, India presented its Budget for tax year 2017–18, which proposed, among other items, the introduction of a limit on interest deductions in the case of related-party borrowings in line with recommendations of Action 4 of the OECD BEPS Action Plan. The provision restricts the interest expenses (exceeding INR10m (approximately US$148,775) claimed by an Indian company (other than a banking or insurance company) or a permanent establishment of a foreign company in India on its borrowings from nonresident associated enterprises to 30% of its EBITDA. Similarly, the Norwegian Ministry of Finance issued a public consultation paper regarding amendments to the interest deduction limitation rules. The proposed rules will have a direct impact on companies that are, or can be part of a consolidated group for financial accounting purposes. For such companies, the proposal will extend the interest limitation rules to include interest on external loans. The threshold is proposed to be increased to NOK10 million, but this threshold will apply to all Norwegian companies that are part of the same tax group, not at an entity level. Two alternative equity escape rules have been proposed. Very simplified, these entail that a company may claim full deductions for all interest cost (i) if the company's debt to equity ratio is equal to or higher than that of the group's consolidated balance sheet or (ii) if the Norwegian group companies' debt to equity ratio is equal to or higher than that of the group's consolidated balance sheet. The proposed changes were subject to a public consultation process in 2017. No changes were included in the 2018 fiscal budget, as the Government is currently assessing the comments received during the public consultation process, and it has stated that it will revert with the proposed amendments to the rules as soon as possible so that the new rules can become effective in the 2019 income year.

Draft proposal rules that focus on intercompany loans and limit interest deductions between related parties to a prescribed ratio, expected to be between 10% to 30% of EBITDA or EBIT (earnings before interest and taxes) have been announced by Malaysia in October.

EU activity

Steps toward the implementation of the ATAD, which inter alia includes an interest expense limitation for multinational enterprise groups in line with the recommendation in the final report on Action 4, have been taken by many countries through proposals and draft bills during 2017. The Swedish memorandum that was published by the Government in June proposes the introduction of legislation to align Sweden's rules on corporate interest deductions with the ATAD and BEPS Action 4. In this respect, it is proposed to limit the deductibility of the net interest expense to 35% of the taxable EBIT, or alternatively, 25% of the taxable EBITDA. The rules have been proposed to be implemented on 1 July 2018. Also, in October, the Dutch Government published its Policy Paper that outlines its policy for the next four years and proposes the introduction of interest deduction restrictions as per the EU ATAD that would include a general 30% of EBITDA restriction with a €1 million safe harbor threshold. The introduction of the new interest deductibility limitation rule is expected from 1 January 2019.

Action 5

The focus of the final report on Action 5, Countering Harmful Tax Practices More Effectively, is mainly on two topics: (i) requiring substantial activity for preferential regimes through the use of a “nexus approach” in the context of intellectual property (IP) regimes; and (ii) improving transparency through a framework for the compulsory spontaneous exchange of information on certain rulings that could give rise to BEPS concerns.

Harmful tax regimes

In February, the OECD released the peer review documents on Action 5, including the agreed terms of reference containing the evaluation criteria regarding the minimum standards and the assessment methodology for the peer review process. Later, in October, the OECD released Harmful Tax Practices – 2017 Progress Report on Preferential Regimes, which provides an update to the 2015 BEPS Action 5 report and contains the results of the review of all Inclusive Framework members' preferential tax regimes that have been identified. The Progress Report also includes guidance on preferential tax regimes, timelines for amending regimes and recommendations on monitoring certain features of preferential regimes.

With respect to IP regimes, in May, Israel approved tax regulations implementing the OECD’s “nexus approach,” which came into effect retroactively as of 1 January 2017. In line with the OECD BEPS Action 5 guidelines, IP tax incentives in Israel (which can provide corporate tax rates as low as 6%) will be conditional on the extent of research and development (R&D) activities of taxpayers receiving benefits. Notably, the regulations propose exceptions that
allow multinationals to conduct R&D outside of Israel and to transfer IP trade which includes IP into Israel and still gain access to the tax benefits.

A bill on a new intellectual property box regime was submitted to the Luxembourg Parliament. This new IP regime is intended to reinforce R&D activities inside the country and encourage foreign investors to consider R&D spending in Luxembourg. If enacted, the provisions of the bill would become effective beginning in tax year 2018 and apply (non-cumulatively) in parallel with the former Luxembourg IP regime until the expiration of the latter’s grandfathering period on 30 June 2021. Similar to the current IP regime, eligible net income from qualifying IP rights would benefit from an 80% tax exemption. Qualifying IP rights would also benefit from a full net wealth tax exemption.

In its Budget 2017, Singapore announced the introduction of a new IP Development Incentive (IDI). The IDI will cover qualifying IP income and will comply with the OECD’s “modified nexus approach.” In conjunction with the IDI, Singapore’s existing tax incentive regimes (namely the Pioneer Certificate Incentive and the Development and Expansion Incentive) will be modified to remove IP income such that in the future, IP income will be incentivized only under the IDI. There will be a grandfathering period of up to 30 June 2021 for taxpayers with existing incentives covering IP income. Details on the IDI and the changes to the existing incentive regimes are expected to be released in early 2018.

It should be noted that Singapore’s existing incentive regimes have undergone peer review by the Forum on Harmful Tax Practices (FHTP) and, in the progress report issued by the FHTP on 16 October 2017, the existing incentive regimes were found to be in compliance with international standards on countering harmful tax practices.

In addition, Italy’s Council of Ministers enacted a Law Decree that provides for certain urgent measures on Italian tax matters, including the exclusion of trademarks from the patent box regime to align the rules with BEPS Action 5 recommendations. Similarly, in line with the relevant recommendations, the Andorran Government submitted a Bill to Parliament implementing a patent box regime under which, qualifying IP income derived from the assignment of intangible assets to non-Andorran tax residents may be reduced by 80%. That results in an effective tax rate of 2% in Andorra. However, the 80% reduction is decreased to 75% for fiscal years ending before 1 January 2019, and for the subsequent tax years, such reduction is decreased by 25% per year until tax year 2021.

Lastly, in June, the German State Council (Bundesrat) approved the Act against Harmful Tax Practices with regard to Licensing of Rights, which restricts the tax deduction of royalties and similar payments made to related parties if such payments are subject to a non-OECD compliant preferential tax regime and are taxed at an effective rate below 25%. The Act was published one month later in the German Federal Gazette, and it is applicable for expenses incurred as of 1 January 2018 and later. On 5 December 2017, the ECOFIN of the EU approved and published an EU list of non-cooperative jurisdictions in taxation matters, aimed at promoting good governance worldwide. The list of non-cooperative jurisdictions includes 17 jurisdictions in total, namely American Samoa, Bahrain, Barbados, Grenada, Guam, Republic of Korea, Macao SAR, Marshall Islands, Mongolia, Namibia, Palau, Panama, Saint Lucia, Samoa, Trinidad and Tobago, Tunisia and United Arab Emirates. The placement of a jurisdiction on the list for tax purposes is expected to have a dissuasive effect and encourage the jurisdictions to comply with the criteria set therein. However, with the aim at preventing the erosion of the EU member states’ tax bases and until the jurisdictions that appear on the list make the changes requested of them, the EU and the member states could apply defensive measures.

In addition to approving and publishing the list of non-cooperative jurisdictions, the ECOFIN also adopted a so-called gray list consisting of 47 jurisdictions. Jurisdictions included in this gray list are jurisdictions that have decided to introduce some of the relevant changes indicated by the Code of Conduct Group in their tax legislation in order to comply with the EU screening criteria, and they have therefore been determined as cooperative, subject to the successful delivery of their commitments. For eight jurisdictions affected by hurricanes during 2017, the screening process has been temporarily put on hold.

Exchange of information
The OECD released updated and new IT tools to support the exchange of Tax Rulings (ETR) under BEPS Action 5. The new IT tools were developed to provide structured feedback on received ETR information. The ETR Status Message XML Schema allows Competent Authorities that have received tax rulings through the OECD XML Schemas to report back to the sending Competent Authority; additionally, Competent Authorities can use this tool to provide structured feedback to the sender on frequent errors encountered. In addition,
on 4 December 2017, the OECD released the first annual peer review report relating to the compliance by members of the Inclusive Framework on BEPS of the minimum standards on Action 5 for compulsory spontaneous exchange on certain tax rulings (the transparency framework). The report covers the jurisdictions that participated in the BEPS project prior to the creation of the Inclusive Framework, and it assesses the 2016 calendar-year period. Overall, more than 10,000 relevant tax rulings were identified as issued by the assessed jurisdictions in the period up to the end of 2016. This includes both certain past rulings (issued during the period of 1 January 2010–31 March 2016) and future rulings (issued during the period of 1 April–31 December 2016). The assessed jurisdictions performed almost 6,500 exchanges of information in the reviewed period. In general, all jurisdictions either already had in place, or have undertaken steps to implement, the requirements of the transparency framework.

In the context of improving transparency, the Guernsey Income Tax Office issued a circular providing clarifications on the exchange of information on tax rulings. According to this circular, the following categories of rulings will be subject to exchange of information, namely (i) rulings relating to preferential regimes; (ii) unilateral advance pricing agreements or other cross-border transfer pricing rulings; (iii) cross-border rulings providing for a downward adjustment of taxable profits; (iv) permanent establishment rulings; (v) related-party conduit rulings; and (vi) any other rulings agreed by the OECD Forum on Harmful Tax Practices giving rise to BEPS concerns.

The Brazilian Federal Revenue Agency published a Normative Instruction 1,689/2017 (NI) in order to regulate the exchange of information on tax rulings. The NI will be effective from the date of its publication in the Official Gazette. Brazilian tax authorities would disclose a summary of the ruling to the tax authorities located in jurisdictions under which Brazil has an exchange of information agreement.

On 28 November 2017, the Italian Government issued a Decree providing amendments to the Italian Patent Box regime. The Decree introduces (together with other measures) exchange of information rules according to which the Italian Revenue Agency will exchange with the relevant tax authorities and, in certain circumstances, the name of each Italian taxpayer whose Patent Box option also includes trademarks.

The Inland Revenue Authority of Singapore has indicated a scheduled timeline for the spontaneous exchange of information in respect of (i) permanent establishment rulings and (ii) unilateral advance pricing agreements (APAs). Such rulings will be spontaneously exchanged by December 2017 where the ruling/APA was issued either (a) on or after 1 January 2012 and still in effect on 1 January 2015 or (b) on or after 1 January 2015 but before 1 April 2017. Rulings/APAs issued on or after 1 April 2017 will be spontaneously exchanged within three months after the date of the ruling letter/agreement.

**EU activity**

In March, the Estonian Parliament adopted the law that transposes the EU Directive 2015/2376/EU on automatic exchange of information in the field of taxation, and, based on this, Estonia will exchange information on advanced binding rulings issued before 2017 to the Member States and the European Commission by 31 December 2017 at the latest. Law 4447/2017, art. 3 was approved by the Greek Parliament on the implementation of the EU Directive on Automatic Exchange of Information with respect to cross-border advance tax rulings and APAs under the amended Mutual Assistance Directive, already introduced to local rules. According to this bill, which is also in line with BEPS Action 5, Greece will exchange information on tax rulings and APAs issued, amended or renewed as of 1 January 2017 in accordance with the procedure stipulated. In June, the bill, which implements the EU Directive 2016/881 of 25 May 2016 and provides, among other things, for a penalty for failure to file or incomplete and not timely filing, was published in the Dutch Official Gazette. The bill retroactively applies to fiscal reporting years of the multinational group starting on or after 1 January 2016, and the penalty above became effective with regard to filing omissions on 5 June 2017.

**Action 6**

The importance of economic substance and business purpose has increased as a result of the new economic environment and work carried out by the OECD. The report on Action 6, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, was released on 5 October 2015 to address treaty abuse. That report provides several recommendations regarding changes to tax treaty provisions together with proposed domestic law provisions to address the inappropriate granting of treaty benefits and other potential treaty abuse situations, involving a number of
changes to the OECD Model Convention and its Commentary, as well as the introduction of new anti-abuse rules to be incorporated within the tax treaties. OECD countries have committed to adopting a minimum standard into tax treaties to combat treaty shopping, as it has been identified as a dangerous treaty abuse strategy and a main source of BEPS occurrences.

At the beginning of January, the OECD released a Public Discussion Draft for comment that includes three draft examples with respect to treaty entitlement of non-collective investment vehicle (non-CIV) funds when the principal purpose test (PPT), one of the minimum standards to protect against treaty shopping, is applied. In March the comments received on these draft examples were published on the OECD website. However, the examples have been characterized to be extremely vague and controversial. Many commentators have criticized the OECD proposals, and this can be illustrated by the size of the comments received and their content. In response to the discussion draft on non-CIV examples proposed by the OECD, many commentators expressed their worries that the PPT remains imprecise and subjective, leaving open the possibility that tax authorities could deny treaty benefits in respect of many cross border investments.

On 29 May, the OECD, through its own broader peer review process and with the purpose of ensuring the consistent and effective implementation of BEPS actions that have been agreed as a minimum standard, released the peer review document on BEPS Action 6. The document sets forth the agreed terms of reference and the assessment methodology for the peer review process. The process will begin in 2018 with the objective of concluding a first report on the implementation of the minimum standard for the January 2019 meeting of the Inclusive Framework on BEPS. Some items in the Action 6 final report needed further work and were not finalized when the OECD issued the 2015 report. The 2017 OECD Model Tax Convention, which was approved on 21 November 2017, contains the finalized version of this further work, including, among others, the addition of a new Article 29 (Entitlement to Benefits) and related commentary, which includes in the Model Tax Convention (MTC) a limitation on benefits (LOB) rule (simplified and detailed versions), an anti-abuse rule for permanent establishments situated in third States, and PPT rule. Also, the three examples on the application of the PPT rule to the aforementioned non-CIV funds have been included on the Commentary on Article 29.

The PPT rule as provided for under Action 6 has been incorporated in Dutch tax legislation for nonresident recipients of dividends and capital gains. As of 1 January 2018, Dutch domestic law provides for certain minimum substance requirements that function as a safe harbor rule to satisfy the PPT rule under Dutch domestic law, tax treaties, and the EU Parent Subsidiary Directive. The safe harbor rule provides great certainty on the Dutch tax treatment to shareholders that invest in or via the Netherlands.

The Indonesian Government issued a regulation, in effect since April 2017, revising its anti-treaty abuse rules for non-Indonesian residents with income from Indonesia. The new regulation strengthens anti-treaty abuse policies, and it removes a requirement that the income of a nonresident must be subject to tax in its home country in order to avail tax treaty benefits (the so-called subject-to-tax test), which has been considered to create high level of uncertainty in the past.

On a bilateral level, many treaties have been amended in order to include an anti-abuse clause and the Action 6 recommendations. The protocol to the double tax treaty between Ghana and the Netherlands, which was signed on 10 March 2017, contains a PPT rule based on a benefit under which the treaty can be denied if the subjective test is met, unless under the objective test it can be established that granting the benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions. In June, Mexico and Spain exchanged the final note of ratification of the protocol amending the convention between Mexico and Spain, which, among other changes, includes a PPT in line with the one set out by the MLI. In October, Japan and Denmark signed a revised tax treaty that provides for a LOB clause for certain treaty benefits and a PPT. The inclusion of a LOB clause and PPT has been made to a number of bilateral treaties during 2017, e.g., Argentina-Brazil, Japan Lithuania, Estonia Japan and Japan Latvia.

MLI

The MLI contains six articles to address treaty abuse. Articles 6 and 7 reflect the Action 6 minimum standard on treaty abuse, while Articles 8–11 are specific anti-abuse rules that target specific avoidance strategies. As there is no option to reserve the right on paragraph 1 of Article 6 of the MLI Convention, all the CTAs will be modified to include the suggested preamble, unless a jurisdiction reserves the right
so that its CTAs already containing preamble language in line with Action 6 are not modified. In total, 11 out of the 72 signatories followed the aforementioned exception.

The PPT, which would be introduced in all CTAs by the MLI, is a general anti-abuse rule based on the principal purposes of transactions or arrangements. For most OECD countries, as well as most non-OECD countries, it will become the most important tool to combat treaty shopping and other situations of inappropriate use of tax treaties, such as certain conduit financing arrangements that are not covered by a specific anti-abuse rule. If one of the principal purposes of a transaction or arrangement after having considered all the relevant facts and circumstances is to obtain treaty benefits, these benefits would be denied unless the granting of these benefits is in accordance with the object and purpose of the treaty provision. Thus, the PPT rule is a subjective test that is based on an assessment of the intentions of each arrangement or transaction. The Action 6 Report in the form of commentary illustrates how this rule would apply by providing a number of examples. All jurisdictions that have signed the MLI have chosen to apply the PPT rule, although 12% of the jurisdictions made a statement of acceptance of the PPT as an interim measure.

Regarding the specific anti-abuse rules of Articles 8–11 of the MLI, in general, half of the signatories reserved the right to apply each of these provisions to their CTAs, with the exception of Article 10 (an anti-abuse rule for permanent establishments situated in third jurisdictions) to which 69% of the signatories reserved their right to not apply this provision.

### Action 7

The final report on Action 7, *Preventing the Artificial Avoidance of Permanent Establishment Status*, aims to tackle strategies used to avoid having a taxable presence in a country under tax treaties by changing the definition of a permanent establishment in the OECD Model Tax Convention. As part of its ongoing work on Action 7, in 2016, the OECD released a first discussion draft to provide additional guidance on attribution of profits to permanent establishments with respect to dependent agent PEs and to warehouses as fixed places of business PEs. On 22 June 2017, the OECD released a second discussion draft on this topic, replacing the first discussion draft published for comments in July 2016. This new discussion draft provides additional guidance on the attribution of profits to PEs arising from Article 5(5) of the OECD Model Convention, including dependent agent structures and with respect...
to PEs arising from the changes in Article 5(4), such as warehousing and similar PEs, including also the impact of the anti-fragmentation rule. The approval of the 2017 OECD Model Tax Convention in November provides for changes to the definition of permanent establishment in Article 5 and the related commentary. These amendments include, for example, the meaning of “at the disposal of,” which has to be considered when looking at whether a fixed place of business PE exists in the context of Article 5(1), while another part of the commentary deals with the topic of whether a home office of an employee can create a PE.

In addition, the 2017 update of the OECD MTC includes the changes and additions made to the observations and reservations of OECD member countries and the positions of non-OECD economies, which were not included in the 2017 draft update. With reference to Article 5 and the permanent establishment issue, Finland, Luxembourg, Sweden and Switzerland reserve the right to not include Article 5(4.1) of the OECD MTC in their tax treaties. Article 5(4.1) contains the anti-fragmentation rule which was introduced as part of the recommendation in the final report on BEPS Action 7. This provision corresponds to Article 12 of the MLI. Finland, Germany, Luxembourg, Sweden, Switzerland and the United States reserve the right to follow Articles 5(5) and 5(6) as they stood before the 2017 update. Article 5(5) defines Dependent Agent PE (DAPE), and Article 5(6) defines independent agent. The final report on BEPS Action 7 broadened the definition of DAPE while narrowing the definition of independent agent. These provisions correspond to Articles 12 and 13(1) of the MLI, respectively. Finland and Sweden also reserve the right not to include the definition of closely related enterprises contained in Article 5(8). This provision corresponds to Article 15 of the MLI.

In New Zealand, the Government proposed the introduction of a new PE avoidance rule (together with a corresponding deemed source rule for income attributable to PEs). The legislative details were announced on 6 December, and the effective date for introduction is for income years beginning on or after 1 July 2018. Bilaterally, Latvia ratified the income tax treaty with Japan in order to contain, among others, an anti-contract splitting rule, an anti-fragmentation rule and the new definition of agency PE. Except for the anti-contract splitting rule, the tax treaties that Japan signed with Estonia and Lithuania followed the inclusion of the same PE provisions in their agreements.

**MLI**

Action 7 is not a minimum standard, so signatories to the MLI are free to opt out or selectively adopt any of these PE provisions. From the countries that signed the MLI, 23 opted to adopt all PE articles, while 28 adopted some of the PE articles and the remaining 21 opted not to adopt any of the PE articles. With respect to Article 12, which deals with the changes to the agency PE definition, out of the total of 72 signatories, 57% reserved the right to not apply Article 12 to their CTAs.

Also, most signatories (64%) have also reserved the right to not apply Article 14, i.e., the splitting-up of contracts provision.
For Article 13 dealing with the specific activity exemptions, 38% of the signatories reserved the right for the entirety of this article not to apply to their CTA. The remaining 62% of signatories that did not reserve the right for Article 13 generally also opted to adopt the new anti-fragmentation rule except for Austria, Germany, Luxembourg and Singapore. The chart below shows the percentages of the signatories’ choice. From those countries that did not reserve their right for Article 13 of the MLI, the vast majority chose option A (i.e., each of the exceptions included in that provision needs to meet the “preparatory or auxiliary” threshold), 16% opted for option B (i.e., each of the exceptions is intrinsically preparatory or auxiliary, and thus, these activities should not be subject to the “preparatory or auxiliary” threshold), while the remaining 7% did not take any option.

EU activity
The challenges posed by the digital economy to fair taxation in the EU was at the center of debate at the informal ECOFIN meeting in Estonia on 16 September. In this regard, the Estonian Presidency proposed in terms of a solution changes to the definition of permanent establishment so as to “abandon the requirement that companies have to be physically present in a country or own assets there,
and replace this with the concept of a virtual permanent establishment. A precondition for this is a more precise agreement on the virtual taxpayers who have to start paying taxes.”

In line with the aforementioned, the final version of the Amendment to the Income Tax Act was approved by the National Council in Slovakia, which introduces many amendments to the rules regarding what constitutes a PE. As it was aforementioned under Action 1, the Amendment extends the current definition of a fixed place creating the PE in Slovakia which would also cover regular mediation of transport and accommodation services provided through a digital platform. Also, conditions for the foundation of a construction PE are also subject to change in Slovakia. According to the Amendment, when assessing a construction PE, the entire period for completion of the construction, plus construction and assembly projects and the involvement of related parties, will be considered. Regarding the agent PE and upon the amendment to the act, the taxpayer with a limited tax liability may have a PE in the territory of Slovakia even when its agent has the decisive influence in finalizing a contract that is subsequently concluded by the taxpayer without fundamental change. A few days after the ECOFIN meeting, the Austrian Minister of Finance stated that the introduction of the concept of digital/virtual PE should not be undertaken only at the multilateral level but also on a bilateral and national level. To that regard, and considering that Ireland is the seat of the main digital companies operating in Europe, the Austrian Ministry of Finance plans to renegotiate the double-tax treaty with Ireland to introduce the concept of a digital/virtual PE. As it was aforementioned under Action 1, in Italy, the Law has replaced the domestic definition of PE with the one provided by BEPS Action 7, which added a new example in the defined list of paragraph 2. Under the new provision, a significant and continuous economic presence in the territory of the State set up in a way that it does not result in a substantial physical presence in the same territory may constitute a PE. This implies the possibility of a PE presence even in the case where a company does not have a physical presence in the Italian territory to the extent other factors may indicate a significant presence (e.g., revenues or number of customers).

**Actions 8–10**

The work under the final report on Actions 8–10, *Aligning Transfer Pricing Outcomes with Value Creation*, intends to ensure that the transfer pricing methods will allocate profits to the most important economic activities. The final report stipulated further work under these Actions on profit splits and financial transactions. In this context, on 23 May 2017, the OECD released a discussion draft on the implementation guidance on Hard-to-Value Intangibles (HTVI) in connection with BEPS Action 8. The guidance included in the draft is aimed at reaching a common understanding and practice among tax administrations on how to apply adjustments resulting from the application of the HTVI approach. A month later, the OECD released a discussion draft on the revised guidance on profit splits (BEPS Action 10), dealing with the clarification and strengthening of the guidance on the transactional profit split method (PSM) and sets out the text of the proposed revised guidance on the application of this method. In October, the comments received on this latter discussion draft were published on the OECD website, while on 6–7 November, the OECD held a public consultation on the discussion drafts at the OECD Conference Centre in Paris. The consultation was an opportunity for stakeholders to engage directly with the OECD Secretariat and the country delegates who are responsible for the OECD’s transfer pricing work.

Another development in this regard during the period under review is the release of the 2017 edition of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD TPG) in July. This new version of the TPG consolidates the agreed changes to the section on safe harbors and the various BEPS recommendations. As a result, the 2017 edition includes 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 enterprises (MNEs) group synergies (additions to chapter I); transfer pricing for commodity transactions (additions to chapter II); low-value adding intragroup services (revisions to chapter VII); new versions of chapter VI, addressing intangibles; chapter VIII, covering cost contribution arrangements; and chapter V on transfer pricing documentation. Furthermore, on 6 November 2017, the OECD published updated Transfer Pricing Country Profiles (TPCPs) for 31 countries to reflect on their existing transfer pricing legislation and practices (namely Austria, Belgium, Brazil, Bulgaria, Canada, Colombia, Croatia, Czech Republic, Denmark, Germany, Indonesia, Ireland, Japan, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Netherlands, New Zealand, Nigeria, Peru, Russian Federation, Singapore, Slovak Republic, Slovenia, Spain, Switzerland, United Kingdom and United States).
updated profiles, prepared by means of questionnaires filled out by the countries, focus on the domestic legislative measures based on major transfer pricing issues, including the transfer pricing methods, arm’s-length principle, transfer pricing documentation, comparability analysis, intangible property, intra-group services, cost contribution agreements, administrative approaches to avoiding and resolving disputes, safe harbors and other implementation measures.

At the beginning of 2017, the Inland Revenue Authority of Singapore released revised transfer pricing guidelines. Key features include more guidance on the arm’s-length principle and emphasis on risks (specifically in connection with BEPS Actions 8–10). The Cyprus Tax Authorities issued a Circular revising the transfer pricing framework for companies carrying out intra-group financing activities in Cyprus which became effective 1 July 2017. The Circular provides additional guidance in terms of substance and transfer pricing requirements in line with the OECD Guidelines, as well as guidance as to the required content of a transfer pricing study. Ireland launched a public consultation on the implementation of Actions 8–10. This consultation will run until 30 January 2018. Effective 1 January 2017, the Luxembourg Tax Authorities issued a Circular reshaping the transfer pricing framework for companies carrying out intra-group financing activities in Luxembourg. The Circular provides additional guidance in terms of substance and transfer pricing requirements in line with the OECD Guidelines. It refers to Article 56bis, which was introduced into the Luxembourg Income Tax Law by the 2017 Budget Law and incorporates the concept of the arm’s-length principle, based on the OECD principles as revised by Actions 8–10 of the OECD BEPS Action Plan, into the local legislation.

**Action 11**

The final report on Action 11, *Measuring and Monitoring BEPS*, assesses currently available data and provides evidence that BEPS exists and has been increasing over time. Despite the significant data limitations and the complexity of the measuring, the report suggest a dashboard of six BEPS indicators that show the economic impact of BEPS. The report also presents a toolkit to help countries evaluate the fiscal effects of BEPS countermeasures and provides recommendations regarding data and monitoring tools to improve the analysis of BEPS in the future.

On 8 July 2017, the OECD issued a report to the G20 Leaders at their summit in Hamburg, Germany, updating them on progress in key areas of the G20/OECD’s tax work. The report provided a wide spectrum of updates, including, among others, the identification of six updated indicators of BEPS: (1) the concentration of foreign direct investment relative to gross domestic product; (2) the profit rates of MNE affiliates in low-tax countries compared to those in high-tax countries; (3) the profit rates of MNE affiliates in low tax countries compared with the profit rate of their own MNE groups; (4) the effective tax rates of MNEs compared to those of domestic-only enterprises; (5) the separation of intangible property from the location of its production; and (6) the concentration of debt in MNE affiliates located in higher-tax rate countries. The final Action 11 report recommended that the BEPS indicators be periodically updated and refined to assist with the monitoring of the scale of BEPS and the impact of the measures implemented under the BEPS package. Several of the BEPS indicators have been updated using more recent data. The report said that while these indicators do not provide any insights in relation to measures implemented under the BEPS package, they do provide a more recent update of the indicators in the period leading up to the release of the BEPS package, confirming the trends seen in the previous data.

**Action 12**

The final report on Action 12, *Mandatory Disclosure Rules*, makes a series of recommendations about the key design features of mandatory disclosure regimes while focusing in particular on international tax schemes, which are viewed as an area of particular concern. The recommendations are aimed to allow maximum consistency between countries while also being sensitive to local needs and compliance costs.

The UK introduced a new corporate criminal offense of failing to prevent the facilitation of tax evasion. The new offense concerns when an “associated person,” such as an employee, agent, contractor or subsidiary, facilitates the evasion of tax of a third party while acting on behalf of the business. If those persons acting on behalf of a business facilitate the tax evasion of a third party, then the business (defined as a “relevant body”) would be at risk of a criminal conviction and unlimited fine if it cannot prove that it had reasonable preventative procedures in place to prevent the facilitation of tax evasion. While UK legislation, the impact is far reaching and could result in overseas businesses being prosecuted. By September 2017, HMRC expected all businesses to have identified, documented and categorized the specific risks of
facilitation of tax evasion across their organization, and to have devised a plan on how each will be addressed.

EU activity
On the EU level, the European Commission published in July the proposal for a Council Directive amending Directive 2011/16/EU with respect to the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. The proposal imposes obligations on European Union tax consultants, banks, lawyers and other intermediaries to disclose any cross-border arrangement that contains one or more features or “hallmarks” and meets a somewhat unclear main benefit test. The hallmarks include those around confidentiality or contingent fees used in other disclosure regimes, as well as hallmarks such as the use of losses to reduce tax liability or deductible cross-border payments that are, for a list of reasons, not fully taxable where received. It is foreseen that the new reporting requirements would enter into force on 1 January 2019, with EU Member States required to exchange information every three months after that.

Action 13
The final report on Action 13, Transfer Pricing Documentation and Country-by-Country Reporting, sets out a three-tiered standardized approach to transfer pricing documentation and introduces a new version of chapter V of the OECD TPG, covering documentation. The standardized approach consists of a local file, a master file and aCbC report.

During 2017, there has been ongoing and increasing activity around CbC reporting. In promoting the consistent and effective implementation of CbC reporting, the OECD released in February the peer review documents on BEPS Action. The terms of reference focus on three key aspects of CbC reporting, meaning the domestic legal and administrative framework, the exchange of information framework, and the confidentiality and appropriate use of CbC reports. The peer reviews will consist of three phases structured into annual reviews, starting, respectively, in 2017, 2018 and 2019. Each year’s review process will culminate in the production of an annual consolidated report on the outcomes of the peer reviews.

The OECD has further updated its CbC Guidance five times: in December 2016, April 2017, July 2017, September 2017 and November 2017. In April 2017, the OECD released an updated version of its Guidance on the implementation of CbC Reporting. The content of the Guidance has been rearranged into topics and five new questions have been added. The new specific issues that have been addressed in this Guidance are the following: (i) the definition of revenues; (ii) the accounting principles/standards for determining the existence of and membership in a group; (iii) the definition of total consolidated group revenue; (iv) the treatment of major shareholdings; and (v) the definition of related party for purposes of completing Table 1 of the CbC report. A few months later, the OECD’s Inclusive Framework on BEPS released two new sets of guidance to give greater certainty to tax administrations and multinational enterprise groups on the implementation and operation of CbC Reporting. The aforementioned April Guidance has been updated again to address three new issues: (i) the definition of revenues, (ii) the treatment of MNE groups with a short accounting period and (iii) the treatment of the amount of income tax accrued and income tax paid. At the same time, the OECD released guidance for tax administrations on the appropriate use of the information contained in CbC reports (the Appropriate Use Guidance). This latter guidance includes clarification on the meaning of “appropriate use,” the consequences of non-compliance with the appropriate use condition and approaches that may be used by tax administrations to ensure the appropriate use of CbC Reporting information. The latest update occurred on 30 November 2017, and it addresses a number of specific issues, including the following: (i) how to report amounts taken from financial statements prepared using fair value accounting; (ii) how to treat a negative figure for accumulated earnings; (iii) the purpose of the deemed listing provision in the definition of the term “group” in Article 1.1. of the Model Legislation in Action 13; (iv) the definition of total consolidated group revenue for the purpose of determining whether an MNE Group is an Excluded MNE Group; (v) short accounting periods; and (vi) issues relating to mergers/acquisitions/de-mergers.

In order to support countries introducing CbC reporting regarding the treatment of the issues addressed therein, the OECD released in September two handbooks: the first handbook is on effective implementation and is a practical guide to the key elements that countries need to keep in mind when introducing CbC reporting in line with the Action 13 minimum standard; the second handbook is on effective tax risk assessment, and the OECD offers guidance on how each tax authority receiving CbC reports and other
documentation may wish to consider using this information more efficiently. In the same month, the OECD released updated and new IT tools and guidance to support the exchange of CbC reports. The new IT tools were developed to provide structured feedback on received CbC information. The OECD updated the CbC XML Schema and User Guide to allow MNE groups to indicate cases of stateless entities and stateless income, as well as to specify the commercial name of the MNE group. Furthermore, certain clarifications have been made with respect to the correction mechanisms under the CbC XML Schemas and User Guides.

CbC reporting is the BEPS recommendation that has been implemented the most. In the Annex of this publication, there is a chart listing jurisdictions that are expected to implement CbC reporting, that have released draft legislation or have implemented rules. The chart provides some high-level information on the rules in each jurisdiction. Furthermore, the number of signatories of the Multilateral Competent Authority Agreement (MCAA) to automatically exchange CbC reports increased to 68 during 2017. In 2017, 16 jurisdictions signed the CBC MCAA, namely Belize, Bulgaria, Cayman Islands, Colombia, Croatia, Gabon, Haiti, Indonesia, Malta, Mauritius, Monaco, Pakistan, Qatar, Russian Federation, Singapore, and Turks and Caicos Islands.
During 2017, the OECD activated a number of exchange relationships under the CbC MCAA. Currently, together with the exchange relationships under the European Union Council Directive 2016/881/EU, there are more than 1,400 automatic exchange relationships established among jurisdictions committed to exchanging CbC reports as of mid-2018. The United States also continues to work toward agreeing bilateral competent authority agreements (CAAs) for the automatic exchange of CbC reports with specific partners under Double-Tax Conventions or Tax Information Exchange Agreements. More specifically, the United States has signed CAAs with 34 countries (namely Australia, Belgium, Bermuda, Brazil, Canada, Colombia, Czech Republic, Denmark, Estonia, Finland, Greece, Guernsey, Jersey, Iceland, Ireland, Isle of Man, Italy, Jamaica, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Slovakia, South Africa, Spain, Sweden and the United Kingdom). In July, Guernsey and the Isle of Man also signed a CAA to exchange CbC reports. The list of automatic exchange relationships that have been activated is available on the OECD website.

**EU activity**

The CbC Directive has been transposed by all Member States. On 4 July 2017, the European Parliament approved, in first reading, the proposed Directive on public CBC reporting contained in the joint report submitted by the Committee on Economic and Monetary Affairs and the Committee on Legal Affairs in June. The joint report proposed to amend the European Commission proposal to broaden the scope of the reporting obligation to any MNE group that has an annual consolidated turnover of or exceeding €750 million, with undertakings or branches within the European Union, and provides for exemptions in the case of commercially sensitive information. It is uncertain whether a political compromise will be
achieved. The proposal builds on the OECD BEPS work, in particular Action 13 on CbC reporting. However, it went a step ahead by requiring large MNEs to make certain items of the CbC report publicly available. It is uncertain whether a political compromise will be achieved and, if so, to which extent the presidency compromise text and the parliament legislative resolution will remain in place, particularly since some Member States have already expressed their concerns of going beyond the OECD recommendations.

**Action 14**

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. These measures are aimed at strengthening the effectiveness of the Mutual Agreement Procedure (MAP), minimizing uncertainty and preventing unintended double taxation by ensuring effective and timely resolution of disputes. The final report represents an agreement reached by the countries by way of developing a minimum standard on the resolution of treaty-related disputes.

As aforementioned with regard to other actions, in November, the OECD approved the draft contents of the next update to the OECD Model Tax Convention, which also introduces changes to Article 25 and the related commentary that are intended to remove any doubt that, in a case where the competent authorities have agreed on a common meaning of an undefined term, the domestic law meaning of that term would not be applicable, as well as changes to reflect the MAP arbitration provision 7 developed in the negotiation of the MLI.

Countries have further agreed to undertake effective implementation through a peer-review-based mechanism to monitor the process. To that end, in January, the OECD announced that it is now gathering input on the implementation of BEPS Action 14 for the first batch of countries under review. On 26 September 2017, the OECD released the first batch of peer review reports relating to the implementation by Belgium, Canada, the Netherlands, Switzerland, the United Kingdom and the United States and, on 15 December 2017, by Austria, France, Germany, Italy, Liechtenstein, Luxembourg and Sweden of the BEPS minimum standards on Action 14 on improving tax dispute resolution mechanisms. Overall, these jurisdictions meet most of the elements of the Action 14 Minimum Standards: they have mechanisms to prevent disputes from arising, and when disputes occur, they have MAP available and accessible in the situations required by the Minimum Standards. Also, regarding application and time, the function of the competent authorities, in the view of the peer review, is adequate and pragmatic, and MAP agreements reached so far have been implemented on time. Main areas identified as requiring improvement concern the observance of the average period of 24 months for the resolution of MAP cases, the accessibility and understanding of the MAP guidance, and the alignment of the tax treaties’ MAP provisions with the Action 14 Minimum Standards. In the next stage of the peer review process, each jurisdiction’s efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored. As the work of the peer reviews continues, in August, the OECD announced an invitation for taxpayers to provide input on the third batch of Dispute Resolution peer reviews, which according to the schedule of review, concerns Czech Republic, Denmark, Finland, Korea, Norway, Poland, Singapore and Spain, while in November, it announced an invitation for input on the fourth batch concerning Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand and Portugal.

Furthermore, on 27 November, the OECD released its annual statistical publication on the MAP caseloads of all OECD member countries and partner economies (i.e., non-OECD member countries) for the 2016 reporting period. The report covers opening and ending inventory of MAP cases for 2016, the number of new MAP cases initiated, the number of MAP cases completed, cases closed or withdrawn, and the average cycle time for cases completed, closed or withdrawn cases. In comparison with the 2015 MAP statistics, both the number of MAP cases in start inventory and the number of started MAP cases have increased, which results from both an increase in the number of reporting jurisdictions and modified counting rules.

In July, the Japanese National Tax Agency issued a Q&A guidance on the MAP, addressing MAP issues such as eligible persons, eligible cases, timelines, procedures, necessary documentation and forms in line with the BEPS Action 14 final report. Furthermore, the Luxembourg Tax Authorities issued an administrative Circular to set out the procedures for the implementation of the mutual agreement procedure provided for in bilateral tax treaties as concluded by Luxembourg with an intention to eliminate legal and economic double taxation.
On a bilateral level, the revised treaty between Austria and Japan provides that a case for mutual agreement procedure can be presented to the competent authorities of either contracting state, and any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. The same request for arbitration is available to the treaties that Japan has conducted with Denmark, Estonia, Latvia, Lithuania and Slovenia.

**MLI**

Article 16 of the MLI requires countries to include in their tax treaties the provisions regarding the MAP of Article 25 paragraph 1 through paragraph 3 of the OECD Model Tax Convention, including certain modifications of those provisions. Thirty-five percent of the signatories reserved the right to not apply the first sentence of paragraph 1 of Article 16 of the MLI Convention, which reads as follows: Where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, that person may, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, present the case to the competent authority of either Contracting Jurisdiction. Only 7% of the signatories reserved the right to not apply the second sentence of paragraph 2 of Article 16, which refers to the implementation notwithstanding any time limits in the domestic law of the Contracting Jurisdictions.

Article 17 aims to add or replace treaty provisions enabling Contracting Jurisdictions to provide for a corresponding adjustment, and it is necessary for the competent authorities of the Contracting Jurisdictions to consult to determine the appropriate amount of that corresponding adjustment with the aim of avoiding double taxation. In total, 10% of the signatories have reserved the right to not apply Article 17, while 90% did not make such reservation and thus would like this article to apply in their CTAs.
The MLI allows jurisdictions to opt into mandatory binding arbitration, an element of BEPS Action 14 on dispute resolution. Mandatory binding arbitration is a mechanism that obliges the parties to the treaty to submit unresolved issues in a MAP case to an arbitration panel. However, it will be available to resolve disputes in relation to a specific CTA only where both Contracting States to that CTA have expressly chosen to adopt it. Among the signatories, 27 jurisdictions opted in for mandatory binding arbitration. Sixty-three percent of the signatories have not chosen to apply part VI with respect to their CTAs.

**Article 18 - Choice to Apply Arbitration**

![Article 18 - Choice to Apply Arbitration](chart)

62% Yes  
38% No

**EU activity**

On 10 October 2017, and after the agreement that was reached during the ECOFIN meeting in May, the Council of the European Union adopted the Tax Dispute Resolution Directive setting forth the rules for a mechanism to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements that provide for the elimination of double taxation. The adopted Directive constitutes part of the EU's ongoing fight against aggressive tax planning and its efforts to resolve double-taxation issues for businesses, and it is in line with recommendations set out under Action 14.

**Action 15**

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. Each provision under the MLI (Articles 3 to 26) first reflects the BEPS measures as developed during the BEPS project with certain modifications. However, it is structured in a way so as to provide flexibility for Contracting Jurisdictions to implement (parts of) the MLI based on their needs.

So far, 72 jurisdictions have signed the MLI — 68 jurisdictions signed during a ceremony hosted by the OECD in Paris on 7 June 2017, while 4 more jurisdictions (Cameroon, Curaçao, Nigeria and Mauritius) signed the MLI after the ceremony. The 7 June 2017 MLI signing ceremony marks another key milestone in the BEPS project, in particular with respect to the implementation of the treaty-related BEPS minimum standards. At the time of signature, signatories submitted a list of their tax treaties in force that they would like to designate as Covered Tax Agreements, i.e., to be amended through the MLI. After the ceremony, even more jurisdictions expressed their intent to sign the MLI in the near future (Cote d’Ivoire, Estonia, Jamaica, Lebanon, Panama and Tunisia). Thus, the impact of the MLI on the worldwide network of tax treaties will be important. Out of the 72 MLI signatories, 67 Jurisdictions are BEPS members, and 5 are non-BEPS members.
Signatories of the MLI

Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cyprus, Curaçao, Czech Republic, Denmark, Egypt, Fiji, Finland, France, Gabon, Georgia, Germany, Greece, Guernsey, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Japan, Jersey, Kuwait, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Poland, Portugal, Romania, Russia, San Marino, Senegal, Serbia, Seychelles, Singapore, Slovakia, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Turkey, United Kingdom and Uruguay.

The MLI can be characterized as a successful story with regard to its aim, i.e., to facilitate quick implementation of all the treaty-related BEPS changes in as many of the thousands of existing bilateral tax treaties as possible. To demonstrate this in numbers, more than 1,100 treaties are expected to be updated to meet the minimum standard of PPT and MAP based on the current positions; more than 300 will include new measures with regard to permanent establishments, and, even though mandatory arbitration is optional, more than 160 tax treaties will be updated to include it. Four ratifications have been made by Austria, Jersey, Poland and Isle of Man, and it is expected that soon enough 1 more country will move to ratification. So far, Austria, Isle of Man and Jersey have submitted their final positions to the OECD.

It is likely that the first modifications to CTAs will become effective in the course of 2018. The timing of entry into effect of the modifications is linked to the completion of the ratification procedures in the jurisdictions that are parties to the covered tax treaty.
**Annex**

**Action 13 implementation overview as of 31 December 2017**

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### Country-by-Country Reporting

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**Legend:**
- ✓: Yes
- x: No
- ? = Not clear
- Delay in commencement of secondary filing by 1 year

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**Legend:**
- ✗ = Delay in commencement of secondary filing by 1 year ( ✗ represents this delay)
- ☑ = Yes
- ☑ = No
- ☑ = Not clear

### Notes

- SF: Surrogate Parent Entity
- CE: Constituent entity
- LF: Local filing
- MCAA: Multilateral Competent Authority Agreement
- RFY: Reporting fiscal year
- UPE: Ultimate Parent Entity

**CE:** If there are CE tax resident in [Country], they shall notify the competent tax authority about the Reporting Entity (i.e. the entity that is required to file a country-by-country report).

**SPE:** If the SPE is tax resident in [Country], it shall notify the competent tax authority about the SPE.

**UPE:** If the UPE is tax resident in [Country], it shall notify the competent tax authority about the UPE.

**RFF:** Generally means an annual accounting period with respect to which the UPE of the MNE Group prepares its financial statements.

**Surrogate Parent Entity (SPE):** A SPE is a constituent entity that is required to file a country-by-country report in its own right and in respect of its own activities, and is required to include in this report information of the MNE Group as a whole.

**Constituent entity (CE):** A CE is a constituent entity of the MNE Group that is not itself a SPE and is a constituent entity of another constituent entity that is a SPE.

**Ultimate Parent Entity (UPE):** A UPE is the tax resident entity that is the final parent entity of an MNE Group for tax purposes.
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Some countries that have not implemented the OECD’s recommendations for Master File and Local File may have reporting obligations that gather similar information. For example, the US has not implemented the OECD’s recommendations for Master File and Local File but, for a foreign ultimate parent with a constituent entity in the US, the US has several reporting obligations that gather similar information (e.g., reporting obligations under IRC § 6038A (Form 5472), and transfer pricing documentation under IRC §6662(e)/(h)).

### Country-by-Country reporting

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<th>Country</th>
<th>Status</th>
<th>For Fiscal years commencing from</th>
<th>Voluntary filing</th>
<th>MCAA signatory</th>
<th>CAA with U.S.</th>
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