Are you ready for your close-up?

How a new era of tax transparency is being woven together
This report provides a non-exhaustive update on transparency and disclosure requirements. The volume, speed and complexity of new developments continue to be high, and this document has been prepared for general informational purposes only. It is not intended to be relied upon as accounting, tax or other professional advice. Please refer to your advisors for specific advice.
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Multinational businesses face a multitude of different transparency and data disclosure requirements as the international tax environment adapts to 21st century ways of doing business. Among other things, businesses face: new transfer pricing documentation requirements; demands to publicly account for their tax and business activities on a country-by-country basis; and pressure in countries like the UK to disclose more information about their overall tax strategy.

This report provides a snapshot of some of these new demands and offers to executives who have the responsibility of keeping business compliant some insights on the current and potential future trajectories of the debate.

Where we have come from

In the past, the public typically became aware of businesses’ interactions and controversies with tax authorities only if those disputes ended up in court, or where a tax footnote was made in a public securities filing. More recently, the general public has become more acutely and intensely aware of businesses’ tax affairs. This dynamic not only affects companies’ relationships with the tax authorities, it also has broad ramifications for companies’ public profile, relationships with consumers and potentially their brand, reputation and profitability.

Our early 2015 publication, A new mountain to climb, described how, for many tax professionals, reacting to the “fair share of tax” debate as experienced in headlines, online, in legislative hearings and in legislation itself has been an unfamiliar and frequently challenging experience. We also argued that a solid grounding in transparency readiness – in terms of both systems readiness and data integrity – can help businesses meet new transparency and disclosure obligations with less disruption to ongoing business activity. Businesses can also leverage that grounding to develop appropriate communication tools, if desired, to help mitigate reputation risk. Such readiness, we concluded, can help companies to communicate more effectively about their tax profile to both internal and external stakeholders.

An evolving debate

Those arguments remain valid today. In the relatively few months since our report, though, the pace of change of the transparency debate has not only quickened but also changed direction.

For example, some stakeholders are demanding that information originally intended to be kept confidential between taxpayer and tax authority should be made public. Many national governments have either launched new local disclosure and transparency initiatives outside the scope of multilateral discussions, or signaling that the implementation of such multilateral recommendations (such as Action 13 of the G20 and Organisation for Economic Co-operation and Development’s base erosion and profit shifting [BEPS] project) may occur in an inconsistent manner. And in at least one country, we are seeing governments demand that businesses disclose not only tax and financial data but also overall approaches to tax strategy, tax planning and tax risk, the relationship the company wishes to have with the taxing authority, and whether the company has an effective tax rate (ETR) target (and if so, what it is, and what measures the business is taking to reach or sustain this target ETR). Furthermore, the European Commission has issued a consultation on whether to go further than the BEPS proposals in relation to Action 13.
These changes in trajectory do not bode well for companies that wish for certainty, clarity and consistency from tax regimes. Instead, these changes point to an increased compliance burden, higher costs and resource needs and the possibility of future controversy and disputes, as companies struggle to meet diverse and complex reporting demands.

**Why transparency?**

Tax authorities around the world are stressing the need for more — and more readily accessible — information from companies in order to get a clearer picture of how their profits are taxed globally, where they locate their intangible assets and whether their business model is backed by sufficient amount of substance, including having an appropriate number of people in the right roles on the ground in low-tax jurisdictions.

But a complete picture of a company’s tax footprint is arguably the sum of many different parts. To achieve a full and accurate picture, widespread aggregation of a number of different data sources is being coupled with a new generation of data analytics platforms that allow tax authorities to more accurately (and more quickly) identify compliance breaches, both actual and potential. This early identification, in turn, drives earlier compliance interventions. It also helps tax authorities pre-emptively urge compliance from taxpayer segments that they believe are most at risk of using particular arrangements or techniques.

Gaining more visibility of a business’s tax footprint (as well as overall tax strategy) will also allow more tax authorities to give taxpayers specific risk “ratings.” By segmenting taxpayers according to their overall level of perceived risk, tax authorities will be able to apply their limited resources in a more targeted manner.

**Assessing recent developments**

There have been a number of key developments recently.

At the heart of new transparency developments is Action 13 of the base erosion and profit shifting (BEPS) project of the G20 and Organisation for Economic Co-operation and Development (OECD). Here (as we explain on page 9) the OECD in June 2015 issued model legislation that countries can use to implement country-by-country (CbC) reporting requirements and model competent authority agreements that countries can adopt to facilitate implementation of information exchange. In essence, companies now have everything they need to start preparing to submit data covering the 2016 fiscal year, which is to be filed by 12 months after the end of such fiscal year.

Likewise, the potential content of Action 12 of the BEPS project, covering Mandatory Disclosure, has become clearer as we pass through 2015. With a March 2015 discussion draft focusing in particular on international tax schemes (which are viewed as an area of special concern and are the primary focus of the BEPS project), the business community expressed several common concerns at a subsequent OECD public consultation.
First, business participants stated that the proposed rules lack clarity. Subjective rules would create uncertainties and, with substantial penalties proposed, any failure with respect to compliance with such rules would be very costly. Second, business participants also stressed that transactions subject to the disclosure rules must not be assumed to be per se abusive. Business participants also pointed out that the concept of “cross-border outcomes” should be narrowly defined, to cover transactions with only material tax consequences. They noted that overly broad disclosure would make risk identification more difficult, especially for developing countries.

Actions 12 and 13 were joined in March 2015 by the European Commission’s Tax Transparency Package, one of two key tax projects within the Commission’s 2015 Work Program. A key element of the Tax Transparency Package is a proposal to introduce quarterly, automatic exchange of information between EU Member States regarding their cross-border tax rulings, including Advance Pricing Arrangements (APAs), while a second element also calls for a one-off exchange of tax rulings made within the last 10 years, where such rulings remain active at the point the revised Directive is adopted. This period was reduced to five years when a political agreement was reached in the Economic and Financial Affairs Council of the European Union (ECOFIN) on 6 October 2015. The new rules are required to be implemented no later than 1 January 2017.

Much discussion continues on the scope and timing of this package of measures. In early June 2015, the Presidency of the European Union Council (Latvia) published a report that sets out the current state of play, as well as a number of open issues and questions. The questions focus on the scope and timing of the package, with many Member States asking for more time than the 1 January 2016 deadline to transpose the measures into national law. As noted below, much debate continues to evolve in regard to this initiative.

The national dimension

These multilateral developments have been accompanied by a barrage of national developments in recent months.

- New transfer pricing documentation requirements have been proposed in Ecuador, Greece, Poland and Singapore, among other countries, while companies operating in France have been busy responding to stringent, earlier announced changes.
- Germany and the Netherlands have signed a Memorandum of Understanding regarding the spontaneous exchange of information with respect to tax rulings, pre-empting similar potential requirements at the EU level.
- Argentina has now made e-invoicing mandatory, providing more data for the tax authority to analyze.
- The Brazilian government has announced a provisional measure requiring companies to disclose information on certain tax-planning structures by means of an annual return.
- New Spanish CIT Regulations do not fully implement the model legislation wording of the OECD Implementation Package of Action 13 on CbC reporting, potentially representing a risk for the providers as information could be used for the purposes of a tax audit.

For all involved in cross-border tax, it is a challenge to merely keep on top of how many new requirements are being announced, let alone assess how the business must adapt systems to produce and analyze the required data.

Public disclosure calls gain steam

One of the biggest shifts in the transparency debate centers upon whether tax transparency information should be made available to the general public. In July 2015, for example, the European Parliament proposed changes to the EU accounting directive and transparency directive that would require large groups and public interest entities to include country-by-country information in the notes to their financial statements, including turnover, number of employees, value of assets, sales and purchases, profit or loss before tax, and tax on profit or loss. Issuers of securities on a regulated market would be required to publish similar information. Also included in the proposal are suggestions for changes to those directives that would require that information regarding tax rulings to also be disclosed, providing a breakdown by country of where a group has subsidiaries, which would be included in financial statements.

More countries are also calling for greater executive management, board and audit committee involvement on tax issues. The United Kingdom has been particularly active in this area, with proposals that would require large businesses to disclose their tax strategy, as we describe on page 63. While almost two-thirds of Financial Times Stock Exchange (FTSE) 100 businesses now voluntarily disclose tax information such as tax policies, tax principles and tax payment information, the proposed mandatory disclosure would cover more than 2,000 businesses.

A key provision of the UK proposals would require large businesses to publish (and report to HMRC that they have published) their tax strategy on an annual basis, for the period covered by the business’s annual report or accounts. It has been proposed that the strategy should be the responsibility of an executive member of the board, and should cover the business’s attitude to tax risk, its appetite for tax planning, and its approach to its relationship with HMRC.

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It is clear the tax profession has entered a new era of heightened transparency. As with any change, the journey may not be entirely comfortable.

This information should also cover whether the UK group has a target effective tax rate (ETR) and, if so, identify what it is and disclose what measures the business is taking to reach or sustain this target ETR. These proposals, which are subject to change, join others in the tax corporate governance area from Australia and Spain.

While demands for tax transparency tend to be driven by local market dynamics, it is reasonable to expect this interest from the United Kingdom to be picked up and replicated among other countries; the increase in collaboration between nations on both tax policies and tax administration that we have seen since the global financial crisis distinctly supports that possibility.

Living in the “new normal”

It is clear the tax profession has entered a new era of heightened transparency. As with any change, the journey may not be entirely comfortable.

The inconsistency between countries in terms of defining and adopting new requirements will be one particular challenge, with countries either adding on to the OECD CbC reporting recommendations or leaving off parts of the model legislation.

Systems readiness will be another challenge, with many companies now working hard to rationalize the number of ERP systems they have to access, as well as taking the opportunity to remediate record-to-report processes where weaknesses have been identified. Here also, some national requirements may require data to be audited prior to submission to the authorities, creating an additional cost and compliance burden.

And finally, some companies may find that the data they are disclosing to the authorities may contain anomalies or require additional explanation (and documentation) when viewed through the tax authority lens.

These key points aside, the seemingly simple task of keeping track of the multitude of changes will be an integral part of any company’s response strategy. In this regard, as Hunter S. Thompson once wrote, “A man who procrastinates in his choosing will inevitably have his choice made for him by circumstance.”

We hope you find this report to be useful. While it does not provide an exhaustive list of the transparency demands being proposed around the world, it highlights some key developments, providing insight into the patchwork quilt of requirements that continues to be woven as the transparency debate continues.

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BEPS Action 12 on mandatory disclosure regimes: one to watch closely

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Of the entire spectrum of transparency and disclosure requirements – in which is included country-by-country reporting, transfer pricing Master and Local Files, other transfer pricing documentation obligations and new requirements to submit electronic invoices – one development has arguably received less attention than it perhaps merits.

That development is BEPS Action 12 on Disclosure of aggressive tax planning arrangements. This action was one of the last to see a discussion draft issued (31 March 2015) and has also had a relatively short public discussion period (just 30 days).

As the subsequent public consultation in Paris on 11 May 2015 illustrates, Action 12 is one of the key areas of uncertainty and lack of current clarity in the BEPS project. This is unfortunate; if the experiences of taxpayers in the United States in relation to 2010’s introduction of the Schedule UTP (Form 1120) upon which Uncertain Tax Positions must be documented is anything to go by, the OECD, national governments and taxpayers themselves could gain much by making sure that potential concerns are being sufficiently considered or addressed rather than later.

I was surprised that the June 2015 Business and Industry Advisory Committee (BIAC) position paper1 made no reference to Action 12. I remain surprised today at how seldom the topic of Action 12 comes up in conversation. This may have been due to how little clarity there was on final outcomes. But I also hope that it is not due to a case of “BEPS fatigue” and that, upon implementation, we end up with something that not only causes an unnecessarily high compliance burden but also interacts in a negative way with other BEPS transparency and disclosure requirements.

With those thoughts fresh in our minds, what’s at the heart of Action 12?

Where we are today

While it is tempting to say that disclosure of tax planning arrangements is nothing new, the opposite is in fact true, and almost exclusively, disclosure of these types has been required only after the global financial crisis. In the United States, Uncertain Tax Positions were first required to be reported in 2010.2 In Australia, taxpayers were required to lodge a schedule with their Income Tax Return (ITR) in 2012, while in Brazil, new provisional measure (MP 685) created a requirement for companies to mandatorily disclose certain tax planning structures as recently as July 2015.3 Perhaps an outlier in this area, the United Kingdom’s tax administration has operated the Disclosure of Tax Avoidance Schemes (DOTAS) program since 2004.4

The OECD’s discussion draft, issued in March 2015, was the first step toward a final recommendations paper, which was issued ahead of the G20 Finance Ministers meeting in October. While not attempting to define exactly what a leading practice mandatory disclosure scheme should look like for a given country, the discussion draft instead set out a series of recommendations about the design of mandatory disclosure regimes, intending to allow maximum consistency between countries while also being sensitive to local needs and to compliance costs.

The final Action 12 Report closely follows the discussion draft on Action 12 issued by the OECD in March, but also includes a discussion of information sharing developments, and the potential sharing of information received under mandatory disclosures, that was not included in the discussion draft. Moreover, the Action 12 Report explicitly states that countries are free to choose whether or not to implement a mandatory disclosure regime. Unlike several other BEPS Actions, the recommendations set out in the Action 12 Report do not represent minimum standards. Rather, in the

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2 Since then, the scope of Schedule UTP has broadened considerably: the original asset threshold for filing dropped from US$100m in 2010 to US$50m in the 2012 tax year and to US$10m for 2014.
3 See page 31 for fuller information.
4 See page 63 for fuller information.
Explanatory Statement accompanying the release of the final reports, the OECD describes the recommendations in the Action 12 Report as “guidance based on best practices for countries which seek to strengthen their domestic legislation relating to mandatory disclosure by taxpayers of aggressive or abusive transactions, arrangements, or structures.”

The Action 12 Report begins with an overview of key features of a mandatory disclosure regime and its interaction with other disclosure rules and compliance tools. It sets out options for the modular design of a mandatory disclosure regime. It includes a discussion of international tax schemes in particular and how these could be covered by a mandatory disclosure regime. Finally, it concludes with a brief discussion of information sharing that was not included in the discussion draft.

**Mandatory disclosure recommendations**

The Action 12 Report considers the mandatory disclosure regimes that have been implemented in various countries to identify and evaluate design features that are commonly used. The United Kingdom's Disclosure of Tax Avoidance Schemes rules are a particular focus of attention because they have been in place since 2004 and are perceived to have had considerable success in reducing aggressive tax avoidance. Other forms of disclosure, such as tax rulings, reporting obligations in tax returns and voluntary disclosure rules are also considered. The Action 12 Report includes comparisons of other types of disclosure regime already in existence. It concludes that mandatory disclosure is most effective for accomplishing the objectives of obtaining information early, allowing the promoters and users of aggressive tax arrangements to be identified and deterring the use of such arrangements.

The existing mandatory disclosure regimes considered in the Action 12 Report are either “transaction-based” or “promoter-based.” The former regime requires tax authorities to identify transactions that taxpayers must report when they enter into them. “Promoter-based” regimes place the onus on promoters to disclose arrangements that display prescribed hallmarks. The design recommendations set forth in the Action 12 Report draw on elements from both kinds of regimes.

**Who has to report**

The Action 12 Report states that countries will need to choose whether they place the onus for reporting primarily on promoters or whether to implement dual obligations for reporting by both promoters and taxpayers. However, in the case where promoters have the primary disclosure obligation, it is recommended that this obligation revert to the taxpayer where the promoter is outside the jurisdiction or asserts legal privilege or where the arrangement is developed by the taxpayer alone (i.e., there is no promoter).

Where an arrangement is disclosed by a promoter only, the Action 12 Report recommends that the promoter be required to prepare client lists and that there be a scheme reference number system. These client lists and reference numbers also are viewed as useful tools even when taxpayers are subject to their own disclosure requirement, although the Action 12 Report notes that these tools may not be as essential where a jurisdiction has implemented a dual-reporting obligation for disclosure.

Countries are free to choose their own definition of promoter or adviser, although the Action 12 Report provides examples of definitions from existing legislation that it recommends countries use as a basis for their own definitions. For example, a “promoter” might be defined as a person that is responsible for the design, marketing, organization or management of a scheme, and an “adviser” as one who provides assistance or advice with respect to creating, developing, planning, organizing or implementing the transaction. The Action 12 Report includes a further note, not included in the discussion draft, that input from relevant domestic stakeholders will be important in establishing the appropriate definition of promoter for a particular jurisdiction.

**Threshold conditions**

Mandatory disclosure regimes often have a threshold condition. For example, this might be a test of whether obtaining a tax advantage is a main benefit of the arrangement. Alternatively, a de minimis filter can be used (e.g., based on transaction size). The Action 12 Report acknowledges that threshold conditions can be appropriate because they help keep the number of disclosures to a manageable level. However, the Action 12 Report indicates that a de minimis filter would be unnecessary in combination with a main benefit test, because the regime would already be targeting only those schemes designed to generate a tax benefit. However, the Action 12 Report indicates that it may be appropriate to use a main benefit test as a pre-condition, with de minimis filters attached to specific hallmarks, so as to ease the administrative burden.
Hallmarks

In existing disclosure regimes, disclosure is often triggered by an arrangement that includes certain hallmark characteristics. The Action 12 Report recommends that the existence of a single hallmark in respect of a scheme should be sufficient to give rise to a disclosure obligation.

Hallmarks can either be general or specific, and the Action 12 Report recommends that each country’s hallmarks should include a mixture of both types. General hallmarks should include a promoter’s desire to keep the arrangement confidential or the requirement of a contingent or premium fee. The Action 12 Report indicates that a country may also want to adopt additional generic hallmarks such as one applying to standardized tax products.

In addition, the Action 12 Report recommends that countries use specific hallmarks designed for their local circumstances. Examples of specific hallmarks include leasing transactions, transactions similar to those included on a black list, those involving use of losses or income conversion schemes or transactions with counterparties in low tax jurisdictions. Individual countries are left to design the specific hallmarks most appropriate to their local circumstances and may attach a de minimis filter to individual specific hallmarks.

Countries may choose to adopt a hypothetical approach or purely factual objective tests when determining their generic and specific hallmarks. Unlike in the discussion draft, the Action 12 Report provides examples of factors relevant to the hypothetical application of the confidentiality and premium fee hallmarks. Under a hypothetical test, the confidentiality hallmark would be met if a scheme were sufficiently new and innovative that the designer of the scheme would have required the details of the scheme to remain confidential irrespective of the existence of actual terms of confidentiality.

Timeframe for disclosure

The Action 12 Report recommends that where the promoter has the obligation to disclose, the timeframe for disclosure should be linked to the availability of the arrangement to users. Note that this timeframe could vary from an arrangement being available for implementation (when a fully-designed proposal has been communicated to a client), to a firm marketing approach being made (as in the United Kingdom, which could be earlier in the process), to an advisor being appointed a “material advisor” (as in the United States). Where there is a disclosure obligation on taxpayers, the Action 12 Report recommends that the timing of disclosure be linked to implementation of the arrangement. In both cases, the Action 12 Report notes the benefits of short timeframes for disclosure.

Penalties

According to the Action 12 Report, mandatory disclosure regimes should be enforced through financial penalties for non-compliance. The Action 12 Report notes that countries may also implement other types of penalties (including non-monetary penalties). In addition, the Action 12 Report recommends that domestic law be explicit about the consequences of reporting under a disclosure regime (e.g., disclosure does not mean that the tax administration agrees with the proposed tax consequences of the arrangement).

Procedural matters

The Action 12 Report indicates that tax administrations will need to specify the information that must be disclosed. Furthermore, mandatory disclosure regimes will need to be supported by powers that allow the tax administration to inquire into the reasons for a failure to disclose and the identity of promoters and intermediaries and to request follow-up information. The Action 12 Report recommends that tax administrations set up a small unit focused on risk assessment and coordination of action with respect to the disclosures it receives.

International tax schemes

The Action 12 Report acknowledges that cross-border transactions raise particular issues for disclosure regimes because it may not always be clear in one jurisdiction whether a tax advantage has been obtained in another jurisdiction. Therefore, an alternative approach is recommended for the design of a disclosure regime for “international tax schemes.”

The Action 12 Report recommends that threshold conditions, such as the main benefit test, should not apply to arrangements with cross-border outcomes. This is because the recommended hallmarks would target only arrangements of particular concern to the tax administration. Special hallmarks should be developed for cross-border outcomes. These hallmarks should focus on BEPS-related risks posed by cross-border arrangements and should be broad enough to capture different and innovative planning techniques. These hallmarks should be both specific (in that they identify particular cross-border tax outcomes which raise concerns for the reporting jurisdiction) and generic (in that they are defined by reference to their overall tax effects and are capable of capturing any arrangement designed to produce those effects). In contrast to the discussion draft, so as to avoid unnecessary disclosures, the Action 12 Report also states that each tax administration should provide a specific list of tax regimes and outcomes that are not required to be disclosed. It further indicates that as part of the future work on monitoring the outputs from the BEPS project, countries may consider developing additional hallmarks, including model hallmarks to minimize overlapping disclosure obligations with respect to cross-border transactions.
The Action 12 Report recommends that the definition of reportable scheme in the international context should be broad and should include any arrangement that incorporates a material transaction with a domestic taxpayer and that gives rise to a “cross-border outcome.” In this regard, an arrangement should be reportable only if it involves a transaction that has a material tax impact on the reporting jurisdiction. The Action 12 Report proposes that transactions should be reportable in a specific country only in circumstances where a domestic taxpayer or their adviser could reasonably have been expected to be aware of the cross-border outcome of the arrangement. In contrast, the discussion draft would have required disclosure where the cross-border outcome arises within the taxpayer’s controlled group or where the taxpayer was a party to the arrangement.

The Action 12 Report suggests that a domestic taxpayer or its advisor be required to disclose any material information that is within its knowledge, possession or control. It further recommends imposing an obligation on a domestic taxpayer, at the time it enters into a material intra-group transaction, to make reasonable inquiries as to whether the arrangement that gave rise to the transaction incorporates a cross-border outcome (as identified under any hallmark) and to notify the tax administration if the group member has not provided relevant information, the information is inadequate or incomplete or there is unreasonable delay in providing the information in respect of these inquiries. The discussion draft did not propose this obligation. Similar to domestic schemes, the Action 12 Report indicates that countries should choose whether the disclosure obligation for international schemes should be imposed on the taxpayer or promoter or both.

The Action 12 Report includes an example involving an intra-group hybrid mismatch arrangement—adapted from an example included in the final report on Action 2—to illustrate how the recommendations regarding disclosure of international tax schemes could apply. The discussion draft had also included two additional examples (involving notional interest deduction and use of a client list) that are not included in the Action 12 Report.

Information sharing
The Action 12 Report concludes with a brief discussion of information sharing developments generally and under the BEPS Action Plan. It includes cross-references to the Action 5 requirement of compulsory spontaneous exchange of information on rulings and the Action 13 requirement of a three-tier approach to transfer pricing documentation (including a master file, a local file and a country-by-country report). Further, the Action 12 Report provides an update on the Joint International Tax Shelter Information and Collaboration (JITSIC) Network. It notes that the information to be spontaneously exchanged within the JITSIC Network could include information obtained under a mandatory disclosure regime and that the JITSIC Network provides a forum for cooperation among tax administrations with respect to emerging issues that are identified through such disclosure and exchange.

Implications
The OECD’s final recommendations under Action 12 are in the form of best practices for countries to consider if they are interested in developing a mandatory disclosure regime. Companies should stay informed about any developments with respect to mandatory disclosure in the countries where they operate or invest. In addition to timing and effective dates, jurisdictions considering implementation of a mandatory disclosure regime may vary other key factors, including:

- Whether to place the onus for reporting on promoters or to employ a dual-reporting obligation that includes reporting by the taxpayer as well;
- The type of threshold condition (de minimis level or main benefit test) for reporting; and
- Whether to include additional general hallmarks and which specific hallmarks to include.
At the heart of the debate: Action 13 of the OECD’s BEPS project

Despite the occasional twist and turn during discussions on its ultimate scope, granularity and submission process, Action 13 of the BEPS project is widely viewed as the Action item around which the broadest and quickest government consensus was reached. That is not surprising, given its exclusive focus on transparency and the fact that it does not (directly, at least) impact the overall taxes paid by an enterprise in any one location.

Where we have come from

Key targets of the wider debate on global taxation have been the desire of governments – first, to gain more information in relation to cross-border transactions, and second, to increase overall levels of transparency around the agreements that other governments have come to with large companies. Alongside action 13, in the Master File requirements, this latter issue is specifically being addressed within BEPS Action 5 and also by the European Commission.

In the first instance, tax authorities around the world have stressed the need for more, and more readily accessible, information from companies in order to get a clearer picture of how their profits are taxed globally. Tax authorities now want to know more about the whole supply chain, not just the next step. They also want to know how much tax a company is paying in other jurisdictions, to allow them to gauge whether the company is paying enough in their jurisdiction. The two key elements of Action 13 – Country-by-Country (CbC) reporting and the Transfer Pricing Master File/Local File reporting requirements – are the tangible outcomes.

Where do things stand today?

Without doubt, much of the focus of media headlines and, perhaps, corporate groups has thus far been on the CbCR element of Action 13. New transfer pricing documentation requirements should certainly not be overlooked though; this is highly apparent from the writings of my colleagues in this publication, who point out that many countries are already adopting new or amended transfer pricing documentation requirements, with little consistency among their national implementations.

Since early February of 2015, companies have had a much clearer picture of what must be filed, where, and when to file it. This is the result of the publication of an OECD document titled Action 13: Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting¹ (referred to hereafter as the company guidance) being issued, following the earlier report on Action 13, dated 16 September 2014, which takes the form of a revised chapter of the OECD Transfer Pricing Guidelines, setting forth a three-tier approach for transfer pricing documentation that includes a framework for the Master File and Local File and a template for Cbc reports.

This guidance has also been supplemented by a second document, titled Action 13: Country-by-Country Reporting Implementation Package² (referred to hereafter as the country guidance) in June 2015.

Although this second package is more targeted at countries themselves, including model legislation that countries can use to implement Cbc reporting requirements, and model competent authority agreements that can be adopted to facilitate information exchange between tax authorities with respect to the Cbc reports, it nonetheless provides additional information that is also of benefit and insight to companies.

The company guidance

The company guidance focuses primarily on implementation issues related to the CbC report and calls for the first CbC reports to be filed covering 2016 fiscal years (i.e., they would be filed in 2017). It further provides for CbC reports generally to be filed in the home country of a multinational corporation (MNC) group’s parent company and shared with other relevant countries under government information exchange mechanisms.

The guidance covers the following matters:

- The timing of preparation and filing of CbC reports
- The MNC groups required to file CbC reports
- The conditions for obtaining and use of the CbC reports by jurisdictions
- The framework for government-to-government mechanisms to exchange the CbC reports

While the company guidance relates primarily to the CbC report, it includes the recommendation that the Master File and Local File requirements be implemented through local country legislation or administrative procedures and that MNC groups file the Master File and Local File directly with the tax administrations in each relevant jurisdiction under the requirements of such administrations.

The company guidance further states that countries participating in the BEPS project agree that both confidentiality and consistent use of the framework for the content to be included in the Master File and Local File, as specified in the Action 13 Report, should be taken into account when incorporating these requirements under local law and procedures.

The OECD specifically acknowledges that the need for more effective dispute resolution may increase following adoption and implementation of the CbC reporting requirement and states that the work under Action 14 on improving dispute resolution should take that into account. In that regard, the BEPS position paper issued by the Business and Industry Advisory Committee (BIAC) to the OECD in June 2015\(^3\) states that “... an inability to make major progress on improving international dispute resolution under Action 14 would represent a failure of the process.”

"Many proposals and the interactions between the Action Items will create double taxation" before further calling for “progress to ensure widespread adoption of mandatory, binding arbitration, substantial improvements to MAP best practices, with effective peer reviews or monitoring to ensure adoption, and closer working and collaboration with the Forum on Tax Administration to foster the growth of Cooperative Compliance programs to address BEPS concerns and the use of alternative methods such as the use of a global dispute resolution forum (with mediation services)."

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It is the intention of the countries participating in the BEPS project to reconsider the appropriateness of this revenue threshold in connection with the planned 2020 review of implementation of the CbC reporting standard, which review also will include whether additional or different data should be required to be reported.

**Timing of preparation and filing of the CbC report**

The company guidance recommends that the first CbC report be required to be filed for, and contain information with respect to, an MNC group's first fiscal year beginning on or after 1 January 2016. For MNC groups with fiscal years ending on 31 December, the first CbC report would be required to be filed up to 12 months after. For MNC groups with other fiscal years, the first CbC report would be required to be filed in 2018, 12 months after the close of the first fiscal year beginning after 1 January 2016. The company guidance provides that the term “fiscal year” refers to the consolidated reporting period for financial statement purposes (and not to taxable years or to the financial reporting periods of individual subsidiaries).

The company guidance indicates that countries participating in the BEPS project agree that they will not require filing of CbC reports based on the new template for fiscal years beginning prior to 1 January 2016. The company guidance acknowledges that some jurisdictions may need time for domestic legislative changes.

**MNC groups required to file the CbC Report**

The company guidance recommends that all MNC groups be required to file the CbC report each year, subject to one exemption, which applies to MNC groups with annual consolidated group revenue in the immediately preceding fiscal year of less than €750 million (or a near equivalent amount in domestic currency). The company guidance states that the OECD believes this exemption will exclude approximately 85% to 90% of MNC groups from the CbC reporting requirement, but will require CbC reports from MNC groups controlling approximately 90% of corporate revenues.

The company guidance indicates that it is the intention of the countries participating in the BEPS project to reconsider the appropriateness of this revenue threshold in connection with the planned 2020 review of implementation of the CbC reporting standard, which review also will include whether additional or different data should be required to be reported. The company guidance indicates that no other exemption from filing the CbC report should be adopted. The company guidance states that, in particular, there should be no special industry exemptions, no general exemption for investment funds, and no exemption for non-corporate entities or nonpublic corporate entities.

The company guidance notes that the countries participating in the BEPS project agree that MNC groups with income derived from international transportation or transportation in inland waterways that is covered by treaty provisions which are specific to such income and under which taxing rights on such income are allocated exclusively to one jurisdiction should include the information required by the CbC template with respect to such income only with respect to the jurisdiction to which such taxing rights are allocated.

**Necessary conditions for obtaining and using the CbC report**

The company guidance states that countries participating in the BEPS project agree to the following conditions related to confidentiality, consistency and appropriate use. With respect to confidentiality, jurisdictions should provide and enforce legal protections of the confidentiality of the reported information. Such protection would preserve confidentiality to an extent at least equivalent to the protections that would apply if such information were delivered to the jurisdiction under the provisions of the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters, a tax information exchange agreement, or a tax treaty that meets the internationally agreed standard of information upon request. These protections include limitation on the use of information and rules on persons to whom the information may be disclosed.

Here, the OECD’s February comments have been superseded by a vigorous debate within the European Parliament; as Klaus von Brocke sets out on page 15 of this report, the European Parliament has called for CbC reporting information to be publicly disclosed (by companies themselves), setting up a difficult period of negotiation for the European Commission. On this topic, Pascal Saint-Amans, Director of the OECD’s Centre for Tax Policy and Administration, said in an interview with EY on 25 August 2015 that “CbC reporting has a very high profile in the [BEPS] work that has been carried out so far, and there is consensus on the solution that has been proposed, which provides for a mechanism to protect that confidentiality, as it reflects that consensus. Regional groupings or individual countries can define otherwise, of course; they are free to set their own policies. It’s their business to move in the direction they would like to take. That said, given that some in the US have voiced doubt on these policies, even though that may not represent US policy and even when protecting confidentiality, things may not happen in the US in the same way as elsewhere. So you can expect that some other groupings could say that if it’s not going to happen in accordance with what we have agreed, then we may need to move to some harsher measures, such as public country-by-country reporting.”
With respect to consistency, jurisdictions should use their “best efforts” to adopt a legal requirement that the ultimate parent entities of MNC groups that are resident there prepare and file the CbC report (unless exempted under the revenue threshold). In addition, jurisdictions should use the standard template as set forth in the Action 13 Report (and to be included in the OECD Transfer Pricing Guidelines).

With respect to appropriate use, jurisdictions should use the information in the CbC report only as specified in the Action 13 Report. In particular, jurisdictions should commit to use the CbC report for assessing high-level transfer pricing risk and may also use it for assessing other BEPS-related risks.

Jurisdictions should not propose adjustments on the basis of an income allocation formula using data in the CbC report. Jurisdictions further commit that if such adjustments are made by the local tax administration, the jurisdiction’s competent authority will be required to promptly concede the adjustment in any relevant competent authority proceeding. However, jurisdictions would not be prevented from using the CbC report data as a basis for making further inquiries into the MNC’s transfer pricing arrangements and other tax matters during a tax audit.

In this regard, the company guidance notes that the mutual agreement procedure (MAP) will be available when government exchange of the CbC reports is based on tax treaties. Where the government exchange is under an agreement that does not contain MAP provisions, countries should commit to developing a mechanism for competent authority procedures for discussions aimed at resolving cases of “undesirable economic outcomes.”

Framework for government-to-government mechanisms to exchange CbC reports
The company guidance describes a framework under which jurisdictions should require, in a timely manner, the filing of CbC reports by the ultimate parent entities of MNC groups resident there and exchange this information on an automatic basis with the jurisdictions in which the MNC groups operate and which fulfill the conditions discussed above. The guidance indicates that if a jurisdiction fails to provide information to another jurisdiction, a secondary mechanism would be accepted as appropriate, through local filing or by moving the obligation for requiring the filing of CbC reports and automatically exchanging such information to the next tier parent country.

June’s package of country guidance
The country guidance issued on 8 June 2015 includes a brief narrative introduction and contains model legislation related to CbC reporting and three versions of model competent authority agreements on the exchange of CbC reports. The introduction notes that an intended next step is development of an Extensible Markup Language (XML) schema and a related user guide to accommodate the electronic exchange of CbC reports between countries.

The model legislation is organized into eight articles: (1) Definitions, (2) Filing Obligation, (3) Notification, (4) CbC Report, (5) Time for Filing, (6) Use and Confidentiality of CbC Report Information, (7) Penalties and (8) Effective Date. The introduction to the country guidance notes that the model legislation does not take into account the constitutional law, legal system, or structure and wording of the tax legislation of any particular jurisdiction, indicating that jurisdictions where changes to current legislation are required will be able to adapt the model to their own legal systems.

In that regard, the early-adopting countries will be studied for signs of how implementation may be approached. Here, the signs are not overwhelmingly positive. Spain, for example, has chosen to leave out the clause on the use and confidentiality of the information included in the CbC report. While the lack of such reference should not represent any risk (since these principles should be safeguarded under current confidentiality rules established in the Spanish General Tax Law and International Treaties), it will be interesting to see whether other countries either omit parts of the OECD’s Implementation Package or add their own specific clauses to it.

Article 1 of the model legislation provides definitions for terms used in the model legislation. These definitions reflect some useful elaboration of the definitional information in the template CbC report that was included in the September Action 13 Report. A full description of the eight articles listed above is available in EY’s Global Tax Alert of 23 June 2015 titled OECD issues implementation package for country-by-country reporting under BEPS Action 13.4

At a May 2015 EY client event in Switzerland, 77% of respondents to a poll said it was either somewhat or very likely that they would need to hire additional people resources to meet the Action 13 requirements; similarly, 83% said it was somewhat or very likely that they would need to implement systems changes.

How are companies responding?

No two companies are the same. A €750 million company and a €7.5 billion company most likely have different operating models and global footprints; a financial services company will have a very different ERP setup than an oil and gas company. And while some companies may have reached the nirvana of a single, global ERP system, many more are still struggling to consolidate multiple sub-local, local and regional systems into a single platform.

Indeed, some companies will actually use the Action 13 requirements as a catalyst, embarking on wider transformation of financial systems, including radical consolidation of the number of available ERP systems. Others may take a similarly long-term view, but choose to tackle the new requirements on a phased basis, implementing manual collection systems now, with a view to greater automation in future years.

At a May 2015 EY client event in Switzerland, 77% of respondents to a poll said it was either somewhat or very likely that they would need to hire additional people resources to meet the Action 13 requirements; similarly, 83% said it was somewhat or very likely that they would need to implement systems changes. Sixty-seven percent, meanwhile, report already running pilot schemes to test their ability to meet the new obligations.

But whatever the approach taken, one recurrent theme is that we see many companies bifurcate their approaches, clearly delineating between making sure they can physically retrieve the numbers from their systems and then analyzing the data to ensure that data points will not be misunderstood or misconstrued, not to mention ensuring that any process weaknesses are identified and then remediated.

The questions to ask once you have the data are many, and are not limited solely to their application against Action 13 requirements. Whether a disclosure or transparency request derives from existing national legislation or multilateral recommendation, the transparency concept should be seen as a spider’s web – pull on one strand, and another moves elsewhere. This is particularly true as tax administrations collaborate with one another in a more robust fashion than before. A colleague, Matthew Mealey, who leads EY’s International Tax Services Network in Europe, the Middle East, India and Africa, commented on this: “Countries are changing the way they exchange knowledge. Today, they are carrying out more and more knowledge exchange in relation to what structures they see being used and how they work, so it’s more than just the “traditional” information exchange of hard data. The knowledge exchange might encompass how they most successfully audit certain structures, how they have successfully identified permanent establishments (PEs), and so on. As well as sharing experience around inquiry practices, there is certainly information exchange on particular transactions. For business, management of the audit and inquiry defense needs to be joined up across countries because the countries themselves are sharing more knowledge. We have seen examples where a company gets a tax raid or a very aggressive audit in one country. In some countries, undeclared PEs can create the possibility of criminal sanctions. Companies might be glad to settle a very aggressive audit in a relatively small market. Suppose they accept a PE and accept a profit attribution at 5% of sales but that settlement might create a very unhelpful benchmark in another country where there are much higher sales and possibly less functionality. I think the generic point of all that is that this is a major, major policy issue for those countries, and they are tackling it in a concerted, systematic, and joined-up way. Companies need to be aware of that and reflect it in their response strategy.”

As might be expected, there are many questions to ask oneself in regard to the data collected. Page 73 of this publication sets out a number of key examples.

While every company may well be different, a common framework can be adopted, though. Again, this framework can be adapted to fit a multitude of different transparency and disclosure requirements and is covered in the conclusion of this report.
Controversy will likely be driven by many differing factors – data will be misunderstood, countries will battle to carve up taxes that each feels rightly justified to, and in some cases, they may even be right. But one theme overarches the whole process – there will be a multitude of questions, queries, inquiries and discussions necessary, and these will all take up valuable time and focus.

What might the future hold?

As noted in the BIAC paper, many commentators expect more controversy to arise as a result of the information shared under Action 13. This sentiment is certainly shared by EY’s clients, where 91% of poll respondents at the same event believed that the number of tax disputes would grow either somewhat or significantly in the coming three-year period.

Controversy will likely be driven by many differing factors – data will be misunderstood, and countries will battle to carve up taxes that each feels rightly justified to. But one theme overarches the whole process – there will be a multitude of questions, queries, inquiries and discussions necessary, and these will all take up valuable time and focus. On this point, we have not heard much from the OECD; the focus has been on the potential compliance burden of filing and submitting the report, and not necessarily with dealing with the fallout thereafter!

Personally, I see the future in five very clear phases:

• **2016:** We will see the national implementation of CbC reporting requirements. In some cases, this will be tied to the annual legislative cycle and may therefore yield some early indications in the November 2015 to January 2016 time frame. Through 2016, companies will continue to refine the systems and data readiness, sharing leading practices among themselves, as well as further refining the data analytics tools that can provide a useful visual of an enterprises’ data.

• **2017:** We will see the first CbC reports submitted, and the first questions asked by tax administrators. We can reasonably expect that the leading tax administrations (such as the “E6” members, as outlined in the article on page 23) will be eager to exchange year 1 reports as soon as practicably possible.

• **2018:** I believe that sometime between the end of 2017 and over the course of 2018, we will see the first disputes arise. These will put further strain on already over-burdened dispute resolution processes. In this regard, it is very much hoped that BEPS Action 14 bears more fruit than it has done to date.

• **2019:** Two years into the process, I think we will see a rising debate among government and tax administration stakeholders in regard to what changes they would like to see present in the scheduled 2020 review of Action 13 outcomes. Here, I think it is entirely reasonable to expect the discussion around entity-level reporting to be revisited. EY asked Josephine Feehily, outgoing Chair of the Irish Revenue Commissioners and also outgoing chair of the OECD’s Forum on Tax Administration, for her views on this in late 2014: “Whether what they have received so far will whet administrations’ appetite for more will depend on the competence of the administration and their ability to leverage the data. But I think you are right to ask the question [of whether entity level reporting will be demanded], and I think that question will be asked when the time for review comes around.”

• **2020:** Companies will be into robust, seamless reporting processes – all ready for the overall discussion of what is required to be changed.

All things considered, Action 13 represents one of the most concrete outcomes of the whole debate on cross-border taxation. And today, the timelines are known, the format is set and the race has begun to meet the challenge. As Benjamin Franklin, one of the founding fathers of the United States said, “You may delay, but time will not.”

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While one could be forgiven for thinking that the OECD’s BEPS project was the biggest set of changes to the cross-border architecture we have seen for many generations, it would be a mistake to think that it is the only change impacting companies operating in Europe.

Some commentators have questioned whether the European Commission (the Commission) has become largely irrelevant in the tax avoidance/aggressive tax planning space, given all the BEPS work at the OECD and the recent history of the Commission launching ambitious tax initiatives only to see them stall when consensus could not be reached. In fact, the opposite may well be true – the EU may well become the early adopter of many of the elements in the BEPS space. The Commission, in many ways, is seeking to act on behalf of EU Member States and using its own momentum to forge many new proposals. But, like other Commission projects in earlier years, whether any of the proposals reach hard law status at the national level remains to be seen. Until that time, close monitoring and local engagement with national policymakers is the order of the day.

**March’s Tax Transparency Package proposals**

While foreshadowed in a December 2014 announcement, the 18 March 2015 Tax Transparency Package proposals kicked off a rapid chain of events that continues to unfold today.

Under the proposals, Member States would be required to automatically exchange information on their tax rulings, with the Commission proposing a strict timeline whereby every three months, all Member States would be obliged to report to all other Member States and the Commission on the cross-border tax rulings they have issued in that period. This report, sent via a secure email system, would contain a predefined, standard set of information. The recipient Member States also would have the right to request more detailed information on any of the rulings documented, where the information is relevant to the administration of the tax laws of the Member State. Each year, Member States would have to provide statistics to the Commission on the volume of information exchange on tax rulings.

On 6 October 2015, the Economic and Financial Affairs Council of the European Union (ECOFIN) reached a political agreement on the automatic exchange of information on the part of the package relating to the automatic exchange of tax rulings. Under the Directive, Member States will be required to exchange information automatically on advance cross-border tax rulings, as well as APAs (“push”). Member states receiving the information will be able to request further information where appropriate (“pull”). The European Commission will be able to develop a secure central directory, where the information exchanged would be stored. The directory will be accessible to all member states and, to the extent that it is required for monitoring the correct implementation of the directive, to the Commission. The Directive also considers confidentiality issues such as safeguarding the protection of taxpayers’ personal data as well as the protection of commercial interests.

The obligations stated above in relation to the exchange of information does not cover advance cross-border tax rulings which exclusively concern the tax affairs of one or more natural persons.
At the national level, the new rules will have to be applied from 1 January 2017. In the meantime, existing obligations to exchange information between member states will remain.

In principle, the Directive will be retroactive to 1 January 2012. However, concerning rulings issued before 1 January 2017, specific transition rules will apply:

- If advance cross-border rulings and APAs are issued, amended or renewed between 1 January 2012 and 31 December 2013, such communication shall take place under the condition that they are still valid on 1 January 2014.
- If advance cross-border rulings and APAs are issued, amended or renewed between 1 January 2014 and 31 December 2016, such communication shall take place irrespectively of whether they are still valid or not.
- Finally, Member States will have the possibility (not an obligation) to exclude from information exchange advance tax rulings and pricing arrangements issued to companies with an annual net turnover of less than €40 million at the group level, if such advance cross-border rulings and APAs were issued, amended or renewed before 1 April 2016. However, this exemption will not apply to companies conducting mainly financial or investment activities.

According to the press releases, both countries wish to be fully transparent where it concerns cross-border tax rulings made between tax authorities and businesses, where such a ruling may have an impact on the other country. The countries have therefore agreed to spontaneously exchange rulings, with the exchange of information taking place via the designated competent authorities of the tax authorities of both countries.

Under the agreement, signed by the Ministers of Finance of both countries, Germany and the Netherlands may exchange information with each other spontaneously, meaning that a prior request is no longer required. Both countries state that they will take an active role in this respect. The press releases also note that the MoU does not go so far as to require the countries to exchange information automatically. While the press releases note that the MoU is applicable to rulings granted from 1 January 2015 onward, no information was included on whether rulings concluded in 2014, but that come into force in 2015 or later, would be in scope. The press releases do note, however, that upon mutual agreement between the countries, information exchange may also cover rulings related to prior years. In this respect, it should be noted that the legislative language of existing Directive 2011/16/EU (the DAC) does already allow for spontaneous exchange.

The signing of the MoU applicable to rulings granted from 1 January 2015 onward demonstrates that Germany and the Netherlands wish to be viewed as front-runners among European nations in regard to the exchange of information relating to cross-border tax rulings, and the signing of the MoU is a clear statement of expectation that other countries should follow their lead.

In regard to the provisional start date of the exchange of new rulings under a revised DAC, as noted, many Member States have argued that at least 12 months would be required to transpose any new rules into national legislation. Therefore, the Presidency deemed it appropriate to bind the starting date of mandatory exchange of information (which was originally set to be 1 January 2016) with the transposition deadline, which would be 12 months from entry into force of the new amending Directive. It is therefore reasonable to expect that other countries will follow the lead of Germany and the Netherlands in signing bilateral agreements of this type.
European Parliament calls for expansion of CbC reporting to large groups, self-publication of CbC reporting and ATR data by multinational companies

While the scope and timing of the Tax Transparency Package remain under debate by the Member States, the pace of change of the transparency debate has not only quickened but also changed direction. On 8 July 2015, the European Parliament (EP) adopted a resolution containing a range of governance and tax transparency. In addition, and on the same date, the EP also adopted a resolution containing a range of additional tax recommendations that it hopes will be considered by the Commission in due course.

The overall scope of the CbC reporting requirements in the Accounting Directive would also be slightly expanded, requiring reporting companies to value their assets and the annual cost of maintaining them, as well as to provide data on sales and purchases, though neither of these sets of variables are defined in the amending directive.

Another key development is the suggestion for changes to be made to both the Accounting Directive and Transparency Directive introducing public disclosure of tax rulings, also organized on a country-by-country basis, covering both Member States and third countries. This obligation would be imposed on specific large undertakings, public-interest entities and security issuers exceeding two of the following thresholds over 500 employees, balance sheet total over €86 million and net turnover over €100 million. The report would be audited in compliance with EU auditing rules.

The amending directive

The amending directive put forth by the Commission originally suggested changes to two EU Directives: Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (the Shareholder Directive) and the Accounting Directive as regards certain elements of the corporate governance statement. The EP proposes additional changes to the Transparency Directive, requiring issuers of securities that are trading on a regulated market to provide similar (yet slightly less broad) CbC reporting information. During the next stage, the Council (representatives of the EU Member States' governments) will review the proposed amendments. Should the Council accept the amending directive (qualified majority and not unanimity required), the three EU directives will then be amended, with Member States required to transpose the changes into national law according to a timetable set out by the Commission.

The amending directive suggests the following changes:

- In the Shareholder Directive, an obligation is needed for the announcement of material related-party transactions of companies, accompanied by a report assessing whether such transactions have been executed on market terms, as well as an obligation that related-party transactions are approved by the shareholders or by the administrative or supervisory body of the companies.
- In the Accounting Directive, an obligation is needed for large undertakings and public-interest entities operating in any industry to report in the notes to the financial statements

Footnote:
2. Public-interest entities means undertakings within the scope of Article 1 which are:
   - Governed by the law of a Member State and whose transferable securities are admitted to trading on a regulated market of any Member State as defined by EU law
   - Credit institutions as defined by EU law
   - Insurance undertakings as defined by EU law
   - Designated by Member States as public-interest entities, for instance undertakings that are of significant public relevance because of the nature of their business, their size or the number of their employees
In the Transparency Directive, an obligation is needed for large undertakings operating in any industry to publicly disclose information regarding tax rulings, providing a breakdown by country (for both Member States and third countries) where the undertaking has subsidiaries. The Commission shall be empowered to set out, by means of a delegated act in accordance with Article 49, the format and content of publication. For the purposes of the Accounting Directive, a tax ruling is defined as advance interpretation or application of a legal provision for a cross-border situation or transaction of a company which may lead to a loss of tax in a Member State or tax savings for the company resulting from artificial intragroup transfers of profits. The information provided on tax rulings is to be audited in compliance with EU law auditing rules under Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts. It should be noted that the definition of ruling given in the amending directive is inconsistent with the one suggested to be incorporated in Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation under the recent Commission's proposal for a respective amending directive as part of the package of tax transparency announced on 18 March 2015. In essence, two new definitions of ruling are now under consideration in two different Directives, with those definitions different from one another.

In the Transparency Directive, an obligation is needed for security issuers (i.e., a legal entity governed by private or public law, including a State, whose securities are admitted to trading on a regulated market, the issuer being, in the case of depository receipts representing securities, the issuer of the securities represented) to publicly disclose each year on a country-by-country basis the following information: turnover; number of employees; profit or loss before tax; tax on profit or loss; and public subsidies received. This information shall be audited in compliance with EU law auditing rules under Directive 2006/43/EC and shall be published where possible as an annex to the annual financial statements or consolidated financial statements of the issuer.

In the Transparency Directive, an obligation is needed for security issuers to publicly disclose information regarding tax rulings, providing a breakdown by country of where the undertaking has subsidiaries. This information also will be required to be audited and published in annual or consolidated financial statements.

It is furthermore suggested that Member States implement any amended directive resulting from this process within 18 months of its entry into force.

The dual proposals to extend existing CbC reporting requirements to all multinational companies and to securities issuers under the Accounting Directive and the 2004/109/EC Transparency Directive are a significant development in the tax transparency debate and represent a growing demand by many countries for this information to be made public. It should be noted, however, that with the abovementioned tabled proposal to include the public disclosure of rulings, the Council has now to discuss two diverging draft directives on the same topic.

As noted on page 3 of this report, a political agreement on the exchange of tax rulings was reached in the Economic and Financial Affairs Council of the European Union (ECOFIN) was reached in early October 2015, with rulings from the preceding five year period to be exchanged from 1 January 2017 onwards.

TAXE committee’s report

The issue of whether taxpayer information should remain confidential between taxpayer and tax authority continues to be at the heart of the ongoing transparency debate.

On 20 July 2015, the European Parliament’s Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect (also known as the TAXE Committee) published a 36-page interim report3 (the Report) setting out its initial findings, conclusions and draft recommendations following its investigation into the tax ruling practices of EU Member States. The draft recommendations are extremely wide-ranging, going further than the examination of existing tax ruling practices and covering other issues such as CbC reporting, the regulation of tax advisers and BEPS issues generally.

The TAXE Committee was constituted on 26 February 2015, following a European Parliament decision on 12 February 2015. Since that time, the TAXE Committee has convened a number of meetings, during which it has heard input from EU Commissioners Vestager (Competition) and Moscovici (Economic and Financial Affairs, Taxation and Customs), OECD representatives, whistleblowers, investigative journalists, experts, academics, representatives of multinational companies (MNCs), professional associations, the largest accountancy companies (including my colleague, our Global Head of Tax Policy, Chris Sanger), trade unions, nongovernmental organizations and members of EU national parliament, as well as conducting a number of fact-finding missions both to EU Member States and to third countries.


A key development would be for existing CbC reporting requirements under Directive 2013/34/EU (the Accounting Directive) to be extended to all multinational companies, with companies required to self-publish a range of information within their financial statements (where possible). In addition, the amending directive proposes changes to EU Directive 2004/109/EC (the Transparency Directive), requiring securities issuers to also provide a form of CbC reporting.

CbC reporting information on a consolidated basis, including turnover; number of employees; value of assets and annual cost of maintaining those assets; sales and purchases; profit or loss before tax; tax on profit or loss; and public subsidies received. Parent companies will be obliged to provide a list of subsidiaries operating in each country.

Parent companies will be obliged to provide a list of subsidiaries operating in each country.

Are you ready for your close-up?
While this is not the TAXE Committee’s final report (which is due in November 2015), it does contain a number of views that will no doubt influence and inform the wider European debate on tax transparency.

The Report sets out a number of key findings from its fact-finding missions to five EU Member States and Switzerland, across which the TAXE Committee observed that a number of national tax measures have the potential to be considered as harmful tax practice. The Report sets out some relevant examples, which, it notes, should not be considered as an exhaustive list:

- Definitions of permanent establishment and tax residence, and relationship with economic substance (sometimes allowing taxation in the absence of economic substance or, conversely, no taxation of revenue stemming from real economic activity)
- Deduction of notional interests (enabling companies to deduct from their taxable income a fictitious interest calculated on the basis of their shareholders’ equity)
- Excess profit ruling practices (through which a company may obtain written confirmation from the tax administration that its taxable income does not include those profits that would not have been realized in a stand-alone situation)
- Unclear or uncoordinated transfer pricing provisions
- A number of preferential regimes, in particular in relation to intangibles (patent, knowledge or intellectual property boxes)
- Exemption of withholding tax on interest, dividends and royalties through bilateral tax treaties
- Differences in legal designations between Member States (hybrid entities or hybrid loans)
- In the case of Switzerland, special tax regimes at cantonal level for foreign controlled companies which are not granted to nationally controlled companies

On the basis of these conclusions, the Report calls upon the Member States and the EU institutions, which share the political responsibility for the current situation, to fully cooperate in order to eliminate mismatches – and refrain from creating further mismatches – between “tax systems and harmful tax measures which create the conditions for massive tax avoidance by MNCs and tax base erosion within the internal market.” To enable such cooperation, the Report further calls on the EU heads of state and government to make clear political commitments to taking urgent action to tackle the situation.

Report recommendations

Among a broad spectrum of recommendations that surpass transparency and the exchange of information, the TAXE Committee Report makes a series of recommendations. The first calls on the European Council to adopt, by the end of 2015, the legislative proposal (amending Directive 2011/16/EU) in relation to the mandatory automatic exchange of information in the field of taxation (i.e., the Directive supporting the Tax Transparency Package and, vis-à-vis, the exchange of ATRs and APAs). Second, the Report calls for an extension of the automatic exchange of information to all rulings – cross-border and national level – and, in the longer term, for a clearing house system, through which tax rulings will be screened at EU level to check whether they have a harmful effect on other Member States. Third, the Report invites the Member States to consider that any tax ruling of a cross-border nature should, in particular when involving transfer pricing, be established in cooperation with all involved countries.

Furthermore, the TAXE Committee reiterates its position that MNCs should disclose CbC reporting information in their financial statements and that such information should be available to the public, possibly in the form of a central EU register. The TAXE Committee also calls for more extensive CbC reporting to be made available to tax authorities, building on the OECD standard and including more detailed information, such as tax returns and intragroup transactions and calls also for harmonized accounting standards to be developed.

Alongside these transparency issues, the Report also addresses a number of other issues, including BEPS, tax evasion and avoidance; namely the Report:

- Supports the OECD BEPS Action Plan but stresses that the OECD approach is still based on soft law and that its action should be complemented by a proper legislative framework at the EU level, e.g., in the form of an anti-BEPS directive
- Calls for a common EU approach to tax havens
- Stresses the need for outgoing financial flows to be taxed at least once, possibly through a withholding tax, to ensure that profits do not leave the EU untaxed
- Calls on the Commission to speed up the presentation of legislative modifications for the prompt establishment of a compulsory EU-wide Common Consolidated Corporate Tax Base, including minimum and maximum effective tax rates
- Highlights the fact that specific attention should be paid at the national, EU or international level to the situation of developing countries.
Implications

Attempts at deciphering potential outcomes of EU-wide debates on tax issues are some of the most difficult tasks to attempt. Not only can proposals change direction at Commission, Council and European Parliament levels, but gaining consensus at the Member State level means that the final outcome on a specific issue or measure sometimes differs greatly from what was initially proposed, not to mention the fact that we now have diverging proposals on the public disclosure and administrative exchange of rulings.

In regard to the Tax Transparency Package, the announcement that new rules will have to be applied from 1 January 2017 will be met with relief from many countries. From business’ perspective, a little more certainty has been gained, even if the overall outcome is not particularly palatable.

In terms of the potential public disclosure of CbC reporting, meanwhile, the European Commission is to a degree out of the game in this ordinary legislative procedure, which now involves only the Council and the European Parliament. Nevertheless, the Commission is now attempting to reconcile the fact that there are now two diverging proposals on the table, covering almost the same subject matter. The Council/Member States’ first reaction to the calls from the European Parliament was not overwhelmingly positive, and it is clear that both proposals must be aligned. This delicate situation between Council, Presidency, European Parliament and European Commission will be addressed after the summer break.

That reconciliation of two divergent proposals may be made more complex by the fact that the TAXE Committee will be gaining even more visibility in the run up to its final report, to be published in November 2015. Jean-Claude Juncker, 12th and current President of the European Commission, will appear before the Committee on 17 September, and separately, we may well see actions taken in respect of the unwillingness of some multinational companies to attend TAXE Committee hearings earlier this year. All of this activity will keep the TAXE Committee in tight focus, and may diminish the possibilities of the Member States negotiating an outcome that business finds more palatable.

Finally – although this is not a transparency issue, per se – the decision in regard to the State Aid investigations will be published in the last few months of 2015. Since it is widely believed that the Commission will be using these cases as test cases, it should be expected that appeals against the negative decisions will be raised. With the first instance at the General court and highly likely further appeals to the Court of Justice of the EU, the whole litigation process may last between five and seven years.

All things told, the final three months of 2015 – alongside the fact that the final recommendations from the OECD’s BEPS project are now known – will see frenetic developments in the EU. Companies with European operations should therefore anticipate this uptick in activity, putting in to place the resources and processes to provide an accurate monitoring and assessment program.
Dear Sir or Madam

Public Consultation on Further Tax Transparency

I am pleased to submit our summarised response to the Public Consultation on Further Tax Transparency initiated by the European Commission Banking and Finance directorate. As you will see from the document, EY is in favour of a suitably transparent corporate environment. However, we are also in favour of ensuring that commercially sensitive information is protected and that the burden placed on both taxpayers and tax administrators is kept to a minimum, consistent with the wider policy environment.

This document reflects our main points with respect to the issues raised in this consultation. As you will see, our response focusses specifically on the questions of the role for transparency, the interaction with BEPS, and the need for active systems to resolve the disputes that will naturally arise.

• **Transparency**

There are a number of key principles driving our response to the questions raised in the consultation:

• The tax regime should provide certainty where possible. This certainty at a country level will help companies to decide how, when and where to make the long-term investments that drive growth, jobs and profits. Governments, in turn, will benefit from the resulting increase in tax revenues.

• It is in the interests of taxpayers and governments to have well-resourced and capable tax authorities, and that would require additional financing capacity.

• The tax regime should provide the opportunity for active cooperation between governments and taxpayers, to avoid disputes, to drive efficiency and to deliver an effective tax system.

• Transparency is an important feature of the tax system in supporting trade and growth and cross-border trade is a key driver of economic prosperity.

We see “tax transparency” as encompassing two distinct segments:

• Transparency between taxpayer and tax authority

Firstly there is transparency between companies and the various tax authorities to which they pay their taxes.

As a basic principle, a company should not do anything which it would not wish to disclose to the relevant tax authorities. But business transactions can be complex. As such, in many cases, companies need a confidential channel of communication with the tax authorities to discuss and agree the tax consequences of a transaction before it takes place.
As part of this dialogue, the tax authorities should receive information which is useful to them. So there has to be a balance between the quantity and quality of information requested. Too little information may not result in the right answer. But too much information can be expensive to prepare and difficult to analyse within a reasonable timeframe, while business transactions are often time critical. If a transaction cannot take place due purely to administrative reasons, it is government finances that could suffer and so a balance has to be struck. This should be a balance that is good for business and the economy, but also one that reflects the broader public interest.

- Public “transparency” and publication

Secondly, transparency between companies and a wider group of stakeholders, including the general public.

There has been much debate about the need for greater transparency between companies and the broader public. While transparency is a good thing, we need to find the right balance on public transparency. Some of the information shared by companies with their tax authorities is commercially sensitive and likely to be market sensitive, such as a tax ruling or clearance on a potential major transaction. Similarly transfer pricing studies often go into a great deal of commercially sensitive detail about the way a company is organized, its products and services and its operating strategy. It is important that taxpayers can engage openly with tax authorities in a confidential environment.

- The EU Transparency Standard when compared to the rest of the world

The BEPS Action 13 conclusion states that “Tax administrations should take all reasonable steps to ensure that there is no public disclosure of ... commercially sensitive information contained in the documentation pack [such as] the country-by-country report.”

We believe EU reporting entity standards should be in line with the OECD/G20 Base Erosion and Profit Shifting (“BEPS”) conclusions, not least because the EU has been a key member of the G20 within the BEPS discussions. It will be important to ensure that the alignment and agreement at the OECD/G20 level does not dissipate into differing standards.

- Other impacts: achieving certainty and resolving disputes

One of the key principles of the OECD/G20 BEPS action plan is to tax profits where the activity, risk or capital is located. Discussions on the location of such activity, risk and capital is facilitated by greater transparency to tax administrations.

It is crucial for companies and Member States to have certainty and clarity on how activities and profits are taxed. Where Member States take differing view, there is the possibility of double taxation may be highly detrimental to the European business environment. The statistics show that there are more disputes between countries each year and that these disputes are not being settled very quickly.

Without this certainty and clarity in place, trading both within and beyond our European borders will not achieve its full potential and Member State tax revenues will suffer as a result. It is therefore imperative that tax regimes include mechanisms that allow uncertainties to be resolved swiftly and efficiently. There is a role for the EU to play in assisting the resolution of such disputes.

We appreciate the opportunity to provide comments to this crucial topic. EY is committed to playing a full part in the design of a tax system that is fit for the 21st century. We would be happy to provide more information as the policy develops.

In the meantime, if you have any questions on any of the responses, please do not hesitate to contact me (Christopher Sanger, e-mail: csanger@uk.ey.com, tel: +44 207 951 0150).

Yours faithfully

Christopher Sanger
Global Head of Tax Policy, Ernst & Young LLP
Exchange of extensive corporate taxpayer information between E6 nations drives new tax risks for both digital and “old economy” companies

The tax authorities of a large number of countries, led and supported by the G20, have been stepping up the exchange of information among one another for some years now. In principle, this should facilitate and ensure taxation in the individual countries.

The fact that tax audit notes relating to expenses asserted by a taxpayer are routinely sent to the tax office of the (purported) payee or the exchange of information relating to investment income is now likely to be familiar to every company with international business.

A new approach is currently being pursued by Australia, Germany, France, the UK, Japan and Canada (the so-called “E6” group). These countries and their respective tax authorities have agreed in a non-bureaucratic manner – i.e., without intergovernmental agreements – to exchange extensive information relating to multinational companies in the digital sector. Regardless of whether it relates to current taxation in the participating countries, information which could provide insight into the entire business models of the companies concerned and their structure is being exchanged. This also includes information relating to the current taxation of the company in the respective country providing the information.

Where’s the problem?
The distribution of nonpublic information by certain tax authorities to third parties is not necessarily permitted among all countries. In Germany, for example, tax secrecy laws protect the taxpayer’s data, and noncompliance is punishable under German law. This would seem to make sense; the taxpayer has to submit data in detailed form to the tax office as part of disclosure obligations and other duties to cooperate, in order to be accurately assessed for tax purposes. These data may also include trade secrets, such as transfer prices between group companies. In Germany, tax secrecy is based on the view that the taxpayer can be reasonably expected to disclose confidential information only if he or she can rely on it being treated confidentially by the tax office.

Noncompliance with tax secrecy laws for the purpose of exchanging information with foreign countries is permissible – along with other requirements – only if this is necessary for taxation abroad. While the tax authority does not have to perform its own comprehensive audit under foreign law before submitting the documents, it must still establish whether the documents to be submitted are at all relevant for taxation abroad. Based on consistent precedents set by the German courts, inquiries that resemble mere “fishing expeditions” or that are not relevant in relation to overseas taxation are not permitted.

A first cautionary example can be taken from fast-track proceedings successfully conducted by EY before the Cologne Fiscal Court.

The claimant is a German company (the Company) within an international group of the digital economy. The Company has no business relationships or other points of contact with the countries participating in the E6 exchange of information. The Company was informed that information relating to group structures, tasks and remuneration at the individual group companies, as well as the resulting taxation and any specific features, would be passed on to the other countries in the E6 group. The Company did not receive any further explanation as to which specific information is to be passed on in this regard.

During the administrative procedure, the Company was denied access to any of the files of the tax office and was thus unable to obtain its own picture of the scope of the information to be exchanged. The Company was able to acquire access to the file in order to gain an overview of the information to be exchanged.

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1 Martin Riegel is an executive director in EY’s Tax practice and is a qualified lawyer in Germany (Rechtsanwalt) and certified tax consultant (Steuerberater) concentrating on tax litigation. Martin has a professional background as a judge at the tax court of Baden-Württemberg. Michael Walke is a German qualified lawyer (Rechtsanwalt) and forms part of EY’s Tax Litigation practice. Prior to his activity at EY, he was a clerk at the Central Tax Office (Bundeszentralamt für Steuern) and was responsible for tax court proceedings.

2 The non-formal nature of the E6 group means that its exact composition continues to be debated.
only after it had applied for a preliminary injunction from the Cologne Fiscal Court. The file to be passed on included 16 pages of preliminary information. The documents also revealed that additional specifically pre-defined requests and additional related notifications should have been made after the preliminary information has been submitted.

Information relating to tax matters dating back many years, as well as inaccurate assumptions made by tax officials in prior tax field audits was supposed to be exchanged. What was particularly surprising was that the assumptions concerned had been rejected by the tax authorities a long time ago, and current relevance and accuracy did not seem to be the decisive criteria when compiling the information.

Counsel did not identify any specific indications in the file as to which specific tax situation(s) in the other countries the information could be relevant for. Indeed, if the information had been relevant for taxation in other countries, it would seem to have made sense to check the information to be submitted as to its relevance for the respective recipient country. The submission of identical data to all other countries – imminent in the case at hand – cannot be reconciled with this course of action.

**What’s the underlying objective?**

This course of events made it even more apparent that the objective of the current exchange of information merely lies in achieving a better understanding of companies’ business models and structures in general, as opposed to tackling any specific perceived case of abuse. Based on the information exchanged, the countries intend to prepare studies and related suggestions for the adjustment of applicable tax regulations.

In the lately terminated proceedings, the Federal Central Tax Office (“Bundeszentralamt für Steuern:” BZSt) was therefore able to make only a blanket assertion that the documents were likely to be relevant for taxation abroad. It did not provide a substantiated justification.

Such an unbridled exchange of information, it would represent a continuing further erosion of tax confidentiality. The exchange of information with such a large number of recipients could make it difficult to ensure confidentiality. Inaccurate information could easily lead to suspicions against the taxpayer abroad and make it more difficult for it to enter a new market at a later stage, for example.

In its very recent decision in the fast-track proceedings, the competent court shared EY’s view that an information exchange on this basis was illegal. In particular, the blanket assertion of the tax authorities that the exchange of documents with other countries was necessary for taxation abroad did not provide sufficient cause to justify such exchange. Therefore, the competent tax court issued a preliminary injunction that the information must not be exchanged prior to an eventual binding final decision regarding the information exchange between the taxpayer and the Federal Central Tax Office.

However, due to the nature of an interim relief decision, it is not yet clear whether the Federal Central Tax Office will definitively accept this decision and its implications for the information exchange regarding other taxpayers. Due to the political background of the information exchange within the E-6 group, the Federal Central Tax Office might not refrain from such broad information exchange in other cases.

For German taxpayers, if there is a threat (or indication) of an exchange of information, a provisional injunction may be appropriate.

### Where to next?

In the future, the exchange of information will also assume greater importance for “old” economy companies. The appetite of the respective countries for information does not by any means stop at companies that generate almost exclusively “digital” revenue. Conversely, the number of companies that do include some element of digital activity in their business is continuing to increase.

In addition, the exchange of information within the European Union will expand in the future, with proposed amendments to the EU Mutual Assistance Directive for the automatic exchange of tax rulings, as discussed on page 16 of this publication, coming into force as early as 2016.³ According to the proposed amendments, rulings issued by the German tax authorities are to be submitted automatically to other Member States, despite the fact that the situation to which the application for a ruling relates frequently contains sensitive information such as trade secrets. As noted in the same article, Germany and the Netherlands also recently signed a Memorandum of Understanding to spontaneously exchange tax rulings regardless of the expected amendment to the EU Mutual Assistance Directive.

This development impacts all companies operating in more than one Member State of the European Union, regardless of sector or business model. For this reason, it is not just companies in the digital sector that should monitor developments relating to the exchange of information and the resulting consequences for their company.

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³ Though in all likelihood, this date will be delayed.
Argentina’s Tax Authorities extend electronic invoicing system to all VAT taxpayers

Around the world, tax authorities are taking advantage of the digitization of business processes to identify, source and aggregate more and more taxpayer data. In some cases these data are used to make the tax return process more efficient — by pre-filing taxpayers’ returns, for example — while in others, these data are used to enhance tax administrations’ risk management capabilities, pairing higher volumes of data with newly available data analytics platforms to identify potential tax evasion or avoidance techniques across the supply chain.

In terms of this latter objective, tax administrators have a number of common objectives:

• To source the data as close to the point in time when they are first created
• To assess the data as quickly as possible, to create compliance interventions at the earliest opportunity
• To use patterns within the data to identify low-cost, quick and effective ways in which other taxpayers can be informed that the tax administration is aware (sometimes described as “compliance nudges”)

Argentina has recently made significant strides in this area, focusing its efforts on sourcing value-added tax (VAT) data from invoices. This information allows data “matching” to be performed, identifying possible discrepancies in taxpayer reporting and providing ways in which the tax administration can identify those VAT returns (and taxpayers) with the highest risk. In addition to identifying individual returns and taxpayers, this information also allows the tax administration to see across the supply chain for anomalies.

In earlier years, the issuance of electronic invoices gradually became mandatory, but only for Argentinian taxpayers engaged in certain activities and was optional for all other taxpayers. More recently, however (and in common with many other countries), the list of activities that require mandatory issuance of electronic invoices has increased, resulting in a majority of — but not all — taxpayers being covered by the e-invoicing system.

Extending the mandate

In April 2015, through General Resolution 3749, the Argentine Federal Tax Authorities (AFIP) joined a relatively limited number of tax administrations around the world by extending the requirement to issue electronic invoices to all VAT taxpayers, effective 1 July 2015. However, given the challenges identified by many taxpayers, associations, chambers of commerce and other parties, another regulation issued during early August 2015 (General Resolution 3793), made it possible for taxpayers to postpone their entry into the regime until 31 March 2016.

General Resolution 3749 provides certain exceptions to the obligation of registered VAT taxpayers to issue electronic invoices, as well as electronic credit and debit notes and other official documents. For example, an electronic invoice will not have to be issued for a transaction with an end consumer(s) in which the goods or services have not been delivered or provided in the domicile of the vendor (store, etc.), and the paper invoice is issued in a domicile that does not correspond to the vendor (e.g., domicile of the client).

In order to issue the corresponding electronic invoices, taxpayers must request the corresponding electronic authorization code through the tax authorities’ website.

Invoicing rules in Argentina require following strict procedures and compliance requirements that are significant in scope. For instance, each invoice has a different letter, depending on the characterization of its issuer and receiver, and breakdown of the VAT may vary depending on the invoice letter; data must follow a certain format, and standard information must be included in several parts of the document; certain validations are required on the tax ID and registrations of issuer and receiver; special rules are applicable to taxpayers issuing invoices during the first months of activities, among others.
The issuance of electronic invoices requires interfacing with the tax authorities’ website, among other steps, through the use of appropriate software platforms or other mechanisms.

It is important to note that VAT filings are made in Argentina on a monthly basis. Tax returns are filed electronically through the tax authorities’ website. Until June 2015, VAT returns were made via a software tool that was made available by the tax authorities, and the return had to be filed electronically; in July 2015, a new filing method was established for most taxpayers (excluding those under certain special regimes) that requires the use of an online filing system that requires reporting the VAT per activity. This system replaces the old software for taxpayers now included in the new regime.

The tax authorities have indicated that the implementation of the mandatory electronic system, added to the change in how the VAT returns would now be reported would, in the near future, allow taxpayers to move to a “pro forma VAT return,” which would mean that the tax authorities would pre-populate each taxpayer’s VAT return, leaving the taxpayer a reasonably small volume of data to add in order to complete the return.

According to the authorities’ original intention, the pro forma regime might become applicable as from 2016; however, this term may need to be extended, based on the recent extension of the mandatory electronic invoicing system.
The tax transparency debate continues to garner media attention in Australia, with a series of significant events in 2015 confirming that the current Australian government is committed to increasing the level of disclosure by large corporates in relation to their tax affairs.

At the global level, Australia remains an active participant in the OECD's BEPS project. Locally, the tax debate has been fueled by a recent Senate Enquiry into corporate tax avoidance. The Senate Enquiry, which has yielded some 121 submissions from large corporates, advisors, the Australian Tax Office (ATO), independent lobby groups and industry representatives, commenced in October 2014. In the course of the Senate Enquiry, more than 70 individuals from over 30 organizations have been called to attend and provide information to the appointed Senate Committee. The Senate Committee's interim findings, which were released on 18 August 2015, provided several recommendations for increased disclosure, including:

- **Recommendation 4**: Maintaining existing tax transparency laws that apply to both private and public companies;
- **Recommendation 5**: Establishing a public register of tax avoidance settlements reached with the ATO where the value of that settlement is over an agreed threshold
- **Recommendation 6**: Publishing excerpts from the CbC reports, and suggests that the government consider implementing CbC reporting based closely on the European Union's standards

**Recommendation 7**: Requiring the ATO to provide an annual public report on aggressive tax minimization and avoidance activities to be tabled in Parliament

**Recommendation 11**: An ATO report to Parliament, at least annually on:
- The number of audits or disputes launched concerning multinational corporations
- The number of cases settled with multinational corporations
- The number of successful legal proceedings concluded against multinational corporations
- The staff resources allocated to tax compliance of multinational corporations

The interim report will be the subject of further debate and refinement as Parliament considers the merits of each recommendation.

In terms of specific developments, taxpayers in Australia are already preparing for the additional disclosure requirements that flow from four major regulatory developments.

**ATO public reporting**

By force of law, there is now an obligation upon the Commissioner of Taxation to disclose the following details with respect to taxpayers with annual turnover of AUD$100 million or more:

i. Name and Australian Business Number
ii. Total income
iii. Taxable income or net income (if any)
iv. Income tax payable (if any)
v. Petroleum Resource Rent Tax (payable)

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In this regard, it is expected that the data relevant to the 2013/2014 income tax year will be released in December 2015.

Amending legislation has been tabled in Parliament to exclude from the disclosure regime certain private groups with majority resident ownership. These proposed reforms have come in response to the concern that there are particular commercial sensitivities in relation to the disclosure of such information for private groups. Parliament will consider whether the arguments against disclosure outweigh the broader push for transparency from large corporates.

The disclosure regime itself is unlikely to require significant resourcing on the part of taxpayers, as the published information will be obtained by the ATO from existing tax return disclosures. Taxpayers will be given the opportunity to review and comment on the information prior to its release; however, the process will largely be to identify any transposition errors from original tax return disclosures.

For taxpayers, there is a bigger question as to how to respond to the information once it is disclosed on the ATO website. The ATO will direct readers to the respective company websites for further information, so it will be necessary for taxpayers to consider developing a strategy for responding to the release of this information.

Voluntary Corporate Disclosure Code

In the May 2015 budget, the government released its plan to implement a Voluntary Corporate Disclosure Code (Disclosure Code). The Board of Taxation has been given the responsibility for the design of the Disclosure Code, commencing with a process of consultation with the broader tax community in August 2015.

It is expected that the Disclosure Code will be released for public consultation later this year. A decision has not yet been made as to the turnover threshold corporates will need to exceed in order to be affected by the arrangements. The specific requirements of the Disclosure Code are still being determined.

The Board of Taxation is considering the following issues:

- Whether the disclosure will be of cash tax paid or the annual tax expense
- The extent to which “fairness” should be incorporated into the disclosures
- Whether the disclosure will be in relation to domestic arrangements only or global arrangements
- Whether related-party transactions should be disclosed
- Where the disclosures should be made (e.g., in accounts or with a statutory body) and how to police the accuracy of the disclosures

For taxpayers, there is a bigger question as to how to respond to the information once it is disclosed on the ATO website. The ATO will direct readers to the respective company websites for further information, so it will be necessary for taxpayers to consider developing a strategy for responding to the release of this information.
Effective Tax Borne disclosure

In the recent Senate Enquiry, there was much debate over the calculation of a standardized Effective Tax Rate as a mechanism for comparing the tax performance of comparable entities. In response, the Commissioner of Taxation has commenced Phase 1 of a project to develop an Effective Tax Borne (ETB) calculation for broader application. It is anticipated that in Phase 1, around 10 large taxpayers will participate in a pilot program to develop and test the ETB calculation. Participation is not mandatory and some invitees have chosen not to participate in the program.

At the conclusion of Phase 1, the ATO will commence Phase 2, which may extend the pilot to Higher-consequence taxpayers. An entity is generally characterized as a Higher-consequence taxpayer if its annual turnover exceeds $500m.

The ATO will continue to develop tools and other aids to help taxpayers determine their ETB; however, there is still broader concern in the taxpayer community that the calculation process will require significant resourcing and the inputs required for the calculation may not be readily available.

It remains to be seen whether the ETB calculation will achieve the desired outcome of allowing the ATO (and potentially the broader public) to compare “like for like” in relation to the tax performance of large corporates. We understand that the ATO will consider adopting the ETB calculation as a tool for determining taxpayer risk, so this means that taxpayers with a lower ETB result may be subject to increased ATO scrutiny.

CbC reporting and transfer pricing documentation

On 6 August 2015, the Australian government introduced an exposure draft² amending legislation to adopt CbC reporting and increased transfer pricing documentation requirements for large corporates with annual global revenue in excess of AUD$1 billion.³ The CbC reporting measures are further evidence of Australia’s commitment to greater transparency. Taxpayers will need to calculate annual global revenue in accordance with the statutory definition to determine whether they fall within the CbC regime. Generally, where the group produces audited financial statements for the period, the annual global revenue amount will be the total revenue of all entities to which those statements relate.

The exposure draft amending legislation places a statutory requirement on all large corporates, inbound and outbound, with AUD$1 billion in annual global turnover to lodge additional CbC information; however, the Explanatory Memorandum to the legislation confirms that foreign inbound multinationals will not be required to lodge the CbC reporting documentation locally if the ultimate parent has an obligation to report this information in its local jurisdiction. The Commissioner of Taxation will have authority to exclude specific entities from having to report in one or more income years through a written notification. In addition, specified classes of entities may also be excluded from the reporting requirements by legislative instrument. The Commissioner of Taxation, under his general power of administration, will provide the practical guidance for these reporting obligations.

The 6 August 2015 exposure draft amending legislation also includes reform to Australia’s transfer pricing documentation requirements. Under the draft legislation, transfer pricing documentation requirements in Australia will be required to accord with OECD recommendations as companies will be required to maintain a Master File and a Local File of transfer pricing specific information.

³ Approximately €627 million, lower than the €750 million threshold suggested by the OECD.
The Master File will need to contain documentation comprising the group’s organizational structure, its intangibles and intercompany financial activities, its financial and tax positions, and a description of the group’s businesses.

The Local File will contain specific detail covering transactions between the reporting entity and its associated enterprises in other countries. Under this enhanced reporting regime, the local entity will need to identify relevant related-party transactions, the amounts involved in those transactions, and the specific analysis that has been undertaken to support the determinations that have been made in relation to the arrangement.

Good corporate governance and transparency

It is clear from the aforementioned obligations that entities will need to have confidence in the data that supports any statements made to the regulator or to the public. There is an imperative that the entity is able to reconcile disparate sources of data in a timely fashion. Given the scale of additional disclosure, we are advising our clients that it is critical that they have a high-quality operational tax corporate governance framework. In this regard, on 20 July 2015, the ATO released its most comprehensive publication to date on its expectations concerning risk management and tax corporate governance. The “Tax Risk Management and Governance Guide” emphasizes the importance of the involvement of the boards and directors in managing tax risk and confirms that, in the ATO’s view, corporates should have in place a strategy for communicating the organization’s approach to tax governance to the public.

The way forward

With the Senate Enquiry, the Voluntary Code and the ETB initiative all still in the consultation phase, Australia’s tax transparency landscape, like many others, is anything but clearly established. We expect to see further refinement of the key transparency initiatives over the coming year, and then a broader rollout to taxpayers with lower turnover. While such uncertainty remains, we are advising our clients to carefully plan disclosure obligations or face the challenge of explaining any inconsistencies between disclosures made. It is also incumbent on the tax function to work collaboratively with their company board and media relations team division so that all parties are aware of the sensitivities and complexities that continue to influence the tax discussion. The media will continue to rely upon publicly available information, including published accounts and media statements for content. This means that the company should be comfortable with an underlying basis for any public statements and have a firm action plan in place to respond to media enquiries.

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Brazil moves toward more digitization and data aggregation; calls upon companies to disclose tax structures

Since 2005, Brazil has been developing a broad tax administration digitization project, known as SPED, which centers upon a new digital public bookkeeping system, encompassing both federal and state governments. SPED began with the introduction of an electronic invoicing system (known as NF-e) and in each step of its implementation has replaced many of the tax returns and mandatory books submitted by different classes of taxpayers.

Within SPED, companies are required to file certain electronic deliverables that adhere to a template designed by the tax authorities; the template covers accounting files (ledgers, journal entries, trial balance sheets, financial statements), tax files (federal and state tax computations), and electronic invoices. Today, SPED encompasses almost all companies and industries, with certain exceptions.

**SPED’s next phase**

SPED’s next phase — the so-called ECF — will include Brazil’s corporate income tax (IRPJ and CSLL) and will replace both the old corporate income tax return (known as DIPJ) and computation book (known as LALUR). ECF will be linked to other SPED components, especially ECD (digital accounting books), allowing the tax authority to cross-reference accounting entries with tax computations and adjustments.

By eliminating manual “books” and controls (i.e., off-books controls, such as temporary adjustments, while the formal books would provide a more consolidated view), and consolidating all taxpayer information within a single environment (SPED), the Brazilian tax authorities will gain significant new capabilities to assess risk through data analytics and data mining, which in the future could, it is hoped, enable more tightly focused audits that identify the highest risk cases while providing highly compliant taxpayers with a lighter scrutiny experience.

Besides digitalizing the corporate tax process, the SPED project will also incorporate production and inventories controls (known as Block K) and e-Social in due course. Block K will provide the tax authorities with a deep level of detailed information on purchase, production and inventories management, allowing the internal cross-checking of all balances and consumption of material and resources by a company. In the future, it may allow the tax authorities to cross-check data from buyers and sellers, to ensure consistency among all players and reduce possibilities for tax evasion.

e-Social will bring the same concept to the labor arena, creating a digital environment providing the tax authority with detailed access to all labor-related information (payroll, social security, labor rights, etc.). Via e-Social, the labor and tax authorities will be able to verify compliance not only with tax and social security regulations but also with labor obligations.

**New disclosure requirements**

On 22 July 2015, the Brazilian government enacted a new provisional measure (MP 685), creating a requirement for companies to mandatorily disclose certain tax planning structures. Provisional Measures (MP) have the same effects as a law, although they need to be validated by the Brazilian Congress within 120 days from publication.

As recently as 10 September 2015, however, the tax authorities posted a clarification on the Digital Tax and Bookkeeping Public System (ECF/SPED) website, stating that the tax planning declaration (which was further renamed as DIOR) will not be required this year (30 September) for eligible transactions implemented during 2014, as it would require additional regulations before implementation.

According to MP 685, companies and individuals must file a digital declaration (known as DPLAT) detailing implemented tax planning structures, with the DPLAT data then analyzed and validated by the tax authorities.

If the authorities disagree with the legality of the reported structures, companies will have to pay the avoided taxes with interest, but without penalties. If a company fails to report a qualified tax planning structure via DPLAT, the structure will be deemed to be fraudulent and subject to a 150% penalty and, potentially, criminal charges.
The government also says that this procedure will reduce controversy cases, as it provides a better environment for taxpayers and improves communication with the tax authority. This new requirement has raised many questions and much resistance, especially considering its broad definitions and provisions that would not be quite aligned with Brazilian tax principles. Based on this strong reaction from the market and some Congressmen, the tax authorities are considering waiting until MP 685 is fully approved by the Congress, probably with some changes, to issue additional regulations and set the deadline for the first DPLAT to be filed.

**New voluntary disclosure opportunity**

Through another provisional measure, the government has also enacted a program to allow companies and individuals to come forward and declare assets that are located abroad and that have not previously been declared to the tax authorities, formalizing the existence of such assets. Taxpayers within the program will pay a 17.5% tax on the assets, plus a 17.5% penalty (i.e., 35% total tax), to regularize their situation.

Assets derived from criminal activities will not be permitted to participate in this program, as the program does not entail any amnesty regarding potential criminal activities. In the same manner as for DPLAT, the Brazilian government says that this measure aims at increased transparency levels and believes that it is also in alignment with OECD and BEPS project objectives.

Considering the current status of the Brazilian economy and the need for extra tax revenue, disclosure and transparency play a dual role. They align the country with global trends but also provide tax authorities with more accurate information and better intelligence.

The cooperation among all levels of the tax structure (federal, state and municipal) will further enhance efficiency, allowing better targeted audits and focus on larger taxpayers and specific tax-generating transactions.

**Timing**

As noted, the provisional measures around the mandatory disclosure of tax structures and voluntary disclosure of foreign assets have the same effects as a law, and should be validated by the Brazilian Congress in the near future. The digital bookkeeping program is already supported by law and other regulations, and it is under implementation.

Overall, as the budgetary deficits put more pressure on the government, it is possible that the pace of the debate on transparency in Brazil will quicken once again. With mandatory disclosure representing one first step, the next issue on the agenda may likely be exactly how the tax authorities work in concert to aggregate and process all of the newly available information.
Implications

In essence, the entire Brazilian economy is impacted by these measures, either directly or indirectly. Naturally, larger companies are the focus, but smaller businesses are also impacted, as they will need to adapt in order to be able to deal with larger clients/suppliers.

The main objective of the range of measures is to increase efficiency from a tax collection standpoint, and also reduce the informal economy and tax evasion. Once the system allows the government to extract higher levels of intelligence, it is expected that higher tax collection will result.

Cooperation among Brazil’s different tax authorities has already shown positive results, as once obscure and difficult to track transactions are now disclosed to the relevant tax authorities. As an example, for many years the State Transfer Tax (ITCMD), levied on donations and heritages, was not perceived to be a very important tax, mostly because state tax authorities did not have the means to enforce it. But, since state tax authorities are now cooperating with their federal counterparts, this scenario has dramatically changed; any donations and heritages are disclosed through an individual’s tax returns, and the simple fact that federal tax authorities have required more detailed information on such transactions and have also shared such data with state tax authorities, has resulted in ITCMD collection growing in most states.

As a result of the new measures, large companies in particular are now investing more robustly in IT software, hardware and skills, in order to be compliant with the SPED, as systems and processes must be revised to enable the generation of all information required by the tax regulations. In addition, companies’ ERP systems must also be able to generate the required files, which often required additional software to enable data extraction and handling. Consistency is the greatest challenge. In a very complex digital system, which soon will encompass the whole company, mistakes and inconsistencies will give rise to heavy penalties and consequences.

As Brazil taxpayers face a complex and somewhat negative environment, with a tight link between tax regulation and the economic downturn, companies must carefully analyze all the measures under discussion to evaluate potential impacts and alternatives.

Additional disclosure requirements will demand more careful analysis of tax structures, and, although this new provision must still be approved by Congress, it is likely that it will drive higher levels of future controversy.

For more than a decade, Brazilian companies have been learning how to operate in this new system. While traditionally many functions and processes have been handled by the tax authorities, today, as is being experienced in many other countries, we see more and more of the compliance burden being transferred to the taxpayer, who in turn must invest more in people, software and hardware.
China’s Tax Authorities issue groundbreaking consultation draft to update transfer pricing rules in a Post-BEPS environment

On 17 September 2015, China’s State Administration of Taxation (SAT) issued a consultation draft circular Implementation Measures for Special Tax Adjustments, which would replace the existing Guoshuifa [2009] No. 2 (Circular 2). The public is invited to provide comments on the consultation draft by 16 October 2015. Circular 2 contains the main body of rules governing transfer pricing in China and also covers other areas such as thin capitalization, controlled foreign corporations and the general anti-avoidance rule.

The consultation draft incorporates the internationally accepted arm’s length principle and, in many instances, closely mirrors guidance issued in the course of the G20/Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) project. Notwithstanding this, there are still many aspects of the consultation draft that have a distinctly Chinese approach, such as the strong views on location savings, market premium and other location specific advantages (LSAs). The divergences from BEPS guidance are as informative as the areas of consistency.

The consultation draft would bring many changes to the transfer pricing (TP) framework established by Circular 2.

Documentation requirements

The consultation draft’s TP documentation requirements would put China at the forefront of countries adopting the recommendations of BEPS Action 13. It implements Action 13’s threefold approach to documentation, comprising the Master File, the Local File and the Country-by-Country (CBC) Report. The consultation draft would also require companies to prepare so-called Special Files for intra-group services, cost sharing arrangements and thin capitalization.

The much anticipated rules on CBC reporting are largely consistent with BEPS recommendations. Chinese-parented multinational groups that have global revenues greater than 5 billion RMB are required to submit a CBC Report with their annual tax return (due 31 May). At current exchange rates, the filing threshold is marginally lower than the €750 million threshold set by BEPS.

While the deadline also is earlier than the BEPS recommendation of 31 December, the consultation draft allows Chinese filers to apply for an extension. China also will accept CBC Reports from Chinese subsidiaries that have been designated by their foreign parent company to make the official filing, consistent with the BEPS secondary filing mechanism. Notably, there is no requirement for other Chinese subsidiaries to file a CBC Report in China. However, in the event China is not able to obtain the foreign-filed CBC report through treaty exchange procedures, Chinese tax inspectors are authorized to require the local subsidiary to provide a copy of the CBC Report in the course of a special tax investigation.

The thresholds for required preparation of the Master File and the Local File remain consistent with prior contemporaneous documentation requirements, namely 200 million RMB for buy/sell transactions and 40 million RMB for all other types of transactions. The contents of the Master File are fully consistent with the BEPS guidelines. As for the Local File, the discussion draft’s requirements are significantly more extensive, including a requirement to provide a “value chain analysis.” Taxpayers will need to give serious thought as to their strategies for gathering and presenting information relating to the allocation of profits across their value chains.

On 18 September 2015, the Danish Minister of Taxation published a draft bill that introduces Country-by-Country (CbC) Reporting based on the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) Action 13.

The Danish draft legislation is largely based on the model legislation outlined in the OECD’s Country-by-Country Reporting Implementation Package of 8 June 2015. On this basis the following categories of companies will be required to submit a CbC report to the Danish tax authorities:

1. Ultimate parent companies of multinational groups that are tax resident in Denmark provided that consolidated turnover exceeded DKK5.6b (approx. €750m) in the previous income year
2. Group companies of multinational groups that are tax resident in Denmark provided that consolidated turnover exceeded DKK5.6b in the previous income year and that one of the following conditions is met:
   a. The ultimate parent company of the group is not obliged to submit a CbC report in its country of residence
   b. There is no automatic exchange of CbC reports between Denmark and the country of residence of the ultimate parent company
   c. There is a “systemic failure” regarding the country of residence of the ultimate parent company and the Danish tax authorities have notified this to the Danish group company 

A Danish group company (under #2 above) is not required to submit a CbC report if the multinational group submits such a report through a “surrogate parent company” to the tax authorities of its country of residence and all of the following conditions are met:

1. The country of residence of the surrogate parent company requires CbC reporting
2. The country of residence of the surrogate parent company has concluded an agreement with Denmark regarding exchange of information and exchange of CbC reports is made according to an agreement between the competent authorities
3. There is no systemic failure regarding the country of residence of the surrogate parent company, or the Danish tax authorities have not notified this to the group company
4. The country of residence of the surrogate parent company has received notification that the company is a surrogate parent company
5. The Danish group company has notified the Danish tax authorities which company is required to submit a CbC report and the country of tax residence of this company

The Minister of Taxation intends to issue new transfer pricing documentation regulations which will outline the required content of the documentation. The new regulations will be based on the new three-tiered OECD approach of a (1) master file, (2) a local file, and (3) a country-by-country report. The new rules will contain changes that also will be of relevance for groups that are not required to file CbC reports. Accordingly, all groups will be required to provide more detailed information regarding tax rulings, intangibles and financing activities. Noncompliance with the new CbC rules will be subject to the existing sanctions including penalties.

The CbC report must be submitted no later than 12 months after the end of the income year. The new rules will be effective for income years beginning 1 January 2016 or thereafter. For groups using the calendar year as their financial year this means that the first year to produce a CbC report, and to prepare documentation under the new rules, will be 2016, and that the CbC report for 2016 must be filed no later than 31 December 2017.

1 See EY Global Tax Alert, OECD issues implementation package for country-by-country reporting under BEPS Action 13, dated 23 June 2015.
Since its establishment in 2005, taxpayers subject to Ecuador’s transfer pricing regime generally must submit a Transfer Pricing Annex (TP Annex) and/or a Comprehensive Transfer Pricing Report (TP Report). At that time, Ecuador was, along with Argentina, one of the very few jurisdictions around the world where it was compulsory to deliver such documentation, each year, on a programmed due date, resulting in an increase in the resources needed by multinational companies in order to comply with the Tax Administration (SRI) information requirements. Technical Guidelines govern the content of these reports, with the goal of standardizing their content. Newly issued regulations affect who must file TP Annexes and TP Reports and also address how to prepare and submit the reports, when to submit them and, especially, defining in detail, how to apply certain transfer pricing methodologies.

Apparently aligned with OECD BEPS Action 13, a number of new requirements on the distribution of assets, functions and risks for each transaction will be part of the reports that Ecuadorian taxpayers are required to file. These new requirements are aligned with a set of substantial reforms in corporate income tax (CIT) matters that Ecuador generally commenced in 2008, directed toward the same principles implicit in BEPS actions.

Requirements of the new Technical Guidelines, nonetheless, are not similar to those of BEPS Action 13 in terms of quantitative and detailed information of the foreign affiliates, as this type of information is not requested by the SRI.

A new Technical Guideline was defined on 29 May 2015, by Administrative Ruling, as the standard to be followed. Nevertheless, the Technical Guidelines mainly focus on tax administration technical preferences, while also retaining an element of the flexibility for taxpayers to use methods or applications that may be deemed as factually more suitable or precise.

Increased reporting thresholds

The new regulations increase the threshold at which income taxpayers subject to the transfer pricing regime must file a TP Report. Taxpayers managing related-party transactions that exceed US$3 million, in aggregate for a fiscal year, must file the TP Annex. For aggregated transactions exceeding US$15 million, taxpayers must submit both the TP Annex and the TP Report.

Although the thresholds for previous years were US$3 million for the TP Annex and US$6 million for the TP Report, filing obligations should be carefully reviewed at this time, as calculation of the amount of certain related-party transactions may differ from previous years and other transactions have been defined as not being relevant for the threshold, such as:

- Not affected by transfer prices (such as cash-equity contributions)
- Transactions occurring with government entities
- Transactions occurring with entities under revenue-based tax regimes (such as banana production or banana exporting)
- APAs covering the transactions
- Transactions occurring between domestic related parties

The exemption for domestic transactions does not apply to domestic transactions that may result in profit arbitration to entities benefitting from a reduced CIT rate. Similarly, this exemption does not apply to transactions held by companies whose shareholders are located in tax havens.

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Additional information required

The new regulations require taxpayers to follow updated Technical Guidelines when completing their TP Annexes and Reports. The 10 July 2015 version of the Guidelines requires taxpayers to include substantial information on the economic substance of their related-party transactions and the functions, assets and risks analysis of each related-party and each transaction. The updated Technical Guidelines also specify which methodologies taxpayers should generally use and the circumstances under which taxpayers may choose not to use them. In particular, the methodologies focus on comparable companies and the profit level indicators (PLIs) used in the Transactional Net Margin Method (TNMM), as well as in the asset intensity adjustments.

The new regulations also require taxpayers to preferably use information from the fiscal year being analyzed to demonstrate the reasonableness of their transfer prices, unless such information is not available. Under these circumstances, previous year information may be used, but it should be proven that context of comparable companies was similar during both years. Extended periods of financial information may also be used for the comparable companies, but it would require a demonstration of the economic cycle of the specific industry of the tested party and the comparable companies.

Submitting TP reports and annexes

Taxpayers should file TP annexes using software provided by the Tax Administration. The annexes mainly consist of summarized information of transactions, methodologies used and the corresponding related parties.

Documents that must accompany the TP report

Taxpayers must include in their TP Report contracts and substantiation of the transactions, emphasizing services transactions, along with all the working papers used in the transfer pricing analysis, including (if applicable):

- Acceptance and rejection matrices
- Financial information
- Asset intensity and other comparability adjustment calculations
- Interquartile range calculations
- Details of transactions with related parties
- All charts and information used in the report

How to submit the TP Report

Taxpayers must save their TP report and working papers in digital format, on a non-rewritable CD. They should also include a letter that they or their accountant has signed and filed the report and working papers at SRI’s offices.

When to submit the TP Report

Taxpayers should adhere to the deadlines outlined in the Regulation for the Application of the Internal Tax Regime Law (RAITRL), typically during June each year. As a result of the updated Guidelines, taxpayers may submit their TP Reports and TP Annexes for 2014 transactions during the period 10–28 September 2015, depending on their Tax ID.
France’s changing transfer pricing documentation requirements

Following the introduction of a new law, Article 223 quinquies B of the French General Tax Code, 2014 saw the implementation of a new transfer pricing-related tax return declaration form. This contemporaneous transfer pricing documentation requirement applies to taxpayers that meet the €400 million revenue/assets threshold of article L13 AA, and it comes in addition to existing transfer pricing requirements. This new tax return form requires taxpayers to disclose information on, among others, quantum of intragroup transactions, methods applied and intangibles owned or used, as well as inform the French Tax Authorities (FTA) of any changes in business operations or transfer pricing methods.

In addition, French taxpayers are required to provide the FTA with a specific, additional set of transfer pricing documentation in cases of audit. With the number of audits increasing (and expected to continue to do so, as a result of various initiatives at both OECD and European Commission levels) these changing requirements are rapidly increasing the overall compliance burden for French taxpayers.

Annual transfer pricing declaration required for certain taxpayers

On 8 December 2013, the French government adopted a new, additional transfer pricing documentation requirement, codified under Article 223 quinquies B of the French General Tax Code (FGTC). Under this article, French-based entities (including French permanent establishments) falling under the abovementioned threshold for Article L13AA of the FPTC are required to prepare an annual Transfer Pricing Statement for submission within six months of the deadline for filing their annual tax return.

In that regard, the FTA on 16 September 2014 issued the official tax return (form 2257-SD) and guidance. Administrative guidelines were also released in November 2014. While electronic filing of tax form 2257-SD is authorized in principle, the French government has not yet made such electronic forms available.

The abovementioned guidance clearly states that this Transfer Pricing Statement has to be filed in French language, and failure to comply will result in the application of a penalty ranging from €15 per erroneous information item, up to a maximum of €10,000. The data required under the Transfer Pricing Statement shall be presented in two tables:

- The first table discloses general information about the group – the main activities carried out, including the identification of the intangible assets held by the group and used by the reporting entity. The reporting entity shall report the nature of the assets (e.g., patents, trademarks and know-how) and the location of the entity(ies) owning such assets. Furthermore, the reporting entity shall provide a general description of the transfer pricing policy applied by the group in relation to the reporting entity.
- In the second table and for the audited year, the French entity shall report the total amount of the aggregate transactions it has performed (e.g., services, commissions, royalties, financial charges, purchase/disposal of assets) where the transaction exceeds €100,000 per transaction type, the transfer pricing methods applied, the countries in which the counterparts of the controlled transactions are registered, as well as any change in the transfer pricing policy and/or in the nature and location of the transferred assets. The French taxpayer is also required to provide additional information when the selected transfer pricing method differs from the five methods set forth by the OECD Transfer Pricing Guidelines.

Finally, the Transfer Pricing Statement shall report any change in the activity of the French taxpayer, therefore disclosing business restructurings, if any.

It is worth noting that, as of today, the official tax return requires the disclosure of information that is not required by law. For instance, the Transfer Pricing Statement includes sections for the identification of the statutory auditors of the French taxpayer, its consulting firm(s) (or tax advisor(s)), as well as the countries in which the counterparts of the controlled transactions are registered. Such information is not addressed in Article 223 quinquies B of the FGTC, which forms the legal basis for the reporting requirements. Therefore, the question arises as to the relevance of such additional requests and the level of detail actually expected by the FTA. Indeed, it can reasonably be assumed that the provision of the Transfer Pricing Statement would serve as a risk assessment tool aimed at raising the transfer pricing scrutiny, thus leading to further inquiries.
Transfer pricing documentation to be provided in case of a tax audit

Pursuant to Articles L13AA and L13B of the French Procedural Tax Code (FPTC), French taxpayers are required to provide the French FTA with an additional set of transfer pricing documentation in cases of a case audit. Article L13AA of the FPTC encompasses a mandatory documentation requirement for large MNEs, whereas Article L13B of the FPTC constitutes a de facto documentation requirement covering any French-based company.

More specifically, since 2010 and pursuant to Article L13AA of the FPTC, French-based legal entities (i) whose annual turnover (excluding taxes) or total gross assets exceeds €400 million or (ii) which own or are owned at least 50%, directly or indirectly, by such company, are subject to the “full” transfer pricing documentation requirements as described above. Such companies shall have their transfer pricing documentation ready at the beginning of a tax audit. If not available, the documentation will have to be provided within 30 days upon request by the FTA.

Failure to comply will result in the application of a penalty ranging from €10,000 up to 5% of the transfer pricing reassessment or 0.5% of each transaction not documented (whichever is higher), per audited fiscal year.

The contents of the additional set of transfer pricing documentation are twofold:

- General information concerning the group of associated companies (economic, legal, financial background of the group):
  - General description of the activity carried out, including changes that occurred during the audited period
  - General description of the legal and organizational structures, including identification of the entities involved in controlled transactions
  - General description of the functions performed and risks borne by the related entities to the extent that they impact the audited company
  - List of the main intangible assets held, notably patents, trademarks, brand names and know-how, in relation to the audited company
  - General description of the transfer pricing policy implemented within the group
- Specific information relating to the audited company:
  - General description of the activity carried out, including any change that has occurred over the audited period
  - General description (nature and amount) of the transactions undertaken with related companies, including royalties
  - List of the cost-sharing agreements as well as a copy of the Advanced Pricing Agreements and Tax Rulings concerning the determination of transfer prices, in so far as they impact the results of the audited company
  - Presentation of the method(s) by which transfer prices are determined to be in accordance with the arm’s-length principle, including an analysis of the functions performed, assets used and risks borne, as well as an explanation of the selection and application of the selected method(s)
  - If required by the transfer pricing method, a comparable analysis containing all elements which are considered relevant by the company

It is worth noticing that there is no materiality threshold regarding the transactions to be documented pursuant to Article L13AA or L13B of the FPTC.

Implications

Generally speaking, it is reasonable to expect that any time new documentation requirements are implemented by the FTA, the focus on those new subjects is necessarily high.

In terms of alignment to OECD and/or European transfer pricing documentation requirements, the FTA has tried to align recent developments with those at a multilateral level. In that regard, the French government continues to try to find the right balance between more transparency for internal concerns and not being too harsh with French companies in order to preserve their external competitiveness. It can be expected that the French government will carefully observe other OECD and emerging countries involved in the BEPS process; France should therefore be seen neither as an early adopter of Action 13 recommendations nor a laggard.
Germany's position on tax transparency

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Germany is a major player in the international transparency debate. It has been the co-initiator of several initiatives and host of the 2014 meeting of the OECD’s Global Forum on Transparency and Exchange of Information for Tax Purposes, which in turn led to the signing of the Multilateral Competent Authority Agreement (MCAA). At that time, 51 countries signed a Multilateral Competent Authority Agreement committing to exchange of information either in 2017 or 2018. The German government has repeatedly stated its strong commitment to international transparency and disclosure measures.

Consequently, Germany quickly implements all relevant new EU directives or Foreign Account Tax Compliance Act (FATCA) requirements. Recently, the domestic implementation law for the Convention on Mutual Administrative Assistance in Tax Matters was published in the official gazette. In addition, two further government drafts have been published. First is the implementation of the latest amendments to the Directive on Administrative Cooperation, which expands the scope of automatic exchange of information to financial account information according to the OECD set standard, the Common Reporting Standard. Second is the implementation law for the Multilateral Competent Authority Agreement, which sets a legal basis for the exchange of the very same information to the signatory states, also under the Common Reporting Standard. Apart from the above mentioned legislative measures and the upcoming extension of exchange of tax rulings, the German financial administration actively tries to promote transparency by initiating further activities between international tax authorities at the administrative level.

E6 Group

In January 2014, six countries (Germany, Australia, Canada, France, Great Britain and Japan – E6 – formerly E7 with Russia) agreed on an administrative level, without any public announcement, to exchange extensive and detailed information, in the context of the OECD BEPS Action Plan regarding various companies operating in the digital economy. The objective is to better understand the business models of the companies concerned in accordance with Action 1 of the BEPS Action Plan.

The information to be exchanged is extremely broad (almost all tax and non-tax information the authorities can collect) and is intended to be transmitted identically to the other five countries by the German tax authorities.

As discussed in the article on page 23, many commentators are expressing serious doubts as to whether such a broad exchange of information is based on an appropriate legal framework. In ongoing legal disputes, plaintiffs have taken the position that relevant agreements (Directive on Administrative Cooperation (DAC)), Double Tax Treaties (DTTs) or Tax Information Exchange Agreements (TIEAs) allow an exchange of information for “foreseeably relevant” information for taxation matters. As this exchange seems to be for the purpose of wider research, the question arises whether the administration is allowed to exchange information for these reasons or not.

A similar question is relevant with respect to BEPS country by country (CbC) reporting. But although the information to be exchanged under CbC reporting is not as broad as the E6 group approach, government representatives announced that the implementation of CbC reporting will require legislative amendments in Germany. Regarding CbC reporting, German tax authorities want to safeguard data privacy issues by providing CbC reporting information only to foreign tax administrations and not publicly. It remains unclear if this approach sufficiently guarantees data privacy if confidential taxpayer information is regularly exchanged worldwide. Legislative implementation of CbC reporting will presumably be completed in the first half of 2016 in Germany.

Memorandum of Understanding with Dutch Government

On 14 July 2015, the Ministries of Finance of Germany and the Netherlands announced the signing of a Memorandum of Understanding (MoU) regarding the spontaneous exchange of information with respect to cross-border tax rulings, including rulings on measures such as innovation or patent boxes. It should be noted that the MoU refers to the spontaneous and not the automatic exchange of information on tax rulings.


Both countries wish to be fully transparent where it concerns cross-border tax rulings made between tax authorities and businesses, where such a ruling may have an impact on the other country. The countries have therefore agreed to spontaneously exchange rulings via the designated competent authorities of the tax authorities of both countries.

Information may be exchanged spontaneously, meaning that a prior request is no longer required. Both countries state that they will take an active role in this respect. The MoU does not go as far as to require the countries to exchange information automatically. It is applicable to rulings granted from 1 January 2015 onward, but it remains unclear whether rulings concluded in 2014, but that come into force in 2015 or later, would be in scope. However, upon mutual agreement between the countries, information exchange may also cover rulings related to prior years.

The signing of the MoU applicable to rulings granted from 1 January 2015 onward demonstrates that Germany and the Netherlands wish to be viewed as front-runners among European nations in regard to the exchange of information relating to cross-border tax rulings. The signing of the MoU is a clear statement of expectation that other countries should follow their lead, ahead of formal European Commission legislation in this area in the coming years.

Joint statement by German States (Länder) on proposal to amend Europe’s DAC

On 8 May 2015, the Bundesrat (Federal Council) gave out a resolution in order to address several points regarding the European Commission’s latest proposal to amend the DAC, focusing around the exchange of cross-border tax rulings. The further enhancement of transparency and the fight against unfair tax competition have been welcomed by the German states generally, but several points of criticism have also been expressed.

According to the German states, a main concern regarding tax rulings lies within the tax laws of the single-member states, which may allow tax planning arrangements that impair the functionality of the common market. An exchange of tax rulings that are based on problematic tax laws may mitigate the issue, but the rulings do not necessarily address the cause of the problem. In the eyes of the Bundesrat, the European Commission should emphasize the fight against unfair tax competition with respect to this matter.

Additionally, the Bundesrat requests that the subsidiarity principle of the European Treaties should be respected, as well as finding a more balanced level between information demand and privacy protection. As the bearer of the tax administration costs, the German states ask that administrative expenses should be minimized. Moreover, tax rulings should be exchanged only bilaterally between the affected EU Member States and not with all Member States. Also, a comprehensive collection of exchanged rulings by the European Commission is regarded as disproportionate.

Furthermore, the German states believe that only future rulings should be exchanged, as the exchange of existing rulings would burden the tax administration and harm rights of taxpayers as they were not aware of information exchange procedures at the time the rulings were issued.

In its response to the resolution of the Bundesrat, the Commission acknowledges the desire to exchange rulings only bilaterally, but rejects this concern. According to the Commission, it is important to eliminate any administrative discretion concerning the question whether a ruling is exchanged with another Member State. Existing leeway for administrative discretion is, in the eyes of the Commission, the main cause for the limited information exchange under the current DAC.

The Commission further believes that the principle of proportionality is ensured, as information is exchanged in a standardized format and a comprehensive directory will help keep administrative costs minimized. The Commission believes that a tax ruling could be verified to be in line with the European Treaties only if the Commission and the Member States are aware of its existence and content. The concern regarding limiting the exchange of retroactive existing rulings is addressed with the remark that existing rulings shall be exchanged only once, and will be limited only to those rulings with relevance to future assessment periods.

The Bundesrat’s resolution again demonstrates Germany’s engagement in the European debate on information exchange and transparency. While criticizing certain details, fiscal authorities at the federal and state level are fully committed to the different strands of the international information exchange initiatives.

As a signatory of all major international initiatives such as FATCA, the MCAA or the OECD Convention on Mutual Administrative Assistance in Tax Matters, Germany is already at the forefront of international transparency. At the moment, as FATCA and the DAC form a solid basis of information exchange, the discussion focus. Even though data privacy may be a bigger issue in Germany than in Anglo-American jurisdictions, Germany genuinely supports efforts to foster international transparency, desirably motivating other jurisdictions to engage in the fight against tax evasion and unfair tax competition.

Still, with all existing and further extensions to transparency, German secrecy laws concerning tax information have to be granted. This could allow for an enhanced cooperation with other competent authorities for their taxation reasons, but not to share protected tax information of German taxpayers with other institutions, the public or the media.
Greece’s experiences with two-tier transfer pricing documentation

For more than five years, the Greek economy has faced the popular perception that the inability to raise sufficient taxes is due to a lack of legal grounds (and a shortage of tax administration resources) necessary to properly audit multinational enterprises operating in Greece. These perceptions have led to unprecedented new activity in Greece’s transfer pricing (TP) regime.

The legislative side of such activity, with laws or circulars often prepared under unrealistic deadlines, appears to be influenced by and aligned to OECD BEPS Action 13.

In this light, we provide here an overview of:

- The BEPS Action 13 recommendations that already exist as Greek TP documentation requirements; the reaction/approach of the Greek taxpayers to such specific requirements;
- The effectiveness of such requirements based on tax audits/reviews performed so far

Elements of Action 13 that already exist as part of the Greek TP documentation rules

The two-tier documentation approach

The two-tier documentation approach (i.e., preparation of a Master File and a Local File) has existed in Greek TP documentation requirements since their introduction back in 2008, while the preparation of a CbC reporting table is not part of those requirements.

The two-tier approach was selected based on the suggested two-tier approach set out in the Code of Conduct on transfer pricing documentation for associated enterprises in the EU.1

Based on the current applicable provisions, the Master File that must be prepared by the Greek taxpayers, subject to TP documentation requirements, includes (among other information) reference to:

- The legal, organization and operational structure of the group
- The group’s intangibles, including any change in their ownership
- The group’s financial transactions
- The group’s tax results
- The group’s functional profile
- The group’s TP policy
- A list of Advance Pricing Arrangements (APAs) and tax court rulings relevant to transfer prices of group members

The specific requirements in relation to financial transactions, intangibles, and the group’s tax results were introduced as recently as 2014, as a result of the influence of the ongoing discussions around BEPS Action 13.

Local TP file

In 2014, the following information points, consistent with BEPS Action 13 suggestions, were added to the TP Local File requirements:

- Description of comparability adjustments performed
- Reference to TP adjustments performed in order for transactions to adhere to the arm’s-length principle

Also added was the requirement to explicitly reference operational or organizational restructurings that may have led to transfer of functions, risks and/or assets.

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Timing for preparation of the TP documentation

The Greek TP rules require that TP documentation should be completed by the end of the fourth month following year-end. EY has discussed with the Greek tax authorities on many occasions that this requirement was not in line with the OECD TP guidelines, only to have the BEPS Action 13 recommendations indicating that finalization of the Local File by the time of the tax return filing is now to be considered as a best practice.

Update of the TP documentation

Update of the TP documentation files, again in line with BEPS Action 13 recommendations, is required to be performed annually, whereas the transfer pricing studies for profit-based documentation methods must be renewed every three years, as long as the financial data of the comparable entities from an existing study are “refreshed” every year.

How are taxpayers approaching such requirements?

The “Greek” Master File

Our experience has showed that implementation of the two-tier documentation approach at a local level creates a series of practical compliance difficulties for the Greek subsidiaries of multinational companies. Access to information at a group level cannot always be taken for granted (especially if the group does not centrally prepare any TP documentation). And, more importantly, required information is not always available within the time frame required for Greek TP documentation purposes. As an example, the annual report of a group, which is usually the main source of information required for the Master File, is not necessarily available four months following the year-end of the Greek entity (i.e., within the statutory deadline for completing the TP documentation files). Even in cases where multinational companies do prepare/update Master Files on an annual basis and within the time frame provided in the Greek law, such Master Files do not necessarily meet all requirements provided in the Greek TP documentation rules.

In an effort to comply with the two-tier documentation requirement, Greek taxpayers usually prepare a Master File specifically for Greek TP purposes. In that regard, they must use any available information at the time of preparation and inevitably the Master File may have a complete analysis for certain parts and disproportionally shorter analysis for other parts, due to the unavailability of information at a local level at the time of preparation.

In addition, because no detailed guidance has been issued by the Ministry of Finance as regards the content of the Master File, each taxpayer adopts its own interpretation, and thus we have varying approaches in meeting the obligation. As examples, reference to intangibles is commonly limited to intangibles relevant to the Greek taxpayer; reference to financial transactions is limited to intragroup financial transactions; and reference to business activities is limited to those relevant to the intragroup transactions of the Greek taxpayer.

Greek TP Local Files and timing for preparation and submission

Compliance with the TP Local File requirements is less burdensome for Greek taxpayers compared to Master File content compliance. Here, the key issues creating difficulties are the somewhat limited time from year-end for the completion of the Local File (or its update) and the very recently introduced detail requirements regarding the economic analysis acceptable for Greek TP purposes, which in practice differentiate the Greek requirements from what is usually acceptable in other tax jurisdictions, thus increasing the cost of compliance for Greek taxpayers.

2 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, CHAPTER V: DOCUMENTATION, par 5.15 provides “…Tax administrations should limit the amount of information that is requested at the stage of filing the tax return. At that time, no particular transaction has been identified for transfer pricing review. It would be quite burdensome if detailed documentation were required at this stage on all cross-border transactions between associated enterprises, and on all enterprises engaging in such transactions.”
Finally, the update approach (i.e., to refresh the data in an existing TP Local File) adopted in Greece means that, in practice, the arm-length nature of transfer prices is tested based on the assumption that two group entities are in a position (as they should) to revise the targeted profitability every year, should the market data indicate so. This, in certain cases, may lead to a distortion compared to what is observed between independent parties (e.g., in genuine long-term contracts the profitability of one party may be determined at conclusion of the contract and based on historical market data at that time and not to be subject to revision each year).

**Effectiveness of tax audits based on current TP documentation requirements**

The information as required in the Master File may indeed assist the Greek tax authorities to obtain a better understanding of the group and the position of the Greek entity within the group’s supply chain, as well as to identify any irregularities applicable to the Greek entity as compared to other Group entities’ transfer prices (e.g., by comparing the Group’s TP policy to the TP policy applicable in the similar transactions of the Greek entity).

Time constraints in the preparation deadline of the Master File (which coincides with the preparation of the Local File), however, as well as the absence of detailed guidance on the content of the Master File, have given rise to varying approaches being adopted by Greek taxpayers, including custom-made Master Files solely for use in Greece.

The above approaches usually do not impair the ability of the tax authorities to gain at least a partial group perspective as regards the Greek taxpayer. On the other hand, however, the approaches do not always enable the tax authorities to meet the purposes for which they require the Master File in the first place, i.e., to gain a generic perspective of the group’s supply chain and activities. In addition, the absence of detailed guidance on what is expected at a minimum, results, in certain cases, to the company simply replicating parts of its annual report in the Master File, and not really adding any value for audit purposes, since such information would have already been available to the tax authorities.

In our view, the potential added value for tax audit purposes of a Master File that is required to be prepared for Greek TP documentation purposes, is limited, based on:

- The time constraints for preparing such Master File
- The fact that this is a local requirement and thus taxpayers end up being required to prepare group documentation without necessarily having access to required information
- Absence of concrete guidance as to what is expected at a minimum in the Master File

Based on the above restrictions, the preparation of the Master File is treated more as an issue of TP formalities, in order to evaluate whether a noncompliance penalty should apply, rather than being a source that assists in increasing transparency and determining TP substance issues.

Finally, the content requirements of the TP Local File in our view are sufficient in order for the tax audit to be performed effectively, with the problematic issue in this respect being the time restriction in order to prepare such a file. Especially considering that the submission of the corporate income tax return for legal entities has been set to six months following year-end, the extension of the deadline for preparing the Greek TP documentation should be at least the same.

**Are Greek taxpayers ready for the introduction of BEPS Action 13?**

With the exception of the CbC reporting table that is expected to increase the documentation burden for Greek-based groups exceeding the consolidated threshold provided in Action 13, the Master File and Local File requirements are expected to differ significantly from what is currently required by Greek taxpayers who are subject to Greek TP documentation requirements.
Mexico is emerging as somewhat of a standard-setter in terms of the sheer number of new government initiatives on tax transparency it has implemented, many of which have featured prominently in tax reforms since FY 2014.

In fact, as recently as 8 September 2015, Mexico’s President, Enrique Peña Nieto, presented the country’s 2016 tax reform package to the Mexican Congress. The proposed reform includes full alignment to the country-by-country (CbC) reporting and transfer pricing masterfile/localfile requirements of BEPS Action 13.

Specifically, the proposed reform would add an annual filing obligation that would require Mexican corporate taxpayers and permanent establishments to file three new information returns; namely, a master information return, a local information return and a CbC information return. The filing of the CbC information return would be required only from corporations that qualify as Mexican multinational holding companies or those that are designated by the parent company of a foreign multinational group as responsible for filing the CbC Report. These information returns would be required starting in fiscal year 2016 and would be due for the first time by 31 December 2017. Although it is not yet clear whether the filing of the proposed information returns would be required for the deduction of the corresponding payments to foreign related parties, current tax legislation in Mexico establishes that the timely and accurate filing of transfer pricing information returns is a prerequisite for deducting the corresponding amounts. Additionally, the proposed tax reform would establish that failure to file the proposed information returns would be penalized by disqualifying the taxpayer from entering into contracts with the Mexican public sector and subjecting the taxpayer to hefty fines included in the Federal Fiscal Code (FFC).

Regarding automatic exchange of information regulations, specifically the inclusion to Brazil’s FFC of the OECD’s Common Reporting Standard, is proposed with the objective of aligning actual financial institution reporting obligations with the principles and rules included in that Standard. In general, the Standard would be implemented with the following terms:

(a) Financial institutions would be required to file an annual report for preexisting accounts open before the effective date of the reform (accounts that remain open until 31 December 2015) and accounts that are opened after that date.

(b) Information on high-value accounts and new reportable accounts would be filed through an annual report on 30 June starting in 2017.

(c) Information on low-value accounts and preexisting accounts would be filed through an annual report on 30 June 2018.

(d) The Standard would be applied and interpreted in terms of its commentaries, unless Mexican Tax Authorities expressly state otherwise through general administrative rules.

(e) Fixed penalties for noncompliant institutions could also apply.

The reform package must now be debated and approved by the two chambers of Congress. If passed and enacted, the reform will be effective as of 1 January 2016. This Proposed Reform comes somewhat as a surprise considering President Peña Nieto previously stated publicly that after the very comprehensive 2014 tax reform, there would be no additional tax reforms in Mexico for the following three years.
Prior requirements

Taxpayers are now compelled to meet new reporting obligations through a new electronic control and registration system that can enable tax authorities to identify inconsistencies between information that is uploaded and reported income. Some of these obligations include:

- **Electronic accounting**: As of 1 January 2015, taxpayers must keep accounting books and records containing the following information:
  - Accounting kept in electronic systems with the capacity to generate files in XML format
  - Accounts identified along with the different rates, quotas and activities for which no tax is due, as well as transferred taxes and creditable taxes
  - Balances for each account, including assets, liabilities, equity and results of operations (revenue, costs and expenses) used during the period
  - For final year-end balances, information on recorded tax adjustments
  - Daily entrances with details for each transaction, such as account, subaccount, subledger and information related to electronic invoices
  - For transactions related to third parties, the Tax Identification Number of the third party

- **Electronic tax “drop box”**: This is a mandatory receipt mechanism for new reporting obligations. The legality of the implementation of the electronic tax drop box in connection with electronic audits continues to be questioned by many and has not yet been ruled on by the courts.

- **E-invoicing**: Launched in Mexico in 2004, a compulsory transition from printed to electronic receipts has been phased in since fiscal year 2011. Electronic invoices now meet the legal traditional requirements of ordinary invoices. The authenticity of its origin and the integrity of its content give the taxpayer a sense of legal certainty, as well as narrow the risks of fraud and tax evasion with fake vouchers.

  Relevant features of Mexican e-invoicing include issuance by registered suppliers, strategies developed to allow “real-time” tax reviews, accurate statement of payment method and compulsory digital signature.

- **Relevant Transactions Statement (Form 76)**: This statement provides guidelines for reporting relevant transactions such as financial transactions as provided in the Income Tax Law (derivatives), transfer pricing transactions, capital participations and tax residence reorganizations and restructurings, etc.

  If Form 76 is incomplete or contains errors, the taxpayer may amend it within 30 days. If the report is not amended as such, it will be considered as not filed. Noncompliance may result in fines and penalties, as well as a negative compliance report from the tax authorities. Without a positive compliance report, taxpayers are not qualified to apply for tax incentives or to be awarded a government bid. Although it is not clear in the tax law, noncompliance may result in rejections of tax refund claims or requests for authorizations from the tax authorities.

  Taxpayers with no reportable transactions in 2014 or taxpayers whose transactions in FY 2014 did not exceed MxP$60 million (approximately US$4 million) are not required to file this report. In 2015, taxpayers are not required to file Form 76 if (i) they did not have reportable transactions during a quarter year period or (ii) their reportable transactions did not exceed MxP$60 million. Financial entities are required to file Form 76, since the latter exception does not apply to them.
Appendix 9 of the Multipurpose Informative Return (DIM-Appendix 9): Effective 6 May 2015, a revised version of Appendix 9 of the Multipurpose Informative Return (DIM-Appendix 9) was published by the Mexican tax authorities, creating the obligation for taxpayers to report their operations with foreign related parties. The new version of the DIM-Appendix 9 includes 57 fields of information, broken down by type of transaction, and allows up to 40,000 transactions to be reported. Among the most relevant new fields are:

- Information regarding foreign-related party’s data
- Detailed description of included transactions
- Financial information used to determine the result of the tested transaction
- Comparable companies/operations’ reference interquartile range

DIM-Appendix 9 is associated with Actions 12 and 13 of the BEPS Action Plan, and aims to include specific details in transfer pricing documentation regarding the tax information for each taxpayer belonging to a multinational group. Thereby, the tax authorities expect to receive enough information with the necessary elements and tools for a more targeted audit strategy.

Electronic audits: Based upon data held by the Mexican tax authorities related to one or more contributions, electronic audits (revisiones electrónicas) on taxpayers, joint obligors and related third parties may be carried out at any time. Through the electronic tax drop box, taxpayers receive a preliminary tax assessment and, within a 15-day period, taxpayers must either provide evidence in objection or pay the taxes assessed. If the taxpayer provides evidence, the tax authority issues and notifies a final resolution.

Finally, besides the tax obligations and measures already mentioned, the amount of information that the taxpayers must provide to the Mexican government has increased, due to the recent anti-money laundering reforms.

New compliance burdens

These new measures impose additional administrative burdens on taxpayers in Mexico, since they will have to utilize additional resources to fulfill these obligations, as well as having to update their information and accounting systems.

It is also feared that the tax authorities may mishandle this additional information, to the detriment of taxpayers. In that regard, the tax authorities can issue as many preliminary tax assessments as they want, determining presumptive income and disallowing deductions of expenses with no legal basis, which leave taxpayers with few possibilities to prepare a proper defense strategy against such assessments.

Timely and close attention to SAT audits is not only prudent but also required in order to mitigate the risk of large assessments. Certain responses to the tax authorities or the lack of requested documentation may also impact the taxpayer’s ability to successfully challenge a tax assessment. As such, close monitoring by the taxpayers, alongside their tax consultants, is essential to establish the best possible scenario for a potential appeal or, more importantly, negotiation with the tax authorities.

With respect to negotiations, the tax authorities tend to take a wide-ranging approach and seek to discuss in detail what they consider to be a fair share of taxes in Mexico. The approach, as described, unfortunately appears to be based on revenue considerations as opposed to a combination of legal basis and the application of international taxation principles.

In that regard, we tend to advise our clients to challenge the unconstitutionality of the new system of registry and compliance control of tax obligations, which includes the implementation of the electronic tax drop box in connection with electronic audits, and the accounting-related obligations mentioned above.

The Mexican Supreme Court of Justice, however, has yet to establish a definitive ruling on whether the aforementioned new system is aligned with the Mexican Constitution.
Are you ready for your close-up?
The Netherlands releases draft law implementing new transfer pricing documentation requirements in line with BEPS Action 13

Executive summary

On 15 September 2015, the Dutch State Secretary of Finance released a draft law containing modifications to the Dutch Corporate Income Tax Act 1969 (CITA 1969). The proposed modifications include supplementary transfer pricing documentation requirements in line with the three-tiered approach of Action 13 of the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) project. Under the draft law, the Country-by-Country (CbC) report, the master file and local file requirements will be applicable for fiscal years starting on or after 1 January 2016.

This Alert summarizes the new Dutch transfer pricing documentation requirements.

Implementation of the OECD documentation standards

The OECD’s BEPS Action Plan 13 describes a standardized three-tiered approach for transfer pricing documentation consisting of the CbC report, the master file, and the local file. The draft law, to be codified in articles 29b - 29h CITA 1969, confirms that The Netherlands will implement the OECD’s three-tiered approach. Accordingly, supplementary transfer pricing documentation requirements are to be introduced in The Netherlands.

The CbC report is applicable to Dutch tax resident entities, members of a multinational enterprise (MNE) group, with a consolidated group turnover exceeding €750 million in the fiscal year preceding the fiscal year to which the CbC report applies. The CbC report should be provided to the Dutch tax inspector in certain circumstances as outlined below.

Dutch tax resident entities of an MNE group, also will have to prepare a master file and local file. This requirement will apply to Dutch tax resident entities of an MNE group that has a consolidated group turnover exceeding €50 million in the fiscal year preceding the year for which the tax return applies. For smaller groups, the current Dutch transfer pricing documentation requirements will remain applicable in order to avoid imposing burdensome administrative requirements for small and medium-sized enterprises.

The qualifying MNE group entity should have a master file and local file available at the level of the Dutch entity at the moment of filing the tax return. The Dutch tax administration can request these files from the local Dutch entity.

CbC reporting

The CBC reporting requirements are generally aligned with the OECD draft guidance from the implementation package. If the ultimate parent company of an MNE group with a consolidated group turnover exceeding €750 million, is a Dutch tax resident, this entity is obliged to provide a CbC report to the tax inspector within 12 months after the last day of the fiscal year. The filed CbC report will subsequently be exchanged automatically with states the MNE is operating in with whom the Netherlands has concluded an information exchange agreement. In the following situations, a Dutch tax resident entity, not being the ultimate parent company of a qualifying multinational enterprise, would need to file a CbC report in the Netherlands:

- The country in which the ultimate parent entity is a tax resident has not established CbC reporting obligations.

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• The country in which the ultimate parent entity is a tax resident does not have a signed agreement in place regarding automatic exchange of information with the Netherlands on CbC reports (at the latest 12 months after the last day of the fiscal year)
• The inspector has informed the group entity that the country in which the ultimate parent company is a tax resident has systematically failed to comply

If the MNE group has multiple Dutch resident group entities, and one or more of the above conditions are met, the MNE group can designate one of these group entities to fulfill the requirement to provide the CbC report.

A group entity is not required to provide the tax inspector with a CbC report within 12 months after the last day of the fiscal year of the MNE group if a “surrogate parent entity” provides the CbC report to the tax administration of the country in which it is tax resident.

Furthermore, the draft law requires a Dutch tax resident entity to notify the tax inspector which group entity will file the CbC report if the Dutch tax resident entity is not the ultimate parent entity or surrogate parent entity, at the latest on the last day of the reporting period.

With respect to the content of the CbC report, the draft law requires the following items to be included for each state in which the MNE group is active:
• Revenues
• Earnings before income tax
• Income tax paid
• Income tax according to statutory accounts
• Paid-in capital
• Accumulated earnings
• Number of employees
• Tangible assets (other than cash and cash equivalents)
• A description of each group entity of the MNE group noting the state of which the group entity is a tax resident, and in case of deviation, the state under whose laws the group entity has been incorporated, as well as the nature of the main business activity or business activities of the group entity

Further guidance regarding the form and content of the CbC report will be provided through detailed implementation rules. The CbC report should be prepared in the Dutch or English language.

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3 A group entity of an MNE group that has been designated by the MNE group as the substitute for the ultimate parent entity to file the CbC report on behalf of the MNE group in the country in which it is tax resident.
The purpose of the CbC report is for the tax inspector to be able to assess substantial transfer pricing risks and other risks for the Netherlands related to base erosion and profit shifting. In addition, the CbC report could serve to assess the risk of whether MNE group members are not adhering to the applicable transfer pricing rules and where needed for conducting economic and statistical analyses. Finally, the draft law prescribes that a transfer pricing adjustment by the tax inspector may not be based on the CbC report.

Transfer pricing documentation: master file and local file

The draft law also provides that a group entity taxable in the Netherlands and part of a qualifying MNE group should include, within the term set for submitting its corporate income tax return, a master file and a local file regarding the year to which the tax return applies in its tax administration records. The goal of these files is to support the transfer prices applied. Similar to the CbC report, both the master file and the local file can be prepared in the Dutch or in the English language. The Dutch group entity should provide the transfer pricing documentation to the tax inspector upon request.

The master file should provide an overview of the MNE group business, including the nature of the business activities, its general transfer pricing policy and its global allocation of income and economic activities. Specifically, the master file should include the following information:

- Organizational structure
- A description of business activities
- Intangibles
- Financial activities within the group
- The financial and tax position of the MNE group
- Lists of important agreements, intangibles, and transactions

The local file should include information relevant for the transfer pricing analysis regarding inter-company transactions with Dutch entities and which helps to substantiate the arm’s length nature of the transactions as well as information supporting the arm’s length allocation of profits to a permanent establishment. The local file should include the following information:

- Relevant financial information regarding specific transactions
- A comparability analysis
- The selection and application of the most appropriate transfer pricing method

Under the draft law, profit allocation to permanent establishments will have to be included in the local file, which seems to be broader than the OECD guidance.

Further guidance regarding the form and content of both the master file and the local file will be set forth in detailed implementation rules in line with Annex I and Annex II of Chapter V of the September 2014 OECD report Guidance on Transfer Pricing Documentation and Country-by-Country Reporting.

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4 The consolidated turnover of the MNE group should exceed €50 million in the fiscal year preceding the reporting fiscal year.
Specific penalties for non-compliance with the CbC reporting requirements

The Dutch Government proposes that not satisfying the requirements to submit the CbC report will be regarded as a criminal offense. Non-compliance will lead to a monetary fine of the third category, as provided in article 23, paragraph 4 of the criminal code (as of 1 January 2014: €8,100) or custody of six months at the most for the party involved. In case non-compliance occurs intentionally, then a fine of the fourth category, as provided in article 23, paragraph 4 of the criminal code applies in addition to an imprisonment of four years at the most. The authority to levy an administrative penalty will expire five years after the end of the calendar year in which the requirement originated.

The Dutch Government notes that criminal prosecution will generally be reserved for the most serious cases.

The proposed penalties for non-compliance with the CbC report requirements do not apply to the master file and the local file. These files are considered to be part of the taxpayer’s tax administration. The Netherlands has a penalty regime with respect to not meeting the requirements regarding tax administration. Accordingly, this existing regime is also applicable to the master file and the local file.

Implications

When the draft law is enacted, supplementary transfer pricing documentation requirements will be implemented in The Netherlands in line with the “standardized 3-tier” approach under Action 13 of the OECD BEPS project. The CbC report, the master file and local file requirements will be applicable for fiscal years starting on or after 1 January 2016. MNE groups with a presence in The Netherlands should evaluate whether the new transfer pricing documentation requirements are applicable to them and if so should take actions to meet these requirements.
Poland amends rules on transfer pricing documentation, implementing Action 13 requirements

On 27 October 2015, the President of Republic of Poland signed an Act amending the Corporate Income Tax (CIT) Act, the Personal Income Tax (PIT) Act as well as some other acts (the Act). The Act introduces significant changes related to transfer pricing (TP) documentation, including creating a new requirement for a declaration signed by a member of the Management Board confirming the preparation of complete transfer pricing documentation by the date of filing the annual CIT return.

The new rules aim at aligning with the work of the Organisation for Economic Co-operation and Development (OECD) under its base erosion and profit shifting (BEPS) project.

Key changes introduced by the Act include:

- Modification of the definition of related parties increasing the capital relationship threshold to 25%
- Introduction of an obligation to supplement the annual CIT return with a simplified report on transactions with the related parties for taxpayers whose income or expenses exceed the equivalent of €10 m
- Introduction of an obligation to submit a declaration signed by a member of the Management Board confirming the preparation of complete transfer pricing documentation by the date of filing the annual CIT return
- Introduction of an obligation to prepare comparative analyses for taxpayers whose income or expenses exceed the equivalent of €10 m to support the arm's length character of the transactional prices applied
- Introduction of an obligation to prepare a three-tiered standardized approach to transfer pricing documentation (fundamental change to the scope of the mandatory TP documentation)
- Local File (domestic documentation) for taxpayers with turnover of above €2 m
- Master File (central documentation) for taxpayers with turnover of above €20 m, including description of the group's capital structure, TP policy and significant intangible assets utilized by it
- Country by Country (CbC) Reporting for domestic entities with consolidated turnover above €750 m – a report that provides information concerning the amount of revenue earned and tax paid by location, also activities and places of business for dependent entities and permanent establishments within the group (in alignment with Action 13 of the OECD BEPS Action Plan)
- New TP regulations enter into force from 1 January 2017 with the exception of the obligation to prepare the CbC report, which is applicable to the fiscal year that begins after 31 December 2015

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55 | Are you ready for your close-up?
Impact of the changes

The Act requires entities to increase the level of detail of their TP documentation, which should include comprehensive information concerning the TP policy and, in some cases, the allocation of income and profitability of the related entities in particular countries.

The above changes will allow for a faster gathering of data, more transparency and the ability to carry out tax risk assessments, resulting in a more focused selection of the entities for the TP audit.

It is worth noting, there is an obligation to submit the TP documentation to tax authorities within seven days of a request.

Preparing for new rules

Taxpayers should prepare for the changes by:

• Reviewing TP documentation and assessing the necessary resources to complete the extended documentation requirements

• Developing new standards of intercompany transactions documentation, with a particular focus on engaging the board members in the process and creating a procedure for documenting the transactions as they are carried out, as well as adapting current internal procedures to the new regulations as soon as practical

• Performing a diagnosis of the key risk areas that tax authorities will be interested in and reinforcing the TP documentation in respective areas

• Carrying out a readiness analysis in the context of CbC reporting standards
Singapore Tax Authority releases updated transfer pricing guidelines and documentation requirements, aligns to OECD approach

On 6 January 2015, the Inland Revenue Authority of Singapore (IRAS) released revised transfer pricing guidelines. The 102-page document consolidates all previous circulars and guidance provided by the IRAS relating to transfer pricing. Notably, the 2015 Singapore TP guidelines include a requirement for taxpayers to prepare contemporaneous transfer pricing documentation.

The 2015 Singapore TP guidelines are split into the following key sections:

- Part I — Transfer pricing principles and fundamentals
- Part II — Transfer pricing administration
- Part III — Other issues

An overarching comment is that the 2015 Singapore TP guidelines are broadly in line with the 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD guidelines) and recent OECD drafts that have been issued as a result of the BEPS initiative.

Part I — Transfer pricing principles and fundamentals

Part I of the 2015 Singapore TP guidelines provides guidance on the arm's-length principle and transfer pricing documentation requirements in Singapore. The guidance on the application of the arm's-length principle is broadly consistent with the OECD guidelines, endorsing the arm's-length principle.

Specific guidance is provided that goes further than the 2006 Singapore TP guidelines, including a recommendation (neither mandatory nor prescriptive) to undertake a three-step approach to apply the arm's-length principle:

- Step 1: Conduct a comparability analysis
- Step 2: Identify the most appropriate transfer pricing method and tested party
- Step 3: Determine the arm's-length results

Within this guidance, specific requirements are included with respect to external benchmarking searches and the application of results.

Transfer pricing documentation

The most striking aspect of the 2015 Singapore TP guidelines is that the IRAS requires contemporaneous transfer pricing documentation (TP documentation) to be maintained by the taxpayer. Specifically, the IRAS has included dollar value thresholds for related-party transactions, which will warrant the preparation of TP documentation when these thresholds are exceeded.

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1 In 2006, the IRAS issued its first transfer pricing guidelines (2006 Singapore TP guidelines). These were supplemented by four subsequent circulars that were enacted into law between 2008 and 2009.
These thresholds are as follows:

<table>
<thead>
<tr>
<th>Category of related-party transactions</th>
<th>Threshold (S$) per financial year</th>
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<tbody>
<tr>
<td>Purchase of goods from all related parties</td>
<td>15m</td>
</tr>
<tr>
<td>Sale of goods to all related parties</td>
<td>15m</td>
</tr>
<tr>
<td>Loans owed to all related parties</td>
<td>15m</td>
</tr>
<tr>
<td>Loans owed by all related parties</td>
<td>15m</td>
</tr>
<tr>
<td>All other categories of related-party transactions. Examples:</td>
<td>1m per category of transactions</td>
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<tr>
<td>Service income</td>
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<td>Service payment</td>
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<td>Royalty income</td>
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<td>Royalty expense</td>
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<td>Rental income</td>
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<tr>
<td>Rental expense</td>
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</tbody>
</table>

For the purpose of determining if the threshold is met, aggregation should be done for each category of related-party transactions. For example, all service income received from related parties is to be aggregated.

Documentation is also not required in the following four situations:

- Where the taxpayer transacts with a related-party in Singapore and such local transactions (excluding related-party loans) are subject to the same Singapore tax rates
- Where a related domestic loan is provided between the taxpayer and a related-party in Singapore and the lender is not in the business of borrowing and lending
- Where the taxpayer applies the safe harbor of 5% cost markup for routine services
- Where the related-party transactions are covered by an agreement under an APA with the IRAS (an annual compliance report is still required in the case of an APA)

In the 2015 Singapore TP guidelines, the IRAS has defined contemporaneous to mean “documentation and information that taxpayers have relied upon to determine the transfer price prior to or at the time of undertaking the transactions.” The IRAS has further clarified that it would also accept as contemporaneous TP documentation “any documentation prepared at any time no later than the time of completing and filing the tax return for the financial year in which the transaction takes place.”

The IRAS requires the date of creation of the document to be stated in the document. While the IRAS does not require taxpayers to submit TP documentation along with the tax returns, the 2015 Singapore TP guidelines state that taxpayers have 30 days to submit the documents upon the IRAS’s request.

Taxpayers should update their TP documentation when there are material changes to the operating conditions that impact their functional analysis or transfer pricing analysis. In any case, the IRAS encourages taxpayers to update their TP documentation at least once every three years. Taxpayers should test their related-party transactions annually against the arm’s-length results.

Further, the IRAS has provided examples as to how these thresholds apply in practice.

Outside these threshold levels, the IRAS expects taxpayers to evaluate and decide whether TP documentation is necessary for the purpose of complying with different TP documentation rules of other tax authorities.
In the event that documentation is not provided, or if taxpayers are unable to substantiate that their transfer prices are concluded at arm’s length with their TP documentation, the following consequences could apply:

- Penalties may apply if taxpayers fail to provide TP documentation upon request by the IRAS. Such penalties will be invoked under prevailing laws concerning record-keeping.
- An upward adjustment may be made in the event the IRAS establishes that taxpayers have understated their profits through improper transfer pricing.
- The IRAS may not support taxpayers in Mutual Agreement Procedure (MAP) discussions in the event taxpayers suffer double taxation arising from any transfer pricing audit by the IRAS or foreign tax authorities.
- The IRAS may not accept the application of an APA in the absence of proper TP documentation.
- The IRAS may not accept taxpayer/self-initiated transfer pricing adjustments in the absence of proper TP documentation.

In terms of documentation content, the IRAS has introduced a two-tiered approach toward documentation:

- Group-level documentation
- Entity-level documentation

This is in line with the Master File and Local File approach under the OECD Action Plan to tackle BEPS, specifically Action 13 on transfer pricing documentation and CbC reporting.

While the IRAS does request certain extraterritorial information in its group level information, at this time it does not require taxpayers to prepare and provide a CbC reporting template as proposed by the OECD.

Given that the documentation requirements are laid out in detail, it would seem logical that the starting point for any transfer pricing query or consultation would be to request the transfer pricing documentation.

An omission from Singapore’s e-Tax Guide is the requirement for Singapore taxpayers who are the “Ultimate Parent Entity of an MNE” to comply with CbC reporting per BEPS Action 13; however, under the secondary mechanism for the filing of CbC reporting as contemplated in the CbC reporting Implementation Package2 such entities would be required to make their CbC reporting submission in a different jurisdiction. If the IRAS proceeds with the adoption of CbCR, it is hoped that IRAS will expedite its publication of guidance so that taxpayers can have sufficient time to prepare given the imminent reporting from 2016.

Part II – Transfer pricing administration

Part II of the 2015 Singapore TP guidelines provides information and guidance on the IRAS transfer pricing consultation program and the avoidance and resolution of transfer pricing disputes.

Under the subsection of the IRAS transfer pricing consultation program, clearer guidance in terms of the consultation process is provided compared to the 2006 Singapore TP guidelines. The template transfer pricing questionnaire found in the 2008 IRAS transfer pricing consultation has been removed, although this may be a possible starting point for the IRAS officers looking to conduct a transfer pricing consultation or risk assessment.

The 2015 Singapore TP guidelines provide additional detail on the process to apply for MAP and APA. However, similar to the 2006 Singapore TP guidelines, the 2015 Singapore TP guidelines do not discuss any processes in relation to simultaneous tax examinations or arbitration. Based on the guiding principles in the OECD guidelines, the 2015 Singapore TP guidelines provide detailed step-by-step processes for MAPs and APAs, including sample documents for MAP and APA in the annex.

Part III – Other issues

Part III of the 2015 Singapore TP guidelines discusses issues and provides guidance in relation to transfer pricing adjustments, related-party services, loans, and attribution of profits to permanent establishments. Full information on the issues covered in Part 3 can be found in our transfer pricing alert of 8 January 2015 titled Singapore Tax Authority releases updated transfer pricing guidelines.3

Implications

The 2015 Singapore TP guidelines will have immediate effect. Practically, the tax return filing deadline for the fiscal year (FY) 2013 has already passed. Although not explicitly stated by the IRAS, the first year covered by the 2015 Singapore TP guidelines would logically be FY 2014. That said, for queries relating to previous FYs, the IRAS may still request taxpayers to provide TP documentation to support the pricing. We have noticed this to be the case for queries received from the IRAS subsequent to the issuance of the 2015 Singapore TP guidelines.

South Africa’s Revenue Authority increases transparency demands in its focus on inbound services

On 17 July 2013, the Davis Tax Committee¹ was appointed to formulate, among others, South Africa’s response on the issue of BEPS generally, including the G20/OECD’s project on that same issue. Although the OECD could not make a direct correlation between declining corporate income tax revenues (as a percentage of GDP) to the existence of BEPS, it noted with concern statistical data collected from the South African Reserve Bank (SARB) that indicated substantial outbound payments for non-goods transactions since the end of the global financial crisis. From the sampled data, on aggregate, for the period 2008 to 2011, data show that nearly 50% of all payments flowing out of the country relate to legal, accounting and management consulting services. Copyrights, royalties and patent fees represented the second largest flow of payments.

Considering these significant outflows, a raft of measures has been introduced to close the information gap between the perceived BEPS practices and legitimate intragroup services.


New filing obligation for nonresident companies and trusts

With effect from June 2014, every nonresident company, trust or other juristic person must furnish an income tax return if it, among others, derived “service income” from a source in South Africa.² The obligation to file persists even where a double tax agreement (DTA) would provide relief to a nonresident.

Reportable arrangements

In March 2014, SARS issued a draft public notice in respect of six tax arrangements that it intended to add to the existing list of reportable arrangements; this included fees of a technical, managerial and consultancy nature paid by a resident to nonresidents that exceeded R5 million (approximately US$385,000). While the service arrangement was ultimately removed when the notice as finalized, SARS issued another draft Public Notice on Reportable Arrangements on 19 June 2015, specifically dealing with inbound services.³ Within this notice, it is proposed that the following inbound technical, managerial or consultancy services (the definitions of which were not provided) must be reported to SARS:

- The nonresident, its employees, agents or representatives were or will be physically present in South Africa rendering such services
- The expenditure in relation to the rendering of those services will exceed or exceeds R10m (approximately US$770,000) in the aggregate.

The reporting must take place within 45 business days after becoming “a reportable arrangement.” Failure to report may lead to penalties imposed for each month of the failure to report. Penalties may range from R600,000 to R3.6m (approximately US$46,000 to US$276,000), depending on whether the person is a participant in or the promoter of the arrangement, as well as the quantum of the tax benefit.

Reported information is generally used as a forewarning to assess whether the foreign service provider has a tax presence in South Africa (permanent establishment) and to gather information on Pay-as-You-Earn (PAYE) compliance. Past experience has indicated an increase in SARS audit of reportable arrangements.

**Withholding tax on service fees**

With effect from 1 January 2017, South Africa will introduce withholding tax on service fees sourced from South Africa at a domestic rate of 15%. Service fees are defined as fees for services of a technical, managerial and consulting nature. The withholding tax will be imposed despite the existence of a number of DTAs that effectively take away South Africa’s right to tax in the absence of a permanent establishment. Accordingly, in this regard, one may view the imposition of the withholding tax as an augmentation of the information gathering process which began with the filing and reportable arrangements requirements outlined above.
South Korea’s 2015 transfer pricing documentation amendments follow BEPS Action Plan 13 form

Pursuant to recent BEPS (Base Erosion and Profit Shifting) Action Plan 13 South Korea’s Ministry of Strategy and Finance (MOSF) on 6 August 2015 released drafted legislation that will amend the Law for the Coordination of International Tax Affairs (LCITA), specifically the Korean transfer pricing (TP) regulations.

Upon announcement of the drafted legislation on the LCITA, MOSF explained that the purposes of the draft legislation are to:
- Improve administrative process to assess transparency of tax reporting and potential tax avoidance by taxpayers as the existing form of ‘Summary of International Related Party Transactions’ between companies in Korea and their foreign affiliates only provide limited information
- Enhance, through proactive introduction of the newly developed global TP documentation scheme, Korean companies’ ability to response to the foreign tax authorities’ aggressive scrutiny
- Prevent tax avoidance by multinational companies (MNCs)

New submission requirement for the “International Related Party Transaction Integrated Report”

The draft legislation requires the submission of an “International Related Party Transaction Integrated Report” together with existing “Summary of International Related Party Transactions” by domestic corporations and foreign companies with a domestic subsidiary or place of business with transaction levels and assets above a certain threshold. The threshold will be defined once the Presidential Enforcement Decree (PED) is drafted and announced by the MOSF. The draft legislation will apply to both domestic companies and Korean subsidiaries of foreign MNCs to disclose overall information on business activities and international related party transactions.

Listed below is a comparison between “Summary of International Related Party Transactions” and “International Related Party Transaction Integrated Report.”

<table>
<thead>
<tr>
<th>Template</th>
<th>Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary of International Related Party Transactions</td>
<td>Names of foreign affiliates who have intercompany transaction with the taxpayer, business registration number, location (address), corporate representative, fiscal year and tax period, intercompany transaction amount etc.</td>
</tr>
<tr>
<td>International Related Party Transaction Integrated Report</td>
<td></td>
</tr>
</tbody>
</table>
| Report I (Masterfile) | • MNE’s legal ownership structure and geographic locations of the subsidiaries/branches/representative office  
• Details on top 5 goods or services which account for 5% of the MNE group’s revenue  
• Information on main business restructuring transactions, equity acquisitions, sale of businesses etc. |
| Report II (Localfile) | • Details on local entity’s business and business strategy  
• Details on major intercompany transactions and circumstances which caused such transactions  
• List of the related parties by each transaction type and each company relationship specific indicators etc. |

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Country-by-Country Reporting and transfer pricing documentation

The proposed amendment of the LCITA aligns to the OECD’s BEPS Action 13 recommendations. BEPS Action Plan 13 suggests three types of transfer pricing documents: Masterfile, Localfile, and Country-by-Country (CbC) Report, and provides the three-step approach as guidelines for the preparation and submission of the Transfer Pricing related documentation. In consideration of the taxpayers’ burden in preparing for all three types of reports mentioned, MOSF stated its plans to require only the Masterfile and the Localfile as compulsory reports within this draft legislation. The Masterfile will include the overall global business activities and transfer pricing policies of the MNE, while the Localfile will include information of international related party transactions (tangible assets, intangible assets, services, financial transactions, etc.).

MOSF also mentioned that legislation on CbC that would contain certain information about the global allocation of the MNE group’s income and taxes actually paid by each subsidiary, together with certain economic activity performed by each subsidiary within the MNE group, will be prepared after fully considering the trend and status of CbC adoption in other countries. In addition, to minimize taxpayer’s compliance burdens, the additional information that must now be submitted will integrate into or replace the existing TP-related tax filing forms such as “Summary of International Related Party Transactions.”

Implications to MNCs

This draft legislation has significant implications for business. Specific guidelines for compliance with the draft legislation, if enacted, are yet to be provided, however. Accordingly, the presidential enforcement decree (PED) supporting the draft legislation is expected to play a critical role in its introduction. It will also be important to closely observe wider developments related to the adoption of to BEPS recommendation in other countries within the same area – including Australia, China and Japan.

The draft legislation in Korea, if enacted, would be effective 1 January 2016 and must be submitted with company tax declarations in March 2017 (for companies with a December fiscal year-end). As a result, parent companies of MNCs should closely review their transfer pricing policies to be applied throughout 2016.
Spain enacts regulations on new CbC reporting obligations and amendments to transfer pricing rules

Spain approved a tax reform package with effect from 1 January 2015, introducing many new measures in the Spanish Corporate Income Tax\(^1\) Law (CITL) and additionally, on 11 July 2015, the new Spanish CIT Regulations\(^2\) (the CIT regulations) were approved, which complement the provisions included in the Spanish CITL. The new CIT measures introduce, among other changes, amendments that are in line with Action 13 of the OECD’s BEPS project.

**CbC reporting obligations**

The new CbC reporting obligations implemented by Spain are largely (though not entirely) aligned with Action 13 of the OECD’s BEPS project\(^3\) and are effective for fiscal years starting on or after 1 January 2016. These obligations generally apply to Spanish tax resident entities that are the “parent” of a group (as defined under the Spanish commercial law rules)\(^4\), and are not at the same time dependent on any other entity, whether Spanish resident or not, to the extent the consolidated group’s net turnover in the immediately preceding fiscal year exceeds €750m.

In addition, these rules also apply to Spanish entities and permanent establishments (PEs) which are, directly or indirectly, held by a non-Spanish resident parent entity when any of the following circumstances is met:

- The country in which the parent entity is resident has not established CbC reporting obligations under terms similar to those of Spain.
- The country in which the parent entity is resident has not signed an automatic exchange of information agreement with Spain in relation to these obligations.
- The country in which the parent entity is resident has systematically failed to comply, and this systematic failure has been notified to the Spanish tax resident companies or PEs before the reporting fiscal year-end.\(^5\)

In addition, the CIT regulations include the obligation for Spanish companies belonging to reporting groups to notify the Spanish tax authorities of the name and tax residence of the company within the group filing the CbC report. Such notification must be made before the reporting fiscal year-end.

In all of the above cases, the CbC report shall be filed within a 12-month period from the close of the reporting fiscal year (i.e., companies subject to these obligations with a fiscal year ending on 31 December 2016 need to file the CbC report by 31 December 2017). A specific tax form will be published by the Spanish tax authorities for these purposes.

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2. Royal Decree 634/2015 was published in the Spanish Official Gazette, approving the new Spanish Corporate Income Tax (CIT) Regulations.
5. This systematic failure circumstance is in line with the Country-by-Country Reporting Implementation Package, albeit the Spanish rule does not contain any definition of the relevant concept.
The information to be provided is analogous to the BEPS Action 13 model template, with very minor differences (i.e., instead of “accumulated earnings,” the Spanish implementation rules refer to “the equity”; or instead of requiring “the number of employees,” the Spanish rules establish the “average of the number of employees”) and should be presented on an aggregate basis for each jurisdiction, as follows:

- a) Group’s revenue, distinguishing between that derived from related and unrelated parties
- b) Accounting result before CIT or a tax of similar or analogous nature
- c) CIT (or tax of similar or analogous nature) effectively paid, including withholding taxes
- d) CIT (or tax of similar or analogous nature) accrued, including withholding taxes
- e) Share capital and equity at the end of the fiscal year
- f) Average number of employees
- g) Tangible assets and real estate investments, different from treasury and receivables
- h) List of resident entities, including permanent establishments, and the main activities these are engaged in
- i) Other information that is considered relevant and, if applicable, an explanation on the data included in such information

Regarding the penalty regime, the OECD Implementation Package of Action 13 does not propose any specific provision regarding penalties to be imposed in the event that the reporting company fails to comply with the reporting requirements; however, it mentions the possibility of extending the transfer pricing documentation penalty regime to the requirements to file the CbC report. Despite the OECD approach, the Spanish rules do not extend the penalty regime to include transfer pricing documentation, and we understand that only the general penalties regime set forth in the Spanish General Tax Act should become applicable for not filing the CbC report.

In a distinct difference from the OECD recommendations, the Spanish CIT Regulations do not specifically include any clause on the use and confidentiality of the information included in the CbC report. That said, the lack of such reference should not represent any material risk, since these principles should be safeguarded under current confidentiality rules established in the Spanish General Tax Law and international treaties.

On a wider basis, it will be interesting to see whether other countries either omit parts of the OECD’s Implementation Package or add their own specific clauses to it.
Transfer pricing documentation: Master File and Local File requirements

Master File

The group documentation (Master File) rules specifically highlight two particularly contentious areas: intangible assets and financial activity, which are areas that are subject to analysis by the OECD in the context of the BEPS project.

Alongside the documentation already required by the current regulations, the following documentation must also be included:

- Main activities of the group, with a description of the principal geographic markets where it operates, principal sources of revenue and supply chain of activities representing at least 10% of the group turnover
- Information on the group intangible assets, including a general description of the group’s overall strategy with reference to the intangible assets’ development, ownership and exploitation
- Identification of both the location of the main facilities where the research and development (R&D) activities are carried out and who is responsible for managing those activities
- Amounts of the consideration paid for that purpose by group-related entities
- A report of significant transfers of intangible assets indicating the involved parties and countries and the amounts paid
- Financial activity
- Overall description of the group’s funding structure, including main agreements with entities outside the group
- Identification of the group entities carrying out main financing activities such as the incorporation country and the effective center of management location
- A brief description of any Advance Pricing Arrangements in force and any other decision with any tax authority affecting the distribution of the group’s benefits among countries (as a result, the Spanish tax authorities will have access to any administrative decision, whether or not the decision relates to Spanish resident entities)

Documentation with regard to a group will not be compulsory for groups with turnover of less than €45m for the previous year, as anticipated by the current wording of CITL.

Local File

In respect of taxpayer documentation (Local File), the regulation requires new information to be included:

- Management structure, organizational chart and people or entities receiving reports on taxpayer activities evolution, indicating the tax residence countries. It consists in the reporting structure, i.e., it aims at clarifying where relevant decisions concerning the group and entities business are made.
- Taxpayer activities and their business strategy description; indication of intangible assets’ restructuring, assignment or transfer operations it has been involved
- Main competitors
- Reconciliation among data used in economic analyses with annual financial statements, when appropriate and relevant; financial data of comparable and its source

The new regulations now emphasize again that the use of methods other than those stipulated in the CITL are accepted, provided they are of common use. The regulation refers to the future cash flow discount method, as an example, without limitation. Notwithstanding the aforementioned, the use of other methods must be sufficiently sustained and irrefutably supported, by means of verifiable references of assumptions and scenarios used to carry out the corresponding valuation.

For entities with a net turnover of less than €45m (taking into account the entire commercial group turnover), the taxpayer documentation must contain the following streamlined content:

- Nature and characteristics description, and amounts of related-party transactions
- Complete identification of taxpayer and entities with which the entity carries out related-party transactions
- Identification of valuation method used
- Comparables obtained and value or range of values derived from their use

These new Master File and Local File requirements will enter into force for fiscal years commencing from 1 January 2016. During 2015, the documentation requirements in force up to date will still be applicable.
Changes in the valuation rules and verification of related-party transaction procedures

Among these changes on the transfer pricing documentation requirements, the new regulations, in line with the CITL, allow for recharacterization in the context of a related-party transactions system. Namely, the provision allows the possibility to replace the transactions declared by the taxpayer by those the Administration considers compliant with the arm’s-length principle, or the construction by the Administration of those transactions not registered for accounting purposes by the taxpayer.

For the purposes of determining the market value, in addition to aspects stipulated in the text of the previous regulations, it is now explicitly stated that it will be necessary to analyze other aspects relevant to that process, such as the existence of losses, impact of public authorities’ decisions, existence of location savings, or integrated groups of workers.

Thus, the regulation echoes very topical aspects of the current debate on transfer pricing practices, such as location savings or integrated groups of workers, irrespective of the lack of common international consensus on the appropriate treatment.

On the other hand, the regulations do express reference to the possible use of a range of values and of statistical measures to minimize the risk of errors due to comparability defects, which seem to concern the compulsory adjustment of the comparable values median in connection with the provisions of Section 3.62 of the 2010 OECD Transfer Pricing Guidelines. However, possible statistical measures to be used by taxpayers are not specified, giving rise to some degree of uncertainty to the detriment of legal certainty.

To conclude, these new Spanish rules are intended to make multinational groups with a presence in Spain focus on the actions that may be necessary to ensure their ability to produce the required information, including preparing protocols for gathering the information and developing internal processes and responsibilities with regard to these new documentation requirements.
UK tax authorities continue to drive behind improving large business compliance and tax transparency

Enhanced disclosure and transparency toward the tax authority has for some years been a cornerstone of the UK's risk-based approach to tax compliance. To be classed as low risk, with the resulting benefit of a relatively light touch audit regime, large businesses are expected to be open with HMRC in real time as to how they manage tax compliance risk and to tell HMRC about significant transactions involving innovative interpretation of tax law, fully disclosing any legal uncertainty.

For avoidance schemes, since 2004 HMRC has operated the Disclosure of Tax Avoidance Schemes (DOTAS) program. DOTAS was originally conceived as "a scheme of nonjudgmental transparency," the idea being that transparent disclosure to the tax authority is of itself of significant value to the tax authority in highlighting areas where there may be a high risk of noncompliance, allowing the tax authority to take appropriate countermeasures, whether through investigation and litigation or, in some cases, through bringing about changes in legislation.

This "nonjudgmental" aspect of transparency has been eroded over the years, with HMRC's assessment of a large business's risk status now as dependent on what planning is undertaken as well as on what is disclosed, and the DOTAS regime being used not only as an early warning system but also directly as an indicator of non-compliant behavior; in that regard, it has become a triggering event for HMRC's new "pay now, argue later" accelerated payments and follower notices regimes.

The UK government's enthusiasm for disclosure to the tax authority has not, however, been matched by parallel support for enhanced taxpayer disclosure and transparency toward the public and other non-tax-authority stakeholders. In 2014, the UK Conservative/Liberal Democrat coalition government led the G8 in calling upon the OECD to limit CbC reporting to confidential disclosure to tax authorities and not to wider, public dissemination of the data. This position — opposed by the UK Labour party and a range of "fair tax" lobby groups as a lost opportunity to bring further pressure to bear on "aggressive" tax avoidance — reflected UK government concerns that mandatory public disclosure of taxpayer confidential information could jeopardize competitiveness and — by presenting information out of context — could also hamper rather than assist the tax authorities' tax compliance efforts.

Pushing the agenda forward

On both fronts, public disclosure and enhanced disclosure to the tax authority — the recently elected Conservative government has taken decisive further steps with a package of proposed measures targeted at large business,

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1 HMRC Commissioner, Mr. Dave Hartnett, to House of Lords Select Committee on Economic Affairs, 20 June 2005.


Under consultation: a new requirement for businesses to publish their tax strategy

The first of the proposals is for new legislation that will require large businesses to publish (and report to HMRC that they have published) a tax strategy on an annual basis, for the period covered by the business’s annual report or accounts. The strategy must be the responsibility of an executive member of the board and should cover the business’s attitude to tax risk, its appetite for tax planning and its approach to its relationship with HMRC.

HMRC suggests the following areas could be covered when articulating the tax strategy:

- Overview of internal governance
- Approach to risk management
- Attitude to tax planning and appetite for risk in tax planning (e.g., whether they seek to work in accordance with the spirit — in addition to the letter — of the law)
- Attitude to their relationship with HMRC
- Whether the UK group has a target Effective Tax Rate (ETR) and, if so, what it is, and what measures the business is taking to reach or sustain this target ETR

There will be a requirement for an executive director of the board to be named as having responsibility for signing off an organization’s tax strategy, and possibly for the group to report on what measures it is taking to apply the strategy in practice. HMRC will then consider whether the tax returns and claims received from a business over the period covered by the published strategy, are in line with the stated objectives of the strategy. If the returns appear materially inconsistent with the published tax strategy, HMRC plans to take account of this as part of its regular risk reviews.

The rationale for the new measure — mirroring calls for public tax transparency in the CbC reporting debate — is that public disclosure of a business’s attitude toward tax planning and reputational concerns leading to such disclosure have been shown in research\(^4\) to be associated with a lower tax-risk appetite and encouragement for businesses to pursue less aggressive tax planning arrangements.

A new voluntary Code of Practice on Taxation

A second measure, announced as part of the same package, is a voluntary Code of Practice on Taxation, which sets out best practice tax transparency behaviors toward the tax authority, while combining this with further requirements in regard to the standards large businesses should adopt in structuring their approach to tax planning.

The proposed voluntary code includes many of the factors that HMRC already takes into account in assessing whether a business is low risk, but in some respects goes further in seeking to raise the bar for a business to be classed as low risk. Specifically, the code suggests that a low-risk business should have early dialogue with HMRC on tax planning generally, not just on avoidance or planning viewed as “aggressive,” and would require businesses to demonstrate not just that there are clear accountabilities in place for tax decisions that may increase risk levels, but that transactions with a significant tax impact have actually been seen and agreed to by senior decision-makers within the business.

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\(^4\) Exploring Large Business Tax Strategy Behaviour, TNS BMRB, 2015

While increasing numbers of UK businesses are already being transparent about their approach to taxation, a number are still failing to do so. In addition, there are still a small number of businesses which simply do not play by the rules — persistently engaging in tax avoidance or highly aggressive tax planning, or refusing to engage with HMRC in a full, open and proper way. It would be unfair to the vast majority of business not to do more to tackle this problem, and to level the playing field for all.

Improving Large Business Tax Compliance Consultation document — HMRC, 22 July 2015
Special measures regime for serial offenders

A third proposal is a “special measures” regime for businesses lacking the required level of transparency with HMRC and/or who persist with aggressive tax planning. This would introduce a series of potential sanctions for large businesses that represent a significant tax compliance risk, including:

- Increased requirements for reporting and disclosure to HMRC (e.g., a requirement to routinely provide additional information or documents, such as all non-privileged third-party tax advice, without a specific HMRC request)
- Withdrawal of the HMRC non-statutory clearance service
- Being named publicly by HMRC as subject to special measures

The special measures regime is said to be targeted at a very small number of persistent high-risk businesses. Under current proposals, however, a business may be put into the special measures regime when HMRC takes the view that it presents “significant” risk due to the number or nature of tax avoidance schemes entered into, even if those schemes are found to deliver successful results (i.e., even if HMRC fails to defeat those schemes in litigation), where the business does not make specified improvements in its behavior after an initial 12-month notice period, and its would then remain within the special measures regime for a minimum of two years. Some of the key provisions – such as the definition of “significant” – will be set out in legislation, and it is at present uncertain how widely the regime may potentially reach.

A changing landscape

Almost two-thirds of FTSE100 businesses now voluntarily disclose tax information such as tax policies, tax principles and tax payment information, but the proposed mandatory disclosure of an HMRC-defined tax strategy would accelerate this trend and cover over 2,000 businesses. Even if HMRC does not move to publish details of those signing up to the voluntary Code of Practice, such a code is likely to become a new *de facto* standard for acceptable tax behaviors, and businesses may well choose to publicize their adherence to the code as a way of addressing stakeholder concerns regarding tax risk.

The measures HMRC is proposing and, in particular, the legislative requirement for publication of a tax strategy, go further than any of the transparency measures currently being proposed either under the OECD’s BEPS project or the European Commission’s Tax Transparency Package. Each of the proposed measures represents a further increase not only of transparency requirements but also of raising the bar of what HMRC – and stakeholders – are likely to regard as minimum standards for acceptable tax behavior. Organizations are encouraged to ensure they have appropriate reputational tax risk management plans in place to ready themselves for this new environment.
Following the enactment of enabling legislation in Finance Act 2015, the UK on 5th October 2015 published draft regulations\(^1\) to implement country-by-country reporting (CBCR). A consultation period runs until 16 November, during which any interested party has the ability to make a representation to HMRC. Final regulations will then be enacted to meet the UK’s undertaking to implement CBCR with effect for accounting periods commencing on or after 1 January 2016. In that regard, the UK is expected to follow the large number of other countries who will require such accounting data to be reported in 2017.

The draft regulations provide for filing by multinational groups with annual consolidated revenue of at least £586 million (taken as the current sterling equivalent of €750 million, the threshold set out by the OECD) in the prior period. The rules only apply where the group’s ultimate parent is in the UK, but also include provisions for a company to choose to be a Surrogate Parent Entity – a concept put forward by the OECD for an entity to act as the sole substitute for a group’s ultimate parent, where the parent entity is not required to file the CBCR report. However, the draft regulations do not provide that a UK subsidiary of a foreign-parented group which does not file anywhere else, must file in the UK. We understand that this is because the UK believes there are legal challenges with this under English common law. The UK may still, of course, receive the information via information exchange if it is filed in another country.

Finally, the regulations include modest financial penalties for non-filing, late filing or the provision of inaccurate information.

The actual information and method of filing is not included in the regulations, but will be the subject of a future direction from the UK authorities. This will undoubtedly follow the recommendations that have now made by the OECD in relation to Action 13 of the Base Erosion and Profit Shifting project, though the timing of such direction is not yet clear.

\(^1\) https://www.gov.uk/government/publications/technical-consultation-country-by-country-reporting
US plans to limit CbC reporting to treaty and TIEA partners

The United States’ approach to information exchange has become more clear as 2015 has progressed, with one competent authority within the Internal Revenue Service (IRS) recently stating that the information that will be shared under the OECD’s CbC reporting recommendations will be limited solely to US treaty partners, as well as those countries with which the United States has signed a Tax Information Exchange Agreement (TIEA).

Karen Cate, a senior international tax law specialist at the IRS, stated at a late-July transfer pricing event that limiting CbC reporting to treaty and TIEA-based exchanges “will allow the United States to ensure that the information is used only for the intended and permitted purposes, and help us protect the confidentiality of commercially sensitive data.”

Cate’s comments come just weeks after leaders of tax writing committees in Congress, Paul Ryan, Chairman of the Ways and Means Committee, and Orrin Hatch, the Chairman of the Senate Finance Committee, sent a letter to Jacob Lew, US Treasury Secretary, outlining a number of concerns in regard to the US input into the OECD BEPS project, specifically focusing on whether Treasury has the authority (under the Internal Revenue Code) to exchange information with foreign governments. On this topic, the letter states:

“We are troubled by some positions the Treasury Department appears to be agreeing to as part of this project. For example, we are concerned about the country-by-country reporting standards that will contain sensitive information related to a US multinational’s group operations. We are also concerned that Treasury has appeared to agree that foreign governments will be able to collect the so-called “master file” information directly from US multinationals without any assurances of confidentiality or that the information collection is needed. The master file contains information well beyond what could be obtained in public filings and that is even more sensitive for privately-held companies.”

The letter continues: “Some recent press reports have indicated that the Treasury Department believes it currently has the authority under the Internal Revenue Code to require CbC reporting by certain US companies and that Internal Revenue Service (IRS) guidance on this reporting will be released later this year. We believe the authority to request, collect, and share this information with foreign governments is questionable. In addition, the benefits to the US government from agreeing to these new reporting requirements are unclear, particularly since the IRS already has access to much of this information to administer US tax laws. Therefore, we request that, before finalizing any decisions, the Treasury Department and IRS provide the tax-writing committees with a legal memorandum detailing its authority for requesting and collecting this information. We also request that you provide a document: (i) identifying how the CbC reporting and other transfer pricing documentation obtained by the IRS on foreign multinationals operating in the United States will be utilized and; (ii) providing the justification for agreeing that sensitive master file information on US multinationals can be collected directly by foreign governments. In the event we do not receive such information, Congress will consider whether to take action to prevent the collection of the CbC and master file information.”

While the coming months will tell whether Cate’s statement on the limiting of information exchange to treaty/TIEA partners only will satisfy Congress, more recent events seem to point in a different direction. Chairmen Hatch and Ryan wrote a second time to Treasury Secretary Jacob Lew on 27 August 2015, expressing their concern that the recently released 2015-2016 Treasury/IRS Priority Guidance Plan includes a project to develop CbC reporting regulations under Sections 6011 and 6038. The Congressional tax leaders said that, as expressed in prior correspondence to the Treasury Secretary in June, they are “not convinced that Treasury has the authority to require CbC reporting by certain U.S. companies (including sharing the information with foreign governments).”
Rather than utilize resources on the CbC regulatory project, the two chairmen asked Treasury to provide them with a legal memorandum they earlier requested on various issues related to the OECD BEPS project. Chairmen Hatch and Ryan asked Treasury Secretary Lew to provide the earlier-requested memorandum to them on BEPS no later than 31 August.

IRS extends deadline for disclosing certain of the newly designated listed transactions and transactions of interest

On 23 July 2015, meanwhile, the IRS amended Notices 2015–47 and 2015–48 and modified the disclosure due date for those transactions that would otherwise have been due before 5 November 2015.

With regard to timing of the disclosure, Treasury Regulations Section 1.6011-4(e)(2) provides the general rule that “The disclosure for a reportable transaction must be attached to the taxpayer’s tax return for each [tax] year for which a taxpayer participates in a reportable transaction.” Subpart (3) addresses disclosure of a “subsequently listed” transaction – when a transaction becomes a listed transaction or a transaction of interest after the tax return reflecting the transaction has been filed (subsequently listed), the disclosure must be filed with the IRS Office of Tax Shelter Analysis (OTSA) within 90 calendar days.

The transactions designated on 8 July extended the 90-day rule for subsequently listed transactions to 120 days from the date of the notice, or 5 November 2015. Under the original notices, the disclosure deadline for a transaction in which participation occurred in a year not yet filed (e.g., 2014), was established by the general rule that disclosure must be attached to the return for the year of participation. Therefore, under the original notices taxpayers whose returns are due before 5 November 2015, could have had a disclosure deadline earlier than 5 November.

The amended notices eliminate the requirement to disclose before 5 November — “if under section 1.6011-4(e), a taxpayer is required to file a disclosure statement with respect to the [transaction] described in this notice after 8 July 2015, and prior to 5 November 2015, that disclosure statement will be considered to be timely if the taxpayer alternatively files the disclosure with the Office of Tax Shelter Analysis by 5 November 2015.” In other words, the amended notices eliminate the need for taxpayers to apply the general rule to the newly designated transactions, and give all taxpayers that participated in one of the newly designated transaction until 5 November 2015 to make the required disclosures.

Some recent press reports have indicated that the Treasury Department believes it currently has the authority under the Internal Revenue Code to require CbC reporting by certain US companies and that Internal Revenue Service (IRS) guidance on this reporting will be released later this year. We believe the authority to request, collect, and share this information with foreign governments is questionable.
The amended notices provide that disclosures of the newly designated listed transaction and transaction of interest will be considered timely if submitted to OTSA by 5 November 2015. This change does not affect the disclosure deadline for participation in transactions during years for which returns have already been filed. But taxpayers who have been rushing to determine whether a disclosure must be attached to a return due before November now have some additional time before the disclosure must be filed.

**SEC approves final rule requiring companies to disclose ratio of CEO's pay to an average employee's**

While not specifically impacting taxes, a 5 August 2015 announcement from the Securities and Exchange Commission (SEC) demonstrated how important the wider transparency debate continues to be in the United States.

According to the announcement, the SEC has adopted a final rule that requires a public company to disclose the ratio of the compensation of its chief executive officer (CEO) to the median compensation of the company’s employees.

As required by the Dodd-Frank Act, the rule would amend existing executive compensation disclosure rules to require companies to disclose:
- The median of the annual total compensation of all its employees, except the CEO
- The annual total compensation of its CEO
- The ratio of those two amounts

**Methodology for identifying the median employee**

To identify the median employee, the rule would allow companies to select a methodology based on their own facts and circumstances. A company could use its total employee population or a statistical sampling of that population and/or other reasonable methods. A company could, for example, identify the median of its population or sample using:
- Annual total compensation as determined under existing executive compensation rules
- Any consistently applied compensation measure from compensation amounts reported in its payroll or tax records.

A company could apply a cost-of-living adjustment to the compensation measure used to identify the median employee. If a company applies this adjustment, it would need to use the same cost-of-living adjustment in calculating the median employee’s annual total compensation. To provide context for this adjustment, a company electing to present the pay ratio in this manner must also disclose the median employee's annual total compensation and the pay ratio without the cost-of-living adjustment.

A company also would be permitted to identify its median employee once every three years unless there has been a change in its employee population or employee compensation arrangements that it reasonably believes would result in a significant change to its pay ratio disclosure. Also, within those three years, if the median employee’s compensation changes, the company may use another employee with substantially similar compensation as its median employee.

**Determination of total compensation**

A company would be required to calculate the annual total compensation for its median employee using the same rules that apply to the CEO’s compensation. “Annual total compensation” means total compensation for the last completed fiscal year, calculated using the definition of “total compensation” in existing executive compensation rules, namely Item 402(c)(2)(x) of Regulation S-K. The rule would allow companies to use reasonable estimates when calculating any elements of the annual total compensation.

Companies will be required to provide disclosure of their pay ratios for their first fiscal year beginning on or after 1 January 2017.

**Governmental Accounting Standards Board adopts a proposal on transparency for state and local tax abatements**

On 3 August 2015, the Governmental Accounting Standards Board (GASB) adopted a proposal that will require state and local governments for the first time to disclose information about property and other tax abatement agreements. Governments generally agree to abate or reduce the taxes of businesses and other taxpayers to promote economic development, job growth, redevelopment of blighted or underdeveloped areas, and other actions that are beneficial to the government or its citizens. According to GASB, “The results of external research ... suggest that tax abatements are an issue of concern among citizen groups, county board members, and municipal bond analysts, and that each group desires to receive information about the level of abatement activity and the results of the abatement programs ...
However, the researchers found relatively few states (six) with statutes requiring any level of external reporting after tax abatements are granted. These findings indicate that there is an important information need that is largely unmet.”

In October 2014, the GASB issued an Exposure Draft, *Tax Abatement Disclosures*, for public comment. The proposed guidance was designed to improve financial reporting by giving users of financial statements access to useful information about government tax abatements that is generally not publicly reported. Without the kind of required disclosures proposed, the GASB argues, it is difficult to discern the magnitude and nature of the effects of those agreements. To help users, preparers and auditors of financial statements familiarize themselves with the Exposure Draft, the GASB developed a web page that features new “plain-language” resources.

### What will need to be disclosed?

Specifically, the proposed tax abatement disclosure requirements would include general descriptive information, such as:

- The tax being abated
- Criteria that must be met for the taxpayer to be eligible for the abatement
- Provisions for recapturing abated taxes
- The types of commitments made by tax abatement recipients
- Number of tax abatement agreements
- Dollar amount of taxes abated
- Other commitments made by a government, such as to build infrastructure assets

### Increasing reputation risk?

The Tax Abatement Disclosures standard, due to come into force for periods beginning after 15 December 2015, will significantly increase the overall volume of publicly available information in regard to state and local tax incentives offered to companies. The standard is not retroactive, but it does apply to all periods presented in the financial statements. It does not require governments to refer to tax abatement recipients by name but rather requires governments to present their own tax abatement information aggregated and organized by major program. Governments may choose to report individual tax abatement information, but if they do, they should present individually only those that meet or surpass a quantitative threshold selected by the government.

It is therefore not unreasonable to expect that the new disclosure will drive heightened media activity in terms of reporting of the incentives granted. Companies should therefore take all steps to ensure that they are in full compliance with all requirements for each incentive granted, as well as consider the value of preparing a full and detailed analysis of the total economic, tax and social contribution made to a jurisdiction.

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Preparing for the new era of transparency

Like any journey, preparing to meet a major new challenge head-on requires a clear road map and planned phases, with each phase playing a pivotal role in sustaining the overall journey.

This is very much true for addressing the twin needs of systems readiness and data assurance that will be required as we enter a new era of transparency. Indeed, a competitive advantage may be gained by those who create the resilience and flexibility that allow them to respond quickly, efficiently and effectively to new transparency demands.

As noted by Ronald van den Brekel in the article on BEPS Action 13, many companies will actually use the new requirements as a catalyst, embarking on wider transformation of financial systems, including radical consolidation of the number of available ERP systems. But even some of the most well-known global companies are reacting to the changing landscape initially with manual processes that rely on email, spreadsheet-based data capture and storage of a snapshot of data outside traditional ERP systems or data warehouses, even though most will eventually upgrade to automated data collection, fit-for-purpose data warehousing and sophisticated data analytics capabilities.

As illustrated by the range of new developments set out in this report, the number of diverse national requirements is set only to grow, not contract. In that respect, developing a framework approach that allows for flexibility and adaptation is key. Here, leading practices from Action 13 work can be replicated and applied to national transparency obligations. A common approach we see many companies take is as follows:

- **Identify data sources**
  - Understand the different data sources and the advantage/disadvantage of each one (e.g., consolidation vs. ERP-sourced)
  - Identify where national legislation differs
  - Identify whether additional external audit of data may be required, prior to its submission
  - Determine which ledgers should be imported (e.g., group ledgers vs. local ledger)
  - Understand all unstructured data sources and their taxonomical structures

- **Assess current state**
  - Develop greater awareness of issues/questions that will be raised by tax authorities
  - Confirm understanding of the group’s structure and analysis
  - Determine next steps to take to accurately reflect the group’s tax risk profile in CbC reporting

- **Design data extraction and analysis processes**
  - Map data flows from different source systems to data mart/store
  - Review data transformations to be executed during data load
  - Determine data analysis requirements and current limitations of analysis solution

- **Carry out data extraction**
  - Build end-to-end process to extract, transform and load data in data mart/store
  - Configure audit trail functionalities for maximum transparency and insight

- **Carry out detailed data analysis**
  - Set up specific management dashboards, configured for visualization of KPIs and planning
  - Remediate existing data capture/recording processes, if necessary
  - Assess need for realignment of existing structures, legal entity rationalization or pricing

- **Create a sustainable process**
  - Put in place routines to support data extraction, analysis and reporting with clear responsibilities and deadlines, including quality controls
  - Make CbC data analysis part of a periodic data analysis package for tax and finance for real-time monitoring

For each of the key steps listed above, a matrix can be created against which key tasks, information on how you are addressing each task, including responsibility assignment and timelines, and your overall level of comfort can be mapped. This provides a useful tool for tracking the ongoing status of all national transparency initiatives – an imperative, where so many countries are putting in place so many differing requirements.
A common approach to transparency readiness

- Identify data sources
- Assess current state
- Design data extraction and analysis processes
- Carry out data extraction
- Carry out detailed data analysis
- Create a sustainable process
It will be of little surprise to readers of this report that around 50% of the global developments noted herein are related to transfer pricing. More than ever before, tax authorities are scrutinizing business activities, supply chain operations and transfer pricing strategies.

### Asking the right questions

Having the ability to source the data is one thing. Detecting risk anomalies in the data that may draw attention from tax authorities is another. This is especially true as more and more revenue authorities are able to access data in the ERP system directly. Here, it is not only the growth of the Standard Audit File for Tax (SAF-T) standard in Europe that companies should be aware of. As far apart as Australia and Brazil, tax administrators believe that direct ERP access represents a next phase of risk assessment.

The risk assessment of financial and tax data for transparency and disclosure purposes varies depending on a number of different factors, and no two situations are the same. But some general conclusions can be drawn.

Although national transparency and disclosure regimes will be highly specific, the reporting obligations under the OECD’s BEPS Action 13 provide a robust illustration of some of the types of questions that business leaders should ask themselves when risk assessing the information they may submit:

- Where is revenue earned in the group and where are the profits being derived from in the group?
- Is the company physically able to disclose financial information and allocation schedules on a per-country basis?
- How does the company balance providing sufficient information against the time and cost involved in producing the reports?
- Can the supply chain be diagrammed and can the company provide a functional analysis of each of the nodes of the supply chain for the top five products and/or all products with more than 5% of sales?
- Can the company explain its transfer pricing compliance succinctly and consistently?
- How can the company avoid misinterpretation of data, such as reporting ordinary profits in addition to profits after extraordinary items?
- Does the company have accurate information on global operations – including headcount, revenues and profits by country?
- Has the company identified features listed as potentially indicative of transfer pricing risk?
- Does the company have specific types of related-party payments tax authorities are focused on, and does the company earn consistent returns on similar transactions?
- Does the company have significant transactions with a low-tax jurisdiction or are the functions, assets and risks of the company aligned with its economic substance and reward?
- Has the company experienced a business restructuring, and if so, what impact does it have on financial and tax data?

- Does the company have excessive debt in comparison to its peers?
- What percentage of transactions does the company currently cover in documentation, and is such documentation of sufficient quality?
- Have any transfers of intellectual property (IP) been made to related parties?
- Are the value-driving processes of the company relating to IP aligned with its economic substance and reward?

### Meeting new transfer pricing documentation challenges

It will be of little surprise to readers of this report that around 50% of the global developments noted herein are related to transfer pricing. More than ever before, tax authorities are scrutinizing business activities, supply chain operations and transfer pricing strategies. An increasing number of countries require you to substantiate and document your transfer pricing practices. Since 1994, the number of economies with effective documentation rules increased exponentially from 5 to more than 55, and more are to come. Action 13 of the BEPS Action Plan is set to permanently change the way in which documentation of transfer pricing activity is carried out.

But it can be challenging for even the most diligent taxpayer to obtain complete compliance. EY’s 2013 Global transfer pricing survey1 reflects the magnitude of the challenge. According to this survey, only 28% of parent respondents claimed to be fully compliant in every country. Instead of targeting comprehensive compliance, a plurality of parent respondents (42%) take a risk-based approach to where they document by fully documenting only in those markets that they consider to be high-risk.

The survey provides some evidence that risk-based approaches have not always afforded taxpayers with adequate transfer pricing protection. In fact, the rate at which transfer pricing documentation was rejected as inadequate increased in 22 of 25 countries surveyed since 2010.

The challenge of managing the documentation process will only increase as the number of countries requiring documentation grows, more countries institute country-specific requirements such as transfer pricing disclosure forms and more countries implement Action 13 of the BEPS project. The latest waves of documentation requirements implemented in African, Asian and Latin American countries have often opted for more formal treatments, such as transfer pricing disclosure and information returns. As a result, taxpayers that are used to relying on an

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old-style master file to satisfy documentation requirements may need to re-examine whether they are in compliance with local requirements in Africa, Asia and Latin America. Exacerbating the risk is the fact that these are also the jurisdictions likely to impose penalties for failure to prepare transfer pricing documentation.

For many companies, Action 13 is driving a more globally centralized approach to documentation. Whether a centralized or decentralized approach is chosen, companies understand the severity of transfer pricing scrutiny in the countries where they operate. This allows the company’s business and tax strategies to be aligned with their risk profile, and to direct their documentation efforts to those countries where there is an increased risk that transfer pricing may be challenged. Such a risk-based approach allows companies to direct limited resources to the main areas of concern and to document transfer prices on a globally consistent basis.

In addition, many companies are now increasing their efforts to align transfer pricing resources to respond to increased transfer pricing documentation requirements and controversy in rapid-growth markets that may have been lower priorities in the past. They are further pre-empting difficult technical disputes over marketing intangibles, location savings and the source and exploitation of customer relationships through more rigorous transfer pricing documentation.

In much the same way as for CbC reporting, there are a number of key questions that can help companies assess their transfer pricing documentation needs:

• Have you identified all of the cross-border transactions including services provided and benefits received?
• Are you aware that you should be charging for and documenting the charges for management services?
• Have you critically evaluated and documented the business purpose and economic substance of transactions that encompass intangibles and pass on essential knowledge and skills, brand and technology that help exploit opportunities in new markets?
• Have you recently changed your operating structure in a way that could affect the ownership of intangibles (marketing, trade, technical, networks, processes, etc.) and change the nature of intercompany transactions, and have you adapted your transfer pricing policies and practices accordingly?
• Are your intercompany finance transactions (e.g., loans, guarantees, debt instruments, centralized treasury transactions) appropriately analyzed and documented?
• Do your transfer pricing practices match your transfer pricing policies and intercompany agreements?

• Are you directing your transfer pricing compliance efforts in the light of limited resources and tax risk management to the right transactions, in the right jurisdictions?

Where to from here?

All things considered, it is difficult to argue against the premise that we are entering into a new era of transparency. Whether your company sees this as a broad opportunity for finance transformation or simply an exercise in compliance, striking while the iron is hot will be important and the value of a robust transparency readiness process to ensure that data can be sourced and presented in an effective, efficient and clear manner cannot be overstated.

Companies now have the full picture of what is required under BEPS Action 13 thanks to a final CbC reporting template that is now in place, as well as a full year to prepare. Readiness processes should confirm a number of critical factors: Whether the appropriate data are accessible, and by which means (and if not, what level of investment needs to occur to address the situation); whether there are anomalies in the data that should be assessed and remedied prior to formal submission; whether an appropriate feedback loop exists to ensure that record-to-report processes are functioning as they should, and what year-on-year compliance burden and additional costs (both fiscal and headcount/services provider) the company should expect to incur.

But more than this, the new era of transparency means that companies need to understand not only how to source the data needed to comply with varying new obligations but also what the tax technical implications of what they provide to either government or public may be. We think it is important that all concerned are ready to engage in the next stage of increased transparency and to continue to help all stakeholders and the public better understand the complexities of the tax debate. Only then will we all be able to move the debate into new and more productive waters.
Are you ready for your close-up?
Are you ready for your close-up?
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