

# Tax & Legal Weekly Alert

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### **OECD Council on May 23<sup>rd</sup> had formally approved the amendments to the Transfer Pricing Guidelines set out in the 2015 BEPS report**

In the press release, the OECD stated that “the amendments provide further clarity and legal certainty about the status of the BEPS changes to the Transfer Pricing Guidelines,” which were endorsed by the Council on October 1<sup>st</sup>, 2015, by the G20 Finance Ministers on October 8<sup>th</sup>, 2015, and by the G20 leaders on November 15<sup>th</sup>-16<sup>th</sup>, 2015.

### **Memorandum on the approval of Romania’s accession as an associate to the BEPS implementation Forum, initiated by OECD**

On May 24<sup>th</sup>, 2016, the Ministry of Finance issued a memorandum on the approval of Romania’s accession as an associate to the BEPS implementation Forum, initiated by OECD.

### **European Council Directive regarding the mandatory automatic exchange of information in the field of taxation**

Friday, June 6<sup>th</sup>, the European Union Council adopted the Directive (UE) 2016/881 of the Council from May 25<sup>th</sup>, 2016 which modifies the Directive 2011/16/UE regarding the mandatory automatic exchange of information in the field of taxation.

### **EU Council reached political agreement on the Anti-Tax Avoidance Directive**

The Directive, which will be formally adopted in an upcoming EU Council meeting, sets forth the rules for addressing tax avoidance practices affecting the functioning of the internal market.

## **OECD<sup>1</sup> Council on May 23<sup>rd</sup> had formally approved the amendments to the Transfer Pricing Guidelines set out in the 2015 BEPS<sup>2</sup> report**

In a June 15<sup>th</sup> press release, the OECD announced that the OECD Council on May 23<sup>rd</sup> had formally approved the amendments to the Transfer Pricing Guidelines set out in the 2015 BEPS report on Actions 8-10, "Aligning Transfer Pricing Outcomes with Value Creation," and the report on Action 13 regarding transfer pricing documentation and country-by-country reporting.

In the press release, the OECD stated that "the amendments provide further clarity and legal certainty about the status of the BEPS changes to the Transfer Pricing Guidelines," which were endorsed by the Council on October 1<sup>st</sup>, 2015, by the G20 Finance Ministers on October 8<sup>th</sup>, 2015, and by the G20 leaders on November 15<sup>th</sup>-16<sup>th</sup>, 2015.

According to the press release, the continuing efforts to make conforming amendments to the remainder of the Transfer Pricing Guidelines, in particular to Chapter IX on the transfer pricing aspects of business restructurings are well advanced.

Andrew Hickman, head of the OECD's transfer pricing unit, said last week at a conference sponsored by the OECD, USCIB, and BIAC that the OECD intends to publish a new edition of the Transfer Pricing Guidelines by year end, once the process is complete.

## **Memorandum on the approval of Romania's accession as an associate to the BEPS implementation Forum, initiated by OECD**

On May 24<sup>th</sup>, 2016, the Ministry of Finance issued a memorandum on the approval of Romania's accession as an associate to the BEPS implementation Forum, initiated by OECD. On March 15<sup>th</sup>, 2016, Pascal Saint-Amans, Director of the Centre for Tax Policy and Administration, OECD, sent the invitation of Romania's accession as an associate to the BEPS implementation Forum to the Minister of Public Finance.

Being a BEPS associate implies the following:

- All countries and jurisdictions will work with OECD and G20 members in order to develop standards related to it and to monitor the implementation of the entire BEPS package;
- Evaluation of the four minimum BEPS standards related to unfair tax practices, abuse of tax agreements and country by country reporting requirements;
- The commitment to introduce BEPS package and to apply it, considering the fact that deadlines for implementation may differ from country to country, depending of each country development level;
- A country participation to the achievement of BEPS framework will allow that country to implement the BEPS project and will give the certainty that BEPS solutions are applicable to all the countries and jurisdictions involved.

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<sup>1</sup> OECD – Organization for Economic Co-operation and Development

<sup>2</sup> BEPS – Base Erosion and Profit Shifting

A country or jurisdiction will become BEPS associated by sending its acceptance to the OECD Secretary in order to participate at BEPS actions.

For further questions regarding the aspects mentioned in this alert, please contact us.

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## European Council Directive regarding the mandatory automatic exchange of fiscal information

In order to combat the fiscal fraud, as well in order to align the OECD Guidelines to BEPS, it was proposed the modification of the Directive 2011/16/UE regarding the mandatory automatic exchange of information in the field of taxation between Member States of the European Union.

According to the directive, MNE Groups should provide annually and for each tax jurisdiction in which they operate, information with respect to their revenue, profit before income tax and income tax paid and accrued. MNE Groups should also disclose their number of employees, stated capital, accumulated earnings and tangible assets in each tax jurisdiction. Additionally, MNE Groups should identify each entity within the group doing business in a particular tax jurisdiction and provide an indication of the business activities in which each entity engages.

The reporting obligation applies both for MNE Groups from European Union and for MNE Groups outside the European Union but which perform activities on the European Union territory, whose consolidated group turnover exceed the amount of EUR 750 million. The reporting obligation have to be fulfilled within 12 months from the last day of the Reporting Fiscal Year of the MNE Group. The first report for each country is communicated for the fiscal year of the group of multinational enterprises, starting with January 1<sup>st</sup>, 2016 or after this date, communication that have to be made within 18 months from the last day of that fiscal year.

In order to ensure the proper functioning of the internal market, it is necessary to ensure that Member States adopt coordinated rules on transparency obligations of MNE Groups. As regards the exchange of information between Member States, the Directive already provides for the mandatory automatic exchange of information in a number of fields.

However, the scope of mandatory exchange of information should be extended to include automatic exchange of information on country-by-country reporting.

Thus, some of the main changes / completions brought to the Directive aim to:

- Introduce the scope and conditions of mandatory automatic exchange of information on country-by-country reporting;
- Define the scope of the exchange of information within the transfer pricing file. As such , information communicated between Member States pursuant to Article 8aa shall be used for the purposes of assessing high-level transfer-pricing risks and other risks related to base erosion and profit shifting, including assessing the risk of non-compliance by members of the MNE Group with applicable transfer-pricing rules, and where appropriate for economic and statistical analysis;
- Provide a standard form containing the main types of information to be exchanged between jurisdictions;
- Provide the electronic means through which the mandatory automatic exchange of information will be performed;
- Designate the Member States to decide the applicable penalties for infringements of the national provisions adopted pursuant to this Directive.

Up to date, Romania did not implement any Country-by-Country requirements. However, considering that the European Union Council adopted the Directive on the implementation of Country-by-Country reporting at the European Union level, Romania as a member of the European Union, will align its local transfer pricing legislation in order to be compliant with the legal provisions.

The Member States of the European Union have the obligation to adopt and publish the necessary legislative and administrative documents in order to align with the provisions of the Directive no later than June 4<sup>th</sup>, 2017. The measures are applicable starting with June 5<sup>th</sup>, 2017.

For further information, please follow this [LINK](#).

For further questions regarding the aspects mentioned in this alert, please contact us.

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## EU Council reached political agreement on the Anti-Tax Avoidance Directive

Tax avoidance practices have highlighted the need to lay down some rules against such practices. In this respect, the EU Council has drafted rules for combating tax avoidance in five specific areas:

- Deductibility of interest;
- Exit taxation;
- General anti-abuse rule;
- Controlled foreign company (CFC) rules and
- Hybrid mismatches.

The updated Anti-Tax Avoidance Directive comprising these rules was agreed by the EU Council on June 21<sup>st</sup>, 2016. The Directive will be formally adopted in an upcoming EU Council meeting and shall be implemented by the Member States as of January 1<sup>st</sup>, 2019, with some exceptions as detailed below.

The Directive applies to taxpayers that are subject to corporate tax in one or more Member States, including permanent establishments of entities resident for tax purposes in a third country.

### **Interest limitation rule**

This rule would restrict deductibility of net borrowing costs to 30% of the EBITDA and potentially with a EUR 3 million threshold. The limitation would not be applicable to loans concluded before 17 June 2016, but it would apply to any subsequent amendments of such loans.

Standalone entities may be excluded by Member States from the application of the interest deduction limitation.

By way of derogation, Member States already having national targeted rules for interest rate limitation may postpone implementation of the Directive's specific rule the latest until 1<sup>st</sup> January 2024.

### **Exit taxation rule**

This rule would allow the charge of an exit tax on the difference between the market value and the fiscal value of the transferred assets. A deferral of the payment over 5 years may be allowed, subject to interest on deferred exit tax and guarantees for ensuring proper collection.

As derogation, exit taxation rule has to be implemented by Member States starting 1<sup>st</sup> January 2020.

### **General anti-abuse rule**

The rule sets out to fill in the gaps of each country's legislation on anti-abuse rules. As such, Member States shall deny taxpayers the benefit of tax arrangements put in place for the main purpose of obtaining a tax advantage. An arrangement would be regarded as non-genuine if it is not put in place for valid commercial reasons.

### **Controlled foreign company (CFC) rule**

This rule aims to eliminate tax avoidance generated by the shifting of large amounts of profits to controlled subsidiaries (i.e., direct/indirect holding of more than 50% of the voting rights/capital/profits) in low-tax jurisdictions. Specific guidelines on the computation of the income to be included under CFC rule are presented in the Directive.

### **Hybrid mismatches**

The rules on hybrid mismatches aim eliminating the advantages that taxpayers may use considering the disparities between national tax systems in order to reduce their overall tax liability. Therefore, to the extent that a hybrid mismatch

would result in double taxation or deduction without inclusion, deductibility would be given only in one Member State.

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