JANUARY 2017 ISSUE 22
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TRANSFER PRICING NEWS

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INTRODUCTION

Transfer pricing is increasingly influencing significant changes in tax legislation around the world. This 22nd issue of BDO's Transfer Pricing Newsletter focuses on recent developments in the field of transfer pricing in Brazil, Canada, France, Japan, Spain and Vietnam. For transfer pricing developments in India please refer to the publication of Transfer Pricing Prism 2017, which can be found on www.bdo.in. As you can read, major changes in legislation will be made as a result of the OECD BEPS project.

We are very pleased to bring you this issue of BDO's Transfer Pricing News, which we were able to produce in close co-operation with our colleagues from the above-mentioned countries. We trust that you will find it useful and informative. If you would like more information on any of the items featured, or would like to discuss their implications for your business, please contact the person named under the item(s). The material discussed in this newsletter is intended to provide general information only, and should not be acted upon without first obtaining professional advice tailored to your particular needs.

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BRAZIL

COUNTRY-BY-COUNTRY REPORT

At the end of 2016, the Brazilian Tax Authorities (RFB) issued new legislation, introducing the Country-by-Country Report (CbCR) to meet the BEPS requirements to which Brazil is committed as part of the G20.

The RFB issued Normative Instruction (IN) No. 1.681/2016, on 29 December 2016, which implemented the obligation to disclose the information relating to the Country-by-Country Report. The issue of this IN was already expected, as Brazil committed to adopt the reporting starting in the fiscal year 2016.

The CbCR is an annual report to be completed and sent to the Tax Authorities by the ultimate parent entity of a multi-national enterprise (MNE) group, which will contain information such as revenues, profit (loss) before taxes, income tax accrued and paid, stated capital, accumulated earnings, number of employees and tangible assets other than cash.

In Brazil, taxpayers will complete the Block W in their annual income tax return (ECF) to be sent during 2017, in relation to the fiscal year 2016. The RFB will share this information with the other Tax Authorities that are part of the automatic exchange of information agreement for tax purposes.

In general, the ultimate parent entity of an MNE group that is resident for tax purposes in Brazil has the responsibility to complete the CbCR information. Subsidiaries of foreign entities located in Brazil will not complete the CbCR, unless required for other reasons, but should identify the information relating to the reporting entity.

MNE groups with a consolidated group revenue, during the Fiscal Year immediately preceding the Reporting Fiscal Year, of less than:

(i) BRL 2.26 billion when the ultimate parent entity is resident in Brazil for tax purposes; or,

(ii) EUR 750 million or the equivalent converted at the exchange rate on 31 January 2015 to the local currency of the ultimate parent entity;

are excluded from this obligation.

It is important to emphasise that, under the legislation, if the taxpayer fails to complete the CbCR information the tax return will not be permitted to be delivered electronically to the RFB. Furthermore, in the case of missing, inaccurate or incomplete information, the penalty will be 3% of the amount of the omitted, inaccurate or incomplete transactions.

The CbCR information exchange among several jurisdictions will provide Tax Authorities with an important tool to assist them to map and identify the transactions subject to the transfer pricing rules and verify if the rules are being applied correctly. For the RFB, the CbCR will facilitate the identification of taxpayers that remain hidden, ignoring the application of the rules or utilising the rules imposed by the parent company, which may not work and may not comply with the Brazilian rules.

New year, new reporting

And this time, the new rules did not originate with the RFB – the BEPS requirements were introduced to close some gaps that remained open for decades, and Brazil will continue to adopt measures to comply with the G20 commitments.

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CANADA

CANADA AIMS TO STRENGTHEN INTERNATIONAL TAX INTEGRITY

The Government of Canada (Canada), in its Budget for 2016 (the Budget), expressed its commitment to strengthen international tax integrity by, inter alia, spending CAD 444.4 million and hiring 100 additional tax auditors over the next five years to deal with tax evasion and tax avoidance. From these efforts Canada expects increased revenues of CAD 2.6 billion over the five year period.

Budget provisions regarding transfer pricing

Canada has long had legislation requiring taxpayers to prepare contemporaneous transfer pricing documentation, with a significant penalty applicable to any audit adjustment made on transactions that have not been analysed and documented in a company's contemporaneous transfer pricing documentation. Canada has required the preparation of a Local File for the past 17 years and, as a result, the Budget was silent on the adoption of the Local File concept contained in the recommendations made by the Organisation for Economic Cooperation and Development (OECD) as part of its Base Erosion and Profit Shifting (BEPS) initiatives.

In the Budget, Canada introduced legislation requiring Country-by-Country Reports (CbC Reports) to be filed with the Canada Revenue Agency (CRA) by large Canadian Multinational Enterprises with global revenues equal to or greater than EUR 750 million. The filing deadlines are identical to the deadlines set forth by the OECD as part of its BEPS recommendations. Canada also introduced penalties to be levied on companies that fail to file the CbC Report by the due date, with a higher penalty in situations where the CRA sends a demand that the CbC Report be filed. This legislation was passed into law on 15 December 2016.

It is important to note that the Budget did not include any provisions requiring the preparation of a Master File, as envisioned in the OECD's BEPS recommendations. This may be due, in part, to the fact that the Canadian legislation governing transfer pricing documentation requires the analysis of many of the components that would be found in a Master File, as outlined in the OECD's guidance.

The Budget re-affirms Canada's commitment to the arm's length standard by using the OECD's revised Transfer Pricing Guidelines to govern certain key issues in transfer pricing, such as the valuation of intangibles and dealing with high risk transactions. Given that Canada has been introducing legislation over the past decade aimed at dealing with the aspects of transfer pricing that lead to base erosion and profit shifting, no new transfer pricing-specific legislation was introduced to implement the OECD's BEPS recommendations.

Canada has not yet decided what position it will take with respect to the OECD's work in two areas: low value-adding services; and the types of entities commonly referred to as "cash boxes".

Canada's transfer pricing penalty

Canada's transfer pricing penalty provisions were introduced almost two decades ago, and the penalty has been in effect since the 1999 taxation year. The penalty is levied as 10% of any adjustment made by the CRA that is not covered by contemporaneous documentation. This penalty is due and payable once it has been confirmed by the CRA's Transfer Pricing Review Committee in Ottawa. It is important to note that the average transfer pricing penalty has spiked from CAD 3.4 million in 2012 to CAD 15.9 million in 2015. The total penalties charged in 2012 were CAD 58.6 million, climbing to CAD 478.5 million in 2015. To 30 June 2016, the CRA assessed penalties of CAD 225 million.

Whenever there is a transfer pricing reassessment that may result in the imposition of the transfer pricing penalty, the file must be referred to the Transfer Pricing Review Committee regardless of the existence of contemporaneous transfer pricing documentation covering the year in question.

Transfer pricing in the Canadian courts

While some recent Canadian court cases have been settled out of court, such as GlaxoSmithKline and McKesson Corporation, there is still a lot of activity in the courts involving transfer pricing cases.

For example, on 5 October 2016 the Cameco Corp. case was launched in the Tax Court of Canada with the tax reassessed being CAD 2.2 billion. The CRA reassessed on the basis that the sole use of a Swiss affiliate to report sales of uranium that it purchased from the Canadian mining company, resulting in profit of CAD 7.4 billion, was tax avoidance. As a result, the CRA adjusted Cameco Corp.'s taxable income to include the CAD 7.4 billion in the determination of the Canadian company's taxes. It will be interesting to watch this case unfold, with the CRA's evidence suggesting that the Swiss company did not perform any significant functions to support earning the profit it reported, while legal counsel for Cameco believes its position will be upheld once the Tax Court hears all of the evidence to be presented.

Other recent cases involve high profile companies such as Spin Master Ltd. (relating to the company's Cost Sharing Arrangement, settled out of court for CAD 15 million), Silver Wheaton Corp (another mining company with a significant amount of its profit being earned by entities in the Cayman Islands and the Barbados), AGS Management Ltd., and New Flyer Industries Canada ULC.

Concluding remarks

The CRA has long been considered one of the toughest and most aggressive tax authorities when it comes to auditing companies and proposing reassessments relating to transfer pricing. Canada's increasing commitment to enforcement efforts to address international tax avoidance and tax evasion with a view to strengthening the integrity of the international tax and transfer pricing regime will inevitably lead to more transfer pricing audit activity and more transfer pricing cases being heard in the Tax Court of Canada and the higher courts.

Companies need to take action to address any potential transfer pricing risks inherent in their current structures in order to mitigate those risks. More importantly, companies need to ensure that they maximise their global after-tax cash flows by ensuring that the value chain is aligned with value creation, and that appropriate transfer pricing methodologies are utilised for all intercompany transactions in a manner consistent with the creation of value, while adhering to the guidance set out in the OECD Transfer Pricing Guidelines and the Canadian tax legislation governing transfer pricing.

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FRANCE

FRENCH TRANSFER PRICING DOCUMENTATION – TOWARDS REDUCED THRESHOLDS AND UNCONSTITUTIONALITY OF A PUBLIC CBCR

France, as a high tax jurisdiction, has been an active participant in the elaboration of the BEPS action plans and has already introduced most of the measures proposed by the OECD in its domestic legislation.

Notably, during the last 3 years, the French Government has introduced transfer pricing documentation requirements to the attention of large multinational groups.

Such documentation requirements include the obligation:

(i) To file an annual specific transfer pricing form (Form 2257);

(ii) To keep updated transfer pricing documentation (master file and local file); and

(iii) To submit a Country-by-Country Report (CbCR).

A new law (law no. 2016-1691 – the "new law") enacted on 9 December 2016 provides for a significantly reduced threshold for taxpayers to file the annual specific form.

The current thresholds could therefore continue to be lowered in coming years to bring more companies within the scope of transfer pricing documentation obligations.

In addition, the French Constitutional Court in a decision rendered on 8 December 2016, ruled that the obligation to make CbCRs available to the public was unconstitutional.

"Abridged" transfer pricing documentation – 2257 Form

A new law, applicable from 2017, provides for a significantly reduced threshold (from EUR 400 million to EUR 50 million of turnover or gross assets) obliging French companies included in this new scope to file the 2257 Form.

This form includes information on the group activity, intangibles used, main transfer pricing method retained and intragroup flows.

The form must be filed electronically every year, and submitted no more than six months after the deadline for filing the annual corporate income tax return.

The reduced threshold applies not only at the level of the French entity but also at the level of any other company within the taxpayer group. Hence, if one company has a turnover or gross assets of more than EUR 50 million, the related French entity will be required to file the 2257 Form with the French tax authorities.

Transfer pricing documentation – Master File/Local File

French companies that are part of a multinational Group (in which one entity has total net sales, or total gross assets, equal to or greater than EUR 400 million) must be able to provide a transfer pricing documentation in the frame of a tax audit.

The transfer pricing documentation includes, notably, general information on the group about business strategy, organisational structure, a description of the transfer pricing method used and a comparable analysis, as the case may be.

The current French requirements are compliant with the OECD Transfer pricing guidelines. Companies have to prepare two categories of information on their transfer pricing policy (general information on associated companies and specific information on the audited company).

The transfer pricing documentation must be provided to a tax inspector from the first day of the tax audit. A 30 day extension can be granted to provide such documentation if there is a lack of information.

The scope of this obligation remains unchanged, to date.

Country-by-Country Reporting

The 2016 Finance law introduced the CbCR requirement. It is applicable, in accordance with OECD guidelines, to French companies that are part of a group with annual consolidated revenue equal to or in excess of EUR 750 million.

The annual CbCR must be submitted to the French tax authorities within 12 months of the fiscal year-end. It must be filed by the French ultimate parent entity of the group or by the French entity of a foreign group, if the CbCR has not already been filed with a tax authority that would share it automatically with the French tax authorities.

On 1 October 2016 the French Government published an administrative decree defining the filing procedures and the contents of the CbCR. This provides insight into the practical application of the CbCR and introduces into French regulations certain provisions included in the OECD's base erosion and profit shifting (BEPS) Action 13.

The Government, in a draft bill, introduced a form of public CbCR for qualifying companies in the EU to oblige such companies to disclose their CbCR. This measure has been considered unconstitutional by the French Constitutional Court (Decision no. 2016-741 DC – 8 December 2016).

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JAPAN

TRANSFER PRICING DOCUMENTATION REQUIREMENTS FOR JAPANESE BRANCHES

Japanese international tax principles have moved to an attributable income approach based on the authorised OECD approach (AOA). A Permanent Establishment (PE) of a foreign corporation will be assumed to be a functionally separate entity. Based on the 2014 tax reform, the new documentation rules will apply for fiscal years beginning on or after 1 April 2016.

A foreign corporation with a PE in Japan should prepare the documents and submit them in a timely manner if requested by the authority tax auditor, and the transfer pricing rule will be applied to intra-company transactions to determine income attributable to the PE.

There are two types of necessary documents: one is the document describing intra-company transactions, and the other is a document necessary in order to determine the arm's length principle (ALP).

A foreign corporation holding a PE in Japan will also be required to submit a Master File through the e-Tax system in English or Japanese. The requirement to file a Country-by-Country Report will apply for fiscal years beginning on or after 1 April 2016.

Contents of the document describing intra-company transactions

i. Assets used by foreign corporation and the PE and services rendered by corporation and the PE;
ii. Liabilities relating to the intra-company transactions assumed by the foreign corporation and the PE, and other important information such as currency exchange rate fluctuations, market interest rate fluctuations or changes to the economic environment, should be described;
iii. Intangible properties used by the foreign corporation and the PE relating to the intra-company transactions;
iv. Agreements or equivalent documents describing asset transfers or services under intra-company transactions;
v. The pricing method for the intra-company transactions and negotiation process for the determination of the prices;
vi. Profit and losses relating to the intra-company transactions;
vii. Analysis for the market relating to the intra-company transactions and other relevant information for the market;
viii. Business strategy of a foreign company holding a PE and business description of a foreign company and a PE;
ix. Other information in relation to the intra-company transactions.

Contents of the document in order to determine ALP

i. Comparables screening information and details of the comparables;
ii. ALP method that a foreign company applies, its reason and other related documents prepared for the ALP calculation;
iii. Comparables, reason for the aggregated base analysis approach, and adjustment for differences in the comparables.

Penalty and exemption

Any foreign company that has intra-company transactions with a PE exceeding JPY 5 billion in the preceding fiscal year or intangible intra-company transactions exceeding JPY 300 million must prepare documentation by the filing deadline of the corporate income tax return (contemporaneous documentation requirement). Although submission of the documents will not be required by the corporate income tax return filing deadline, they must be ready to be submitted in the event of request during a tax audit.

The deadline for submission will be set by the tax auditor at a certain date within 45 days from the day when the tax auditor requested the contemporaneous documentation for those companies. For other companies, the deadline set by the tax auditor may be at a certain date within 60 days.

In addition to the "necessary" documents required for the intra-company transaction, the tax auditor may request other "important" documents relevant in setting the transfer pricing, and can set a deadline, within 60 days from the day when the tax auditor requested their submission.

In the event of failure of timely submission of documents, the tax authorities may use presumptive taxation[1] and may visit third parties conducting the same/similar business to collect information for determining an arm's length price.

In addition, in the circumstances below, a monetary penalty of up to a maximum of JPY 300,000 will be imposed for the following third parties:

i. A third party person who has not answered or has falsely answered the tax authority's question; or who has refused, obstructed or evaded the tax authority's inspection;
ii. A third party person who, without justifiable reason, refuses to submit or present an evidence document; or who submits or presents false evidence documents.

The documentation and penalty provisions in respect of the contemporaneous documentation requirement and the timely submission requirement will apply to fiscal years beginning on or after 1 April 2016.

Recommended actions

We highly recommend prompt action as follows:

i. Identify applicable intra-company transactions in order to recognise the documentation burden and penalty;
ii. Carry out a benchmarking study in order to evaluate risks and achieve a more reasonable income allocation.

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[1] *This rule allows the NTA (The National Tax Agency) to presume a certain price to be at arm's length, based on the comparable data obtained by a tax inspector. Since the comparable data is not disclosed to the taxpayer undergoing a transfer pricing (TP) audit (hence the "secret comparables" term), the taxpayer would face difficulties in rebutting the secret comparables when disputing the TP assessment.*

SPAIN

COURT DECISION REGARDING PERMANENT ESTABLISHMENTS

Base Erosion and Profit Shifting (BEPS) and the action plan of the OECD is a leading topic nowadays in the field of international taxation. In the case of Transfer Pricing (TP) specifically, multinational groups have made the first move and have used TP as a planning tool to restructure their activities. For instance, high value assets and risks that were initially centralised in a principal company established in a high tax jurisdiction are later transferred to a lower tax regime. Another example would be fully-fledged manufacturers and distributors established in high tax jurisdictions which change their business model into contract manufacturers or low risk distributors, therefore getting lower returns.

In this respect, Dell Group and other multinational groups of companies restructured their business models into economically more beneficial models.

Dell Computer in Spain (Dell Spain) belongs to a multinational group of companies which manufactures computers and related products in Spain. Dell Products Limited (Dell Ireland) is a European distributor which appointed related entities to operate as commissionaires in several countries. The business model of Dell Group consisted of direct sales through its webpages or call centres. Within this model, Dell Spain operated as a fully-fledged distributor carrying out strategic activities until 1995, when it joined the commissionaires net of Dell Ireland.

Last June, the Spanish Supreme Court (*Tribunal Supremo*) delivered its judgement 1475/2016 on the Dell Case. The appeal, submitted by Dell Ireland, reinforces judgement 182/2012 of June 2015 by the Central Administrative Court (*Audiencia Nacional*).

Thus, in the Central Administrative Court, it was held in 2015 that Dell Spain was a permanent establishment (PE) of Dell Ireland and in charge of the distribution of Dell products under a commission agreement signed with the Irish company.

This conclusion was reached since Dell Spain was considered to be a PE of Dell Ireland for the following reasons:

- Dell products, which are manufactured in Ireland, are sold to Dell Spain through a commissionaire agreement which determined that the Spanish company was acting in its own name but on behalf of Dell Ireland;
- The Irish holding company does not directly own premises in Spain, although it does indirectly since its products are warehoused in this country due to the logistics services provided to Dell Ireland;
- Dell Spain complies with the instructions provided by Dell Ireland regarding the establishment of prices, commissions and sales conditions and it also has to be supervised by the Irish company and regularly submits reports to it;
- Dell Ireland owns the intellectual rights.

Dell Ireland's 2016 appeal was based, among others, on the following arguments:

- Dell Spain could not be considered a dependent agent, since Article 5.5 of the Double Taxation Treaty (DTT) between Ireland and Spain requires a direct representation (therefore, that the Spanish company signed commercial agreements); and
- Dell Ireland did not have a fixed place of business in Spain to carry out its core activities.

The Spanish Supreme Court rejected these arguments since it considered that:

- Dell Spain's intermediary activity was essential for the market and distribution of Dell products, which is the core business of Dell Ireland;
- The Irish company could use the Spanish premises, through Spanish or its own employees, to carry out its main activities (i.e. promotional, logistics and warehouse services);
- Article 5.5 of the DTT does not require the above-mentioned direct representation, but a representation sufficient to bind Dell Ireland by acting on its behalf and concluding contracts under its name;
- The exceptions to the PE included in Article 5.7 of the DTT are not acceptable since Dell Spain follows the instructions of Dell Ireland, needs its authorisation to buy products, has to submit reports regularly and is organically dependent on the Irish company by belonging to the same group of companies, etc.

This Court also referred to the OECD rulings which state that the key to considering a company as a PE is not only its capacity to conclude contracts that bind the company but also the functional and factual correlation between the agent and the company in the sense that the agent has sufficient authority to bind the company in its day to day business, following the instructions of the company and under its control.

Consequently, the Spanish Supreme Court ruled that all of the revenue from Dell's product sales in Spanish territory were taxable in Spain due to the above functional correlation.

This Spanish approach will certainly not be exempt from criticism since other European Courts consider as PEs those commissionaires which effectively sign contracts on behalf of the principal company. However, the appeal to the Spanish Supreme Court might herald the beginning of the actual implementation of the regulations included in Action 7 of the OECD regarding BEPS (*Preventing the Artificial Avoidance of Permanent Establishment Status*).

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VIETNAM

MAJOR TRANSFER PRICING POLICY REFORM

The ongoing development of transfer pricing (TP) legislation in Vietnam demonstrates the Vietnamese tax authorities' increasing efforts to protect revenue through the requirement of arm's length transfer prices between related parties, and deserves attention.

Vietnam's Ministry of Finance (MOF) has recently issued a draft TP Decree (the Draft), which is the first legislative instrument of its kind for TP and is expected to replace entirely the current TP guidance. This Draft is currently being widely circulated for public comments. Much of the content of the Draft adopts the principles of the OECD's Action Plan on Base Erosion and Profit Shifting (BEPS) and introduces the key changes below.

Related party definition

The Draft proposes the removal of several test criteria in the definition of a related party, including:

- One party's participation in the management or control of the capital of one another or a third party
- The use of one party's intangible assets or intellectual property by another party for which the other party pays an equivalent of more than 50% of the cost of its production output or merchandise
- One party supplies more than 50% of the production materials or merchandise of the other party
- More than 50% of one party's products are controlled by another party, and
- Parties that have contractual business co-operation.

Ownership and control

The Draft proposes several changes in the thresholds of ownership and control, which aim to tighten related party relationships. These include:

- The reduction of the current 25% threshold of ownership held by one party in another or by a third party in two other parties to 20%
- The reduction of the 10% threshold of ownership held by the largest shareholder of one party in another party to 5%, and
- The reduction of the current 50% threshold of control of one party by the board members of another party to 30%.

Acceptable TP methods

It is proposed that the acceptable TP methods will be reduced from the current five methods to three methods:

1. The controlled vs uncontrolled price method – which is similar to the existing "comparable uncontrolled transaction price method"
2. The profitability ratio method - which is a combination of the existing "resale price method", "cost plus method" and "comparable profit method", and
3. The profit split method – which is similar to the existing "profit split method".

Other new rules

The Draft also introduces several new rules including:

- Tax deduction of interest payments to a related party being restricted at 20% of earnings before EBITDA
- No tax deduction allowed for the costs of the following intra-group services:
  - Services provided by one party to solely create interest or enhance value of another party
  - The same services being provided by various related parties
  - Service fees charged for the benefits derived solely by members of a group, or by a related party for acting as an intermediary for a third party service provider
  - Payments to a related party whose business is not relevant to the paying party or where the size of business of the related party is disproportionate to the value of the underlying transactions, or where the related party is resident of a country that has no corporate income tax and it does not create revenue or value for the paying party etc.
- A safe harbour rule, which excludes from its scope of application a taxpayer that has transactions with related parties in Vietnam, whereby both parties are paying corporate income tax at the same rate and none of them is enjoying a tax holiday and tax reduction.

Exemptions

Certain taxpayers would be exempt from the requirement of TP documentation, however they would still be required to complete the annual related party disclosure form, including:

- Companies with annual revenue up to VND 50 billion and total value of controlled transactions up to VND 30 billion
- Companies that have concluded an Advanced Pricing Agreement (APA) and that comply with the annual APA reporting requirements
- Companies that perform simple functions, bear no business risk, and generate low value, such as manufacturers or traders that have no inventory and market risks and are not dependent on intangible assets to generate income.

Compliance

The Draft requires TP documentation and disclosures to be contemporaneous as at the due date of filing the annual corporate income tax return. It also proposes several changes to the existing related party transaction disclosure form and introduces a specific penalty scheme for TP non-compliance. A penalty of 10% for administrative non-compliance (or from 100% to 300% in the case of tax fraud) is applicable to the tax shortfall arising from a TP audit, in addition to the other applicable administrative penalties, and the daily accruing interest penalty of 0.03% of the tax in arrears.

For further details and updates on this on-going reform, readers may contact the author of this article named below.

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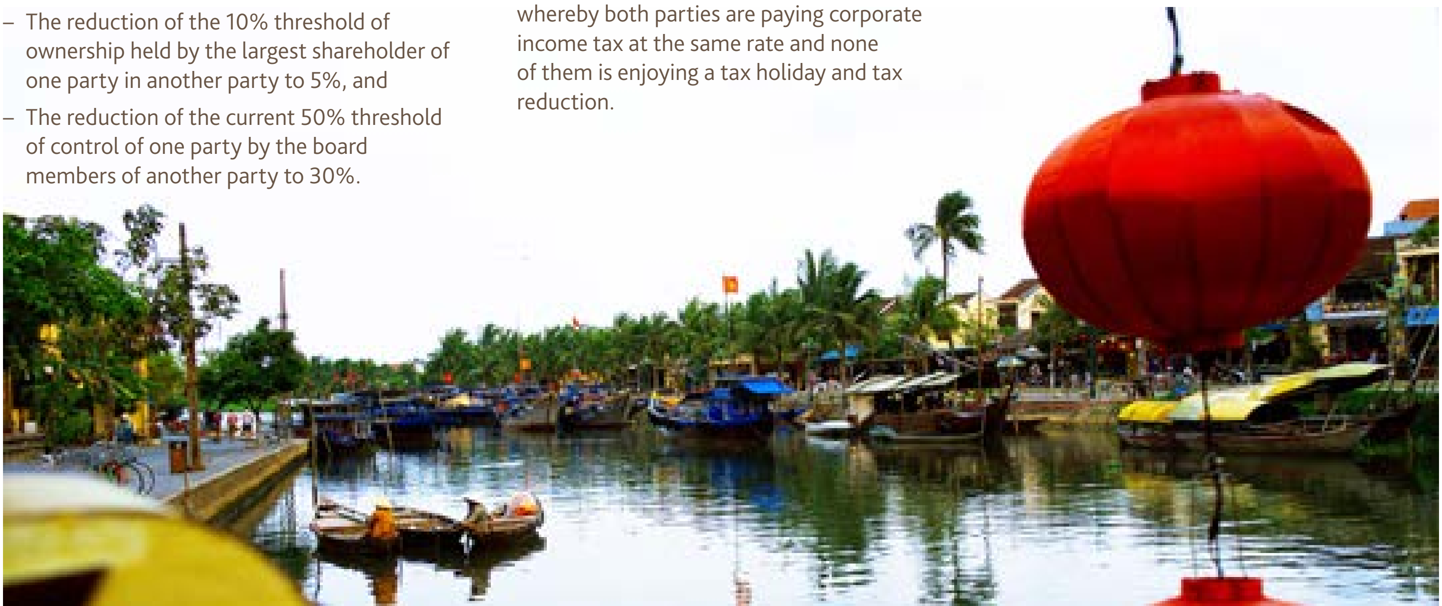

CURRENCY COMPARISON TABLE

The table below shows comparative exchange rates against the euro and the US dollar for the currencies mentioned in this issue, as at 6 January 2017.

Currency unit	Value in euros (EUR)	Value in US dollars (USD)
Brazilian Real (BRL)	0.29538	0.31126
Canadian Dollar (CAD)	0.71483	0.75326
Euro (EUR)	1.00000	1.05361
Japanese Yen (JPY)	0.00816	0.00860
US Dollar (USD)	0.94898	1.00000
Vietnamese Dong (VND)	0.00004	0.00004

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