APRIL 2018 ISSUE 39
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EXPATRIATE NEWSLETTER

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HONG KONG

BE PREPARED FOR COMPLIANCE WITH THE EU GENERAL DATA PROTECTION REGULATION (GDPR)

BDO comment

The introduction of the EU GDPR will see a change to the approach we must take both within the EU and outside of the EU to be compliant with regulations.

Following a lengthy adoption process that began in April 2016, the EU General Data Protection Regulation (GDPR) will take effect from 25 May 2018 throughout the countries of the European Union. The GDPR will replace existing data-protection laws, but it will have a significant impact on businesses around the world, regardless of where they operate. Time is running out: if businesses have not yet addressed the GDPR requirements, they should immediately assess how the GDPR will impact their business and update their data-protection policies and practices to comply with the requirements.

The GDPR aims to strengthen the laws on the protection of 'privacy data' that relates to an identified or identifiable 'natural person' (i.e., one who has its own legal personality). Privacy data includes the following:

– Basic information about a person's identity, such as their name, address and ID number;
– Web data, such as location, IP address, cookie data and radio-frequency identification tags;
– Health and genetic data;
– Biometric data;
– Racial or ethnic data;
– Data about their political opinions; and
– Data about their sexual orientation.

Any organisation that stores or processes personal information about EU citizens in EU states must comply with the GDPR, even if they do not have a business presence in the EU. An organisation must comply with the GDPR requirements if it:

– Has a presence in a EU country;
– Does not have a presence in a EU country but offers goods or services to individuals in the EU or monitors an identifiable natural person (data subject)'s behaviour in the EU (monitoring behaviour could include using cookies to track online activity and develop user profiles, even without knowing the users' names);
– Has more than 250 employees; or
– Has fewer than 250 employees but processes their personal information in a way that would affect the rights of data subjects repetitively.

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EDITOR'S LETTER

The BDO Expatriate Newsletter provides a brief overview of issues affecting international assignees, predominantly, but not exclusively, from a tax and social security perspective.

This newsletter brings together individual country updates over recent months. As you will appreciate, the wealth of changes across multiple jurisdictions is significant so to provide easily digestible information we have kept it to the key developments that are likely to affect your business and international assignees.

For more detailed information on any of the issues or how BDO can help, please contact me or the country contributors direct.

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To enforce the requirements of the GDPR, the European Parliament is introducing the following significant changes:

- GDPR defines three roles that are responsible for ensuring compliance: the data controller, the data processor* (see the note below) and the data protection officer (DPO). The data controller defines how personal data is processed and the purposes for which it is processed. The data controller is responsible for making sure that external contractors comply with the regulation. The GDPR requires organisations to appoint a DPO, and the data controller and data processor must assign the DPO to overseeing the organisation's data security strategy and GDPR compliance.
- The conditions for requesting permission to use personal data have been made stricter. Organisations must obtain permission separately from other permissions and ask for it in a way that is easy to access and understand, using clear and plain language. The consent for requesting the withdrawal of the use of personal data should also be the same as the request for consent to use it.
- The rights of data subjects have been strengthened and new rights have been introduced. These include the following:
  - The right to transfer their data to another processor (known as 'data portability');
  - The right to require the data controller to erase their personal data, to require them to stop sharing it with others and, potentially, to have third parties stop processing the data (known as 'data forgotten'); and
  - The right to obtain confirmation from the data controller about whether or not their personal data is being processed, where it is being processed and for what purpose it is being processed (known as 'data access').
- Organisations must notify the regulatory authorities and the individuals concerned about any data breaches (e.g., accidental or unlawful loss of, theft of, access to or disclosure of personal data) within 72 hours of noticing the breach.
- Data processors (i.e., organisations that process personal data on behalf of other organisations) are now directly and legally responsible for complying with several obligations set out in the GDPR, including ensuring that the data is protected at a technical and organisational level.
- The GDPR does not require all personal data to be kept within the EU. However, if personal data is transferred outside the EU, data controllers should ensure that there is a similar level of technical and legal protection for the data. Therefore, the GDPR implements 'privacy by design', which calls for data controllers to protect personal data and consider the amount of personal data collected, how long it is kept for and how it can be accessed.

Members of senior management team should undertake a holistic review of whether their organisations are ready for GDPR compliance. Your organisation may consider taking the following steps to prepare:

- Conduct an information audit to map data flows and document what personal data you hold, where it came from, who you share it with and what you do with it. Address the risks of cross-border transfer of personal data, especially in virtual and cloud environments, where cross-border data replication and movement is common.
- Designate a team of key members of the senior management team, IT and various operational and support departments to develop a plan for GDPR compliance and educate others about its impact on operations.
- Appoint a Data Protection Officer to implement and monitor your GDPR compliance plan.
- Ensure an appropriate data-protection policy is in place and review the basis for collecting, processing and maintaining personal data, especially the rights to access, accuracy, quality, retention and disposal of personal data.
- Implement a new compliance system with built-in technical and organisational measures for integrating data-protection functions into all processing activities from your end points.
- Review your contracts with third parties and customers with whom personal data is shared and, where necessary, renegotiate terms of business to ensure appropriate supervision over the processing of personal data and compliance with the GDPR.

To minimise the risk to your business operations after the regulation takes effect on 25 May 2018, you should act immediately to address the requirements of the GDPR.

Changes for Hong Kong

In anticipation of the changes in the data-protection laws in EU countries, we have looked at the Personal Data (Privacy) Ordinance (Cap 486) (PDPO). The PDPO came into force in Hong Kong on 20 December 1996, just one year after the European Data Protection Directive of 1995, and certain aspects of the PDPO were developed based on the directive. The PDPO set out principles that data users must follow when handling personal data about individuals. The PDPO and the GDPR cover some of the same subjects.

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CHINA

FOCUSSED TAX INSPECTION/AUDIT REGIME ON FOREIGN EMPLOYEES AND CHINESE OUTBOUND EMPLOYEES

BDO comment

The Chinese tax authorities are actively targeting foreign employees and Chinese employees working overseas. Companies should seek professional advice. With the assistance of professional tax consultants, companies can take the necessary actions to make sure they are compliant with the tax laws and regulations and changing local practices.

With the increase of foreign nationals working in China and Chinese nationals going abroad, Chinese tax authorities in the main cities have been implementing stricter Individual Income Tax (IIT) administration recently. Meanwhile, due to the nationwide usage of the new tax filing system (Golden Tax III), more detailed information for individuals has to be reported to the Chinese tax authorities.

The tax authorities have been launching random tax inspection/audits in order to investigate the accuracy of information reported for both foreign employees and Chinese outbound employees.

Trends and challenges

Foreign national employees
For foreign national employees who receive certain benefits-in-kind, such benefits can only qualify as non-taxable benefits when certain criteria are met. In addition, an increasing number of tax authorities in many main cities require registration of the non-taxable benefits, to include supporting policies on fringe benefits where relevant.

The local tax authority may not accept tax exemption of these benefits if there is a failure to perform such registration. However, in practice the local tax authority could request additional documents as proof of the benefits-in-kind. This is at their discretion.

Chinese outbound employees
According to Chinese tax regulations, Chinese nationals are subject to Chinese tax on worldwide income. For employees who have labour contracts with a local Chinese entity and are assigned to work in a foreign country, the Chinese local entity should act as a withholding agent and report both China sourced and foreign sourced income to the local tax authority via monthly IIT returns. For employees who are employed by a foreign company, they are also responsible for reporting worldwide income via the PRC Annual Tax Reconciliation (ATR) return.

Some Chinese local entities and Chinese outbound employees are not fully aware of the compliance requirement on foreign sourced income. In view of this, local tax authorities are paying special attention to the benefits-in-kind offered to foreign employees as well as Chinese outbound employees who have received foreign sourced income.

Negative impact

Where non-compliance is identified by local tax authorities via tax inspections/audits, withholding agents/employees will be requested to pay the under-reported IIT. A daily late payment surcharge of 0.05%, as well as penalties of between 50% and 5x of the IIT due, may be imposed. Meanwhile, there will also be reputational risks for both the withholding agent and employees. For example, local tax authorities can downgrade company and employee tax credit ratings.

The following are key focus points:

- Re-evaluate the compliance level of benefits-in-kind offered to foreign national employees.
- Review internal control procedures and documentation for benefits-in-kind.
- Ensure the company has fulfilled their withholding obligations for Chinese outbound employees.
- Notify Chinese outbound employees who are employed by overseas companies to report foreign sourced income with the local tax authorities.

Professional advice and proactive communication with the tax authorities are very efficient in reducing the potential tax risks. Meanwhile, where audits are already occurring, effective negotiations with tax authorities are essential in resolving these.

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INDIA

NOTIFICATION OF INCOME-TAX RETURN FORMS FOR TAX YEAR 2017/18

BDO comment

There are two different forms that employees can use to declare their income at the end of the tax year. Expatriate assignees need to be clear on the correct form to use and the income they need to report.

On 5 April 2018, the Central Bureau of Direct Taxes (CBDT) issued notification of the income tax return (ITR) forms for the 2017/18 tax year.

Some of the key changes in the forms generally used by employees (Forms ITR-1 and ITR-2) are mentioned below:

- Form ITR-1 shall be applicable to individuals in the below cases:
  - Those individuals 'Resident and Ordinarily Resident' in India.
  - Having income up to INR 5 million during the year which includes salary income, income from one house property and other sources such as bank interest, etc.
  - Additional detail is required in the form of a breakdown of remuneration.
  - Details of property such as the nature of ownership (occupied or let-out), rental income received, local taxes paid, mortgage loan interest paid, etc. are now required to be provided in this form.
- Form ITR-2 shall be applicable to individuals in the below cases:
  - Having income from Capital Gains or income from multiple properties.
  - Claiming foreign tax credits and/or short-stay exemption.
  - Having assets in a foreign country.
  - Having income from a source outside India.
  - A key change in the form is the option to furnish details of foreign bank accounts to claim a refund of any tax dues. Previously, an Indian bank account was necessary. This is a welcome change, especially for expatriates.

Individuals are advised to ensure they file the appropriate tax return.

DATE FOR LINKING AADHAAR

The CBDT has further extended the date for linking the AADHAAR (unique identification number) to the PAN and welfare schemes to 30 June 2018. The date for linking the AADHAAR to an Indian bank account and mobile number has been extended indefinitely, until the Supreme Court of India delivers its judgement on petitions challenging the validity of the biometric scheme and the enabling law.

INDIA AND HONG KONG SIGN TAX TREATY

In a step to improve transparency in tax matters and to curb tax evasion and avoidance, the Government of India and the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China have signed an Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on income.

The agreement provides articles on tie-breaker rules for determining treaty residency, dependent personal services and measures to eliminate double taxation between the countries. These are especially useful in respect of expatriates.

While the agreement was signed on 19 March 2018, it will not come into force until it has been ratified by both countries.

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THE NETHERLANDS

MORTGAGE INTEREST DEDUCTION – POSSIBLE FOR A HOME NOT SITUATED IN THE NETHERLANDS?

BDO comment

For assignees who earn their income in the Netherlands but take up residence in another country, mortgage interest deduction may be partially available for taxable income earned in the Netherlands.

As you may be aware, according to Dutch national law a resident taxpayer of the Netherlands is allowed to deduct mortgage interest from their taxable income under certain conditions. This is only possible when it relates to a qualified mortgage on an owned home which is used as a primary place of residence.

A recent case challenged this principle based on income derived from two different countries. A taxpayer was living in Spain during the tax year, and therefore qualified as a non-resident taxpayer for Dutch income tax purposes. He owned a home in Spain which he was using as his primary place of residence. There was a mortgage on the property with interest paid. The taxpayer was self-employed and received 60% of his income from the Netherlands and 40% of his income in Switzerland. The taxpayer argued that he should be allowed to deduct the mortgage interest from his taxable income in the Netherlands as it was not possible to deduct it in Spain.

Following the Court of Justice of the European Union, the Dutch High Court decided as follows. Since the taxpayer did not receive taxable income in his residency state (Spain), he was not able to take into account a personal deduction against any taxable income in Spain. Therefore, a part of the personal deduction in relation to the taxable income in the Netherlands should be taken into account.

PERSONAL DEDUCTION ALLOCATED BETWEEN TAXABLE INCOME IN DIFFERENT STATES

The case was referred to a lower Dutch Court. The lower Dutch Court decided that since local Swiss law also allows for a personal deduction for negative income resulting from owned property, the Netherlands only had to take 60% of the mortgage interest into account.

The Dutch State Secretary of Finance agreed with the outcome of the lower Dutch Court, however he did not agree with the assumptions of the lower Court that it was of importance whether the local law in the other working state should also allow for this personal deduction. According to the Dutch State Secretary of Finance, the Netherlands is only obliged to allow for a personal deduction in relation to the taxable income derived from the Netherlands.

If you would like to receive more information on your specific situation, do not hesitate to contact us:

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POLAND

RESIDENCE CERTIFICATE NECESSARY FOR FOREIGNERS IN POLAND

BDO comment

Polish tax residence, and how this affects the income tax to deduct and report, is a complex area. Companies must be clear on the residence position of their expatriate employees to ensure they deducted the correct withholding in Poland. Not only do they need to be aware of this from the outset of the secondment, it must also be checked on an ongoing basis to ensure the position does not change.

As well as the tax position, social security also needs to be considered and is dealt with separately. For inter EU assignments, there is a set of defined but complex rules to navigate before concluding where the social security liability sits. Generally speaking, social security is only payable in one EU country at any one time.

When employing foreign nationals, Polish employers can have difficulties in establishing which state's regulations apply to the employee. Determining the correct tax residence position in order to settle the income they have earned in Poland can be difficult, as Poland has signed double taxation treaties with several countries.

The Personal Income Tax Act defines the concept of a residence certificate as a certificate of the taxpayer's residence for tax purposes. This documentation makes it possible to correctly classify and settle the income earned by the taxpayer. The regulations do not specify how often the data in the certificate should be updated. It is the tax remitter's responsibility to correctly calculate and withhold income tax advances as, in the event of a tax audit, they will be required to show documentation demonstrating how the taxpayer's income was settled. This act does not regulate the form of the residence certificate. There is, however, no doubt that it should be issued and certified by an appropriate body so that it raises no concerns with regard to compliance in the event of an audit.

Tax residency in Poland – Corporates and individuals

In Poland, tax residence is confirmed on form CFR-1 for legal entities and CFR-2 for individuals. It takes approximately 7 days to get the former and around 60 days to obtain the latter.

A residence certificate makes it possible to apply the provisions of double taxation treaties, which can have a favourable effect on the settlement of taxes. This is because the settlement of a foreign national's taxes will depend on whether they have Polish residence status.

A Polish resident is a person who meets one of the following two criteria:

1. Stays in Poland for at least 183 days in a tax year;
2. Poland is the centre of the person's personal and business interests.

If either of the conditions are met, the taxpayer will be considered Polish tax resident. Their total income would then be taxed in Poland. If, however, the taxpayer does not meet the conditions of Polish tax residency then they are only required to pay tax on the income earned in Poland.

A1 form – For whom and for what purpose?

When companies post their employees to other EU Member States, they should obtain an A1 form for their employees to confirm that they remain liable to social insurance in Poland. Furthermore, company owners who intend to provide services outside Poland are required to have an A1 form. The A1 form certifies the requirement to pay social insurance premiums in Poland. It certifies which social security legislation applies to the posted employee. The same applies to foreign nationals who have been posted to work in Poland. Their A1 form shows the country of applicable legislation.

It is worth mentioning that before the Social Insurance Office issues an A1, it will verify the fulfillment of the relevant conditions set out in the EU social security legislation. These are detailed and can be complex and a full understanding of them is required before application. In addition, the posted employee should request a European Health Insurance Card that will enable them to use healthcare services abroad.

Tax remitter's responsibilities towards a non-resident contractor

Contractors who are not Polish tax residents should be subject to the flat income tax rate of 20%. If a valid residence certificate is provided however, it may turn out that no tax should be paid at all. This is because the provisions of an applicable double taxation treaty should be analysed. The taxpayer should also provide a valid document to determine whether they are a resident of another country.

It is important to stress that it is the tax remitter's responsibility to determine the taxpayer's tax residence and correctly settle their income tax. In the event of a tax audit, the tax remitter must show what basis was used to settle the flat tax. If the tax remitter does not receive the documents necessary to determine foreign tax residence, than the tax remitter will be required to withhold tax at 20% of the taxpayer's income and pay it to the relevant tax office by the 20th of the following month.

This is not, however, the end of the tax remitter's responsibilities: by the end of January of the following year the tax remitter must file with the tax office the annual PIT-8AR return, and by the end of February send information IFT-1R to both the tax office and the taxpayer. If the employer terminates business operations before those dates, then the IFT-1R information should be sent no later than on the last day of operations. If a non-resident taxpayer files a written request for IFT-1 form with the tax remitter, the tax remitter will have 14 days from the date of the request to send the information to the tax office and the taxpayer.

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SPAIN AND CHINA

SOCIAL SECURITY BILATERAL AGREEMENT SIGNED BETWEEN SPAIN AND CHINA

BDO comment

Assignees working between Spain and China could continue paying social security contributions in their home country for up to 6 years (with possibility of an extension). It would be necessary to obtain the relevant certificate from the Social Security Authorities.

On 19 May 2017, Spain and China entered into a bilateral agreement on Social Security, which came into force on 20 March 2018.

The principal aim of the agreement is to avoid a dual social security liability for assigned workers and ensure the social protection of these workers.

Scope of application

The agreement is applicable to those who usually live and work in either Spain or China and are sent on assignment to the other country.

The Agreement is applicable to the following regimes:

- Spain:
  - Contributory pensions under the General Regime, except for those due to workplace accidents or occupational disease.
  - Unemployment contributions and benefits.
- China:
  - Basic insurance for old age.
  - Unemployment insurance.

Period of application

The two countries have agreed a limit of six years during which the employees on assignment could apply the Bilateral Agreement. However, it is possible to apply for an extension if the Social Security Authorities of both countries agree.

Workers seconded from Spain to China

The Bilateral Agreement would apply as follows:

- The employee would continue paying their contributions to the Spanish Social Security system and therefore, those aspects included in the Bilateral Agreement relating to China would not be payable.
- However, the employee would have to pay contributions in China for health assistance, work accidents, occupational disease and temporary disability.

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SPAIN

INHERITANCE TAX DISCRIMINATION EXTENDED TO THIRD COUNTRY RESIDENTS

BDO comment

Non-Spanish residents/third country residents that inherit assets from a Spanish resident may be granted the same deductions and allowances as Spanish residents and will not be subjected to the State inheritance tax law.

On 19 February 2018, the Spanish Supreme Court issued a judgement establishing that the Spanish inheritance tax legal framework is in breach of the fundamental freedom of free movement of capital.

This discrimination has arisen because Spanish regions have considerable autonomy in granting tax allowances. These tax allowances do not apply when the heirs are not tax resident in Spain. In the latter case, the tax is determined by the State inheritance tax law, rather than the regional law.

This system gave rise to discriminations challenged by the Court of Justice of the European Union in 2014. The Court established that the differences between the tax treatment provided to residents and non-residents due to the Spanish regional system caused a breach of the free movement of capital.

Consequently, from January 2015 the inheritance tax law extended the regional tax allowance to heirs that are tax resident in the European Union and the European Economic Area. However, the law still excluded third country residents, which implied that they continue to be taxed according to the tax law applicable at State level, which does not grant any allowance to the heirs because of being a close relative of the deceased.

The Spanish Supreme Court confirmed that the Spanish inheritance tax law was discriminatory to non-Spanish residents in respect of the potential tax allowances and reductions provided to residents. The outcome is that the Spanish Supreme Court expanded the effects of its decision to third country residents (in line with another case of the European Court of Justice where the German inheritance tax regime was declared in breach of the free movement of capital).

Therefore, those heirs that have been resident in another country could claim the refund of the taxes paid under this discriminatory rule.

This judgement grants an opportunity for individuals resident abroad that inherited assets or rights located in Spain from a deceased Spanish resident to review the tax returns filed in the last four years.

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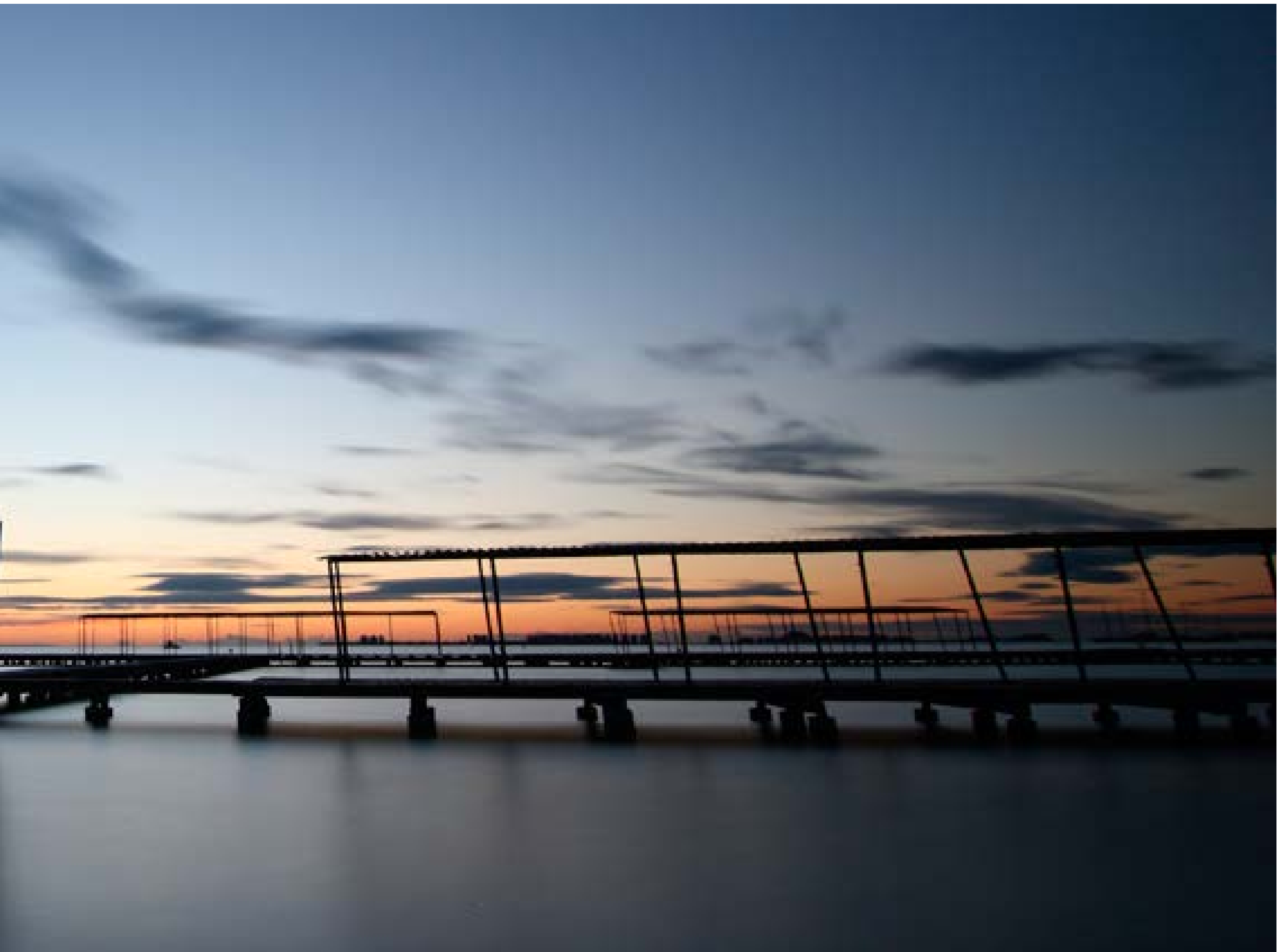

CURRENCY COMPARISON TABLE

The table below shows comparative exchange rates against the euro and the US dollar for the currencies mentioned in this issue, as at 19 April 2018.

Currency unit	Value in euros (EUR)	Value in US dollars (USD)
Indian Rupee (INR)	0.01229	0.01521

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