OECD RELEASES FINAL BEPS PROJECT REPORTS

On October 5, 2015, after more than two years of work on the Base Erosion and Profit Shifting (BEPS) Project, the Organisation for Economic Co-operation and Development (OECD) released a final package of proposals for "comprehensive, coherent and coordinated reform of the international tax rules."

These final BEPS proposals will be formally presented on October 8, 2015, at the G20 Finance Ministers meeting in Lima, Peru, and will be considered by world leaders in November during the G20 Summit in Antalya, Turkey. These 15 proposals are intended to combat the adverse impacts of BEPS, which are perceived to be the result of tax planning undertaken by multinational enterprises (MNEs) that take advantage of so-called tax "loopholes" under current international tax rules.

While the OECD has finalized its proposals, it now falls to individual countries to implement these proposals through changes to their tax and legal systems – a task that could present significant challenges. For example, in the US Congress, tax-writers have repeatedly expressed concerns about various aspects of the BEPS project (e.g., the recent debate over country-by-country reporting) and appear unwilling to grant the US Treasury *carte blanche* to implement these proposals domestically. Nevertheless, prior to this week's release, several countries had already taken action to ensure they would be able to move forward expeditiously with the implementation of the OECD's recommendations. The UK, for example, earlier this year introduced section 122 Finance Act 2015 to enable the promulgation of regulations to allow for the implementation of country-by-country reporting as soon as the OECD completed its work. To that end, on October 5 – the same day the OECD issued its final recommendations – the UK released a technical consultation aimed at ensuring that country-by-country reporting will be implemented in the UK as intended for accounting periods commencing on or after January 1, 2016.

Interestingly, the same week the OECD released its BEPS proposals, the European Commission made an announcement that EU Member States have unanimously agreed to automatically exchange information on cross-border tax rulings. Coming just one day after the release of the OECD's proposals, the Commission is taking steps to equip its Member States with the information they need to protect their tax bases and effectively target companies that are perceived to not be paying their "fair share" of taxes.

Below is a brief overview of the final OECD BEPS reports.

Action 1: Addressing the Tax Challenges of the Digital Economy

Action 1 recommends steps intended to address the unique tax issues that arise as a result of the digital economy. Historically, tax laws have not developed fast enough to address the quickly changing digital world. The report acknowledges that while the digital economy does not itself create novel BEPS issues, the non-tangible nature of these transactions enables companies to take particular advantage of BEPS tax strategies. Some of the risks identified include the need to address the definition of permanent establishment (PE) to ensure members of the digital economy cannot take unfair advantage of certain exceptions to PE status. Examples include the inventory of goods for an online retailer or the conclusion of contracts through an online retailer where the real substance of the transaction is actually occurring in the local jurisdiction. The report also notes that there are particular challenges arising from direct tax issues, such as nexus, data and characterization of income issues, and indirect tax issues, such as collection of VAT when goods and services are acquired from non-local suppliers. Addressing these challenges and risks should be effected in large part through the other BEPS Actions, although this area will need continual monitoring in order to address the ever-changing marketplace of the digital economy.

Action 2: Neutralizing the Effects on Hybrid Mismatch Arrangements

The goal of Action 2 is to address the mismatch of income and expense, double deductions, and duplication of foreign tax credits through the use of hybrid entities, instruments and arrangements. The report outlines ways to resolve these mismatch issues at a local level, as well as a global level through proposed changes to the OECD Model Tax Convention. The suggestions for local level changes include a "primary rule" that denies a deduction if the corresponding amount is not included in the taxable income of the recipient or if a double deduction is sought. They also include a "defensive rule" as a back-up to the primary rule that would require a deductible payment to be included in income or denying the duplicate deduction. The discussion regarding the OECD Model Tax Convention notes that any changes should focus on dual resident entities and hybrid entities, and further acknowledges that any changes made at a local level will need to be aligned with existing treaty arrangements. This Action may prove to be particularly difficult to implement because it involves significant coordination between two jurisdictions in order to identify and match up specific cross-border payments that run afoul of any anti-mismatch rules.

Action 3: Designing Effective Controlled Foreign Company Rules

In Action 3, the OECD recognizes the important role that controlled foreign company (CFC) rules play in preventing profit shifting and long-term deferral of taxation. At the same time, the report acknowledges the challenges facing current CFC rules. The OECD recognizes that by working together, countries will be able to address concerns about competitiveness.

Specifically, the report lays out six "building blocks" countries should use in the design of effective CFC rules:

1. Definition of a CFC
2. CFC Exemptions and Threshold Requirements
3. Definition of Income
4. Computation of Income
5. Attribution of Income
6. Prevention and Elimination of Double Taxation

Additionally, recognizing that countries have different policy priorities, the OECD seeks to provide flexibility with regard to the implementation of CFC rules while also ensuring that the rules are in compliance with countries' international legal obligations. Importantly, the CFC proposals will need to be implemented in close coordination with other BEPS Actions including transfer pricing, hybrid mismatch rules, and interest deductibility.

Action 4: Limiting Base Erosion Involving Interest Deductions and Other Financial Payments

To further address BEPS risks, Action 4 addresses optimal ways to prevent base erosion through the inappropriate use of interest expense. Under the preferred approach, deductibility of interest expense would be limited to a fixed ratio of net interest/EBITDA. Countries would be free to fix their own ratio, but the OECD recommendation is to implement a deductibility allowance between 10% and 30% of EBITDA, with flexibility to adjust the ratio for specific sectors. For example, highly-geared infrastructure projects are identified as being entitled to special treatment since the BEPS risk is arguably reduced due to the involvement of the public sector. The OECD has data, which suggests that 62% of publicly traded multinational groups would in principle be able to deduct all their interest expense at a 10% ratio, rising to 87% at 30%.

The proposal calls for an optional group ratio rule to allow greater deductibility at the entity level up to the group's external net interest/EBITDA ratio (if greater than the fixed ratio). The report notes that currently no country applies a group ratio on this basis, so further design work will need to be done next year.

The recommended approach also allows countries to supplement the fixed ratio rule and group ratio rule with other provisions that reduce the impact of the rules on entities or situations that pose less BEPS risk, such as:

- optional *de minimis* monetary threshold (no suggestion on the amount but aimed at excluding low risk entities)
- optional carry forward of disallowed interest and unused capacity and/or carry back of disallowed interest (to smooth the effects of volatility of profits and interest rates)

The OECD acknowledges that existing domestic thin capitalization and arm's length restrictions on interest deductibility can be operated in conjunction with a fixed ratio restriction – but it would first have to be determined which takes precedence. The report further acknowledges that the fixed ratio is a blunt instrument, thus transitional relief should be offered for existing financing arrangements. Finally, the report passes fairly rapidly over the interaction between its recommendations and the work on hybrid mismatches and CFCs – resulting in yet another area where further work will likely be needed.

Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance

The final report on Action 5 produced three conclusions and recommends that a framework be established to prevent the current problems stemming from harmful tax practices simply being pushed from OECD member countries to non-OECD member countries. The headlines from the report consist of:

- the inclusion of the list of IP assets that can fit within an acceptable preferential regime
- significant detail on the method of calculating how much income can qualify for preferential treatment
- further clarification on which kinds of rulings will need to be shared between tax authorities
- some initial thoughts on the need to prevent the OECD's recommendations from resulting in preferential regimes springing up in non-OECD countries

The OECD has settled on three "categories" of IP assets that can be included in a preferential regime:

1. patents, including protection to plants and genetic material, orphan drug designations, and extensions of patent protection
2. copyrighted software
3. other IP assets that are non-obvious, useful, and novel

In the review of existing IP preferential regimes, the report concluded that all of the regimes need to be amended as none meets the requirements of the modified nexus approach in determining the income benefiting from the special regime.

The report then looks at the framework for improving transparency in relation to rulings, which the OECD sees as a very important harmful tax practice. Rulings are broadly defined as "any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situations and on which they are entitled to rely." The report concludes that it is important to undertake compulsory spontaneous information exchange that generally covers all instances where no exchange may give rise to a BEPS concern. Consistent with many of the other BEPS Actions, the OECD sees transparency as the antidote to the harm caused by rulings such as:

- rulings related to preferential regimes
- cross-border unilateral APAs
- rulings giving a downward adjustment to profits
- PE rulings
- conduit rulings
- any other rulings that the Forum on Harmful Tax Practices thinks in the future needs to be included in the list

It is worth mentioning again that on October 6, EU Member States unanimously agreed on the automatic exchange of information on cross-border tax rulings, further to a proposal on tax transparency presented in March 2015 by the EU Commission. This new EU Directive will remove Member States' discretion to decide on what information is shared, when, and with whom. The rulings – defined widely so as to capture all similar instruments irrespective of the actual tax advantage involved – will have to be exchanged automatically by the Member States every six months, while further allowing the Member States to ask for more detailed information on individual rulings. Additionally, the agreement will also cover existing rulings from the past five years. Member States will have to transpose the new rules into national law before the end of 2016, meaning the Directive will take effect on January 1, 2017.

Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

Action 6 identifies areas where hybrid financial instruments and hybrid entities are abusive. The first area consists of payments that give rise to a deduction/no inclusion outcome (D/NI outcome). Illustrations of this include a hybrid financial instrument where the payments are treated as interest in one jurisdiction, but as equity in another; or where a hybrid entity that makes loans to a borrower company where the hybrid entity is treated as transparent in the borrower's jurisdiction (and not taxable in consequence), but is treated as opaque in the hybrid entity's parent's jurisdiction (with the result that the parent is not taxed on the hybrid entity's profits).

Another area consists of payments that give rise to a double deduction outcome (DD outcome) (i.e., payments that give rise to two deductions). By way of illustration, a parent company in jurisdiction A establishes a subsidiary in jurisdiction B which is "checked open" in relation to jurisdiction A, but which remains opaque in jurisdiction B. The subsidiary borrows from a third party bank. This creates a DD outcome as the borrowing creates a deduction at the parent level in jurisdiction A and at the entity level in jurisdiction B.

Additionally, the OECD appreciates that not every country will apply BEPS. If not, it would be possible, without more, to create a hybrid benefit outside the group members in the BEPS jurisdictions and to funnel that benefit to a BEPS jurisdiction. The OECD wants jurisdictions that have signed up to implement these BEPS measures to police the worldwide group by ensuring that it applies to payments that give rise to indirect D/NI outcomes.

Action 6 also sets out a number of steps to address the issues set out above.

- D/NI outcomes are to be addressed by a combination of two rules. The priority rule is that the payor jurisdiction is to deny the deduction. If the payor jurisdiction does not do this, then the payee jurisdiction is required to bring the payment into its measure of taxable income.
- DD outcomes are to be addressed through the operation of two rules. The priority rule is that the duplicate deduction is to be denied at the parent jurisdiction level. If the parent jurisdiction does not do this, then the payment is to be blocked at the payor level.
- Indirect D/NI outcomes are to be challenged by denying the payer a deduction for a payment where the payee sets off the income from that payment against an expenditure under a separate hybrid mismatch arrangement.

Action 6 contains more than 200 pages of examples as to how the rules will work in practice. It also addresses difficult issues arising from the consultation, such as the extent to which leasing transactions can be treated as financial instruments.

Action 7: Preventing Artificial Avoidance of Permanent Establishment Status

Tax treaties typically provide that profits earned in one country by a foreign business enterprise are not subject to tax by that country unless the business maintains a PE in that country to which those profits are properly attributable. Action 7 is intended to prevent tax planning strategies that might be used by multinational business enterprises to inappropriately avoid a PE in a particular country. This is to be accomplished by a series of changes to the definition of a PE in Paragraphs 5 and 6 of the OECD Model Tax Convention (2014). The OECD's goal is to have these changes (and the results of follow up work to be undertaken on issues related to the attribution of profits to a PE) incorporated the multilateral instrument to be negotiated by year-end 2016 (Action 15 discussed here and below).

The principal change to the PE definition is intended to address *commissionaire* and similar arrangements. Under these arrangements, an in-country person sells products in its own name on behalf of a foreign business, but has no authority to conclude those contracts, which are instead subject to approval in another country (often a low or no tax jurisdiction).

Under the proposal, a PE would be found to exist where the in-country person "habitually concludes contracts, *or* habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the [foreign business], *and* these contracts are (a) in the name of the [foreign business], *or* (b) for the transfer of ownership of, or for the granting of a right to use, property either owned by [the foreign business or which it] has a right to use, *or* (c) for the provision of services by [the foreign business]." The revised PE definition continues, but tightens, the exception from PE status where the in-country person qualifies as an "independent agent" and acts for the foreign business in the ordinary course of that business.

Action 7 would also make these changes. First, it would revise the exception from PE status for certain specific activities (e.g., use of facilities for storage, display, or delivery of goods) to ensure that each of the enumerated exceptions will be applicable *only* if the activity (or, if applicable, the fixed place of business at which permitted activities are combined) is of a "preparatory or auxiliary character." Second, it would address strategies that involve fragmenting of activities or splitting of contracts in order to avoid PE classification. Finally, it would provide special rules for situations involving avoidance of PE status through strategies to sell insurance within a given country without creating a PE in that country.

Follow up work is proposed in relation to further guidance on the attribution of profit to PEs. This guidance is expected to be released before the end of 2016.

Some countries (such as Australia and the UK) have released their own proposals to fight the avoidance of PE status by using domestic anti-avoidance provisions. These proposals have been criticized as going beyond the parameters of BEPS.

Actions 8-10: Aligning Transfer Pricing Outcomes with Value Creation, Actions

Actions 8-10 focus on three separate, but integrated, areas of transfer pricing. Action 8 examines transfer pricing related to intangible creation and corresponding value. Action 9 looks at the allocation of risks through the use of contractual arrangements. Action 10 concentrates on other "high-risk areas," such as profit allocations, separation of profits from economically significant activities, and expense allocations aimed at reducing profit.

The overall theme of these three reports is that profits attributable to value creation should be closely aligned with the economic substance of the transaction. The reports highlight two key areas of interest – risk allocation and intangible ownership. In discussing allocation of risks, the OECD focuses on aligning risk taking with the entity that actually is bearing the risk, can control such risks, and has the financial ability to assume the risks. For intangibles, the report highlights the point that legal ownership of intangibles alone will not be sufficient to justify an allocation of profits and notes that bearing economic risks and rewards associated with intangible ownership should be the driver of profit allocation. With both of these concepts – bearing risk and intangible ownership – current transfer pricing concepts often already require the economic activity to follow the receipt of residual profits in order to be treated as satisfying the arm's length standard.

While many of these general concepts may not be new to companies, a closer look at an MNE's global tax structure and the location of activities may be warranted in some cases. For example, double tier IP holding company structures may be particularly vulnerable where there is an accumulation of profit in a location where there is little substance on the ground. Additionally, this aspect of the proposals may have more immediate implications since many local jurisdictions incorporate by reference or otherwise rely on the OECD transfer pricing guidelines for their local application of the rules.

The OECD also mentions that Actions 8-10 can be enforced through the use of the compliance requirements outlined in Action 13. Furthermore, the OECD believes that Action 14 will ensure that double taxation does not result from the application of these standardized transfer pricing concepts. These BEPS Actions are both addressed below in further detail.

Action 11: Measuring and Monitoring BEPS

The driving force behind the BEPS Project has been the adverse fiscal and economic impacts resulting from the tax planning activities of certain MNEs that take advantage of the mismatches and gaps in the international tax rules. In fact, research has shown that BEPS results in global corporate income tax revenue losses of between 4% and 10% – between €89 billion and €213 billion annually.

According to the OECD, there are various indicators – coupled with significant empirical analysis – that confirm the existence and increasing scale of BEPS in recent years, including:

- the profit rates of MNE affiliates located in lower-tax countries are higher than their group's average worldwide profit rate
- the effective tax rates paid by large MNE entities are estimated to be 4 to 8.5 percentage points lower than similar enterprises with domestic-only operations
- foreign direct investment (FDI) is increasingly concentrated
- the separation of taxable profits from the location of the value creating activity is particularly clear with respect to intangible assets and the phenomenon has grown rapidly
- debt from both related and third-parties is more concentrated in MNE affiliates in higher statutory tax-rate countries

Nevertheless, current measuring and monitoring efforts are severely constrained as a result of limitations on currently available data. As such, the focus of Action 11 is on improved access to and enhanced analysis of existing data, as well as on new data proposed to be collected under Actions 5, 12, and 13. Specifically, the report recommends that the OECD work with governments to report and analyze more corporate tax data and to do so in an internationally consistent way. By doing so, the OECD believes it will be better positioned to more fully understand the impact of BEPS and the actions taken to address BEPS.

Action 12: Mandatory Disclosure Rules

The main objective of mandatory disclosure regimes is to increase transparency by providing tax administrations with early information regarding potentially aggressive or abusive tax planning schemes and to identify promoters and users of those schemes. Action 12 provides a modular framework for those tax authorities that do not currently have a mandatory disclosure regime, but wish to implement one. For jurisdictions that already have mandatory disclosure requirements, including the US, UK and Canada, Action 12 recommends certain tools that can be incorporated to better identify cross-border tax schemes, which are more difficult to target than domestic tax abuse transactions.

Action 12 focuses on identifying the types of structures targeted by the BEPS Action Plan, including hybrid mismatch and treaty shopping arrangements, as well as other cross-border tax outcomes that are known to pose material risks to the tax base of the reporting jurisdiction. Tax administrations are advised to require disclosure only with respect to arrangements that include a transaction with a domestic taxpayer that has material tax consequences in the reporting country and where the domestic taxpayer was aware or ought to have been aware of the cross-border transaction. In addition, taxpayers that enter into intra-group transactions with material tax consequences are obliged to make reasonable inquiries as to whether the transaction forms part of an arrangement that includes a cross-border outcome that is identified as reportable under their home jurisdiction's mandatory disclosure regime.

Action 12 also sets out recommendations for the development and implementation of more effective information exchange and cooperation between tax administrations. The legal basis for the exchange of information will be provided by bilateral or multilateral agreements between jurisdictions. In particular, the expanded Joint International Tax Shelter Information and Collaboration Network (JITSIC Network) of the OECD Forum on Tax Administration provides an international platform for an exchange of early information on emerging tax risks that may be relevant to its members. This could include information obtained under a mandatory disclosure regime.

Action 13: Transfer Pricing Documentation and Country-by-Country Reporting

Action 13 maintains much of the language in the draft report and calls for a "three-tiered standardised approach" to transfer pricing documentation. Specifically, all companies should prepare both a master file providing a high level overview of their global operations and a local file of transfer pricing documentation specific to each country. In addition, companies with consolidated group revenue equal to or exceeding €750 million will need to prepare a country-by-country report to summarize by jurisdiction revenue, pre-tax income, income tax paid and accrued, employees, stated capital, retained earnings, and tangible assets. The report acknowledges that, while the goal is to have this three-tiered reporting begin for the 2016 tax year, some jurisdictions may "need time to follow their particular domestic legislative process" in order to mandate such reporting. In an effort to help this along, a new addition in the final report is the inclusion of model legislation for countries to adopt in order to require country-by-country reporting.

The intention is that the country-by-country reporting will be required to be done by the ultimate parent entity of an MNE. To the extent jurisdictions like the US have difficulty moving quickly enough to implement legislative changes to mandate this reporting, it will be interesting to see whether the subsidiary jurisdictions of MNEs that have implemented the requisite legislation feel they have sufficient authority to request the information via the subsidiary.

Action 14: Making Dispute Resolution Mechanisms More Effective

Action 14 is in some respects the "odd one out." All other BEPS Actions are invasive by nature – as demonstrated by their headings, and use terms such as neutralizing, limiting, countering, preventing, and so on – which is exactly what they are designed to do to undesired tax implications. As a welcome change of tone in the overall report, Action 14 only sets out benefits to taxpayers involved in cross-border business.

This Action is focused on making Article 25 of the Model Convention more effective. It does so by imposing more detailed obligations on the respective tax authorities if the two cannot agree on a mutual application or interpretation of the respective double tax agreement (DTA). More specifically, Action 14 deals with the "Mutual Agreement Procedure" (MAP). MAP provides a procedure allowing a taxpayer to address an incorrect or inconsistent application or interpretation of the respective treaty by one or both of the involved contracting states – in addition to domestic remedies that may not be available to the taxpayer under domestic rules.

As it reads today, Article 25 is constructed quite loosely, with little guidance on implementation. The OECD's final report provides recommendations to mitigate these shortcomings, including several major changes.

First, not all DTAs currently include a MAP. Consequently, the foremost recommendation is to ask all countries to include MAP in their DTAs. The further recommendation, to include transfer pricing disputes in MAP, is of particular practical relevance to all MNEs.

Second, not all countries currently have domestic guidelines prescribing requirements and procedures to initiate and address MAP by their resident taxpayers. Many countries wish to avoid being restricted by regulations in this respect – they see the dispute as a matter that should be addressed by way of flexible diplomatic resolution between the two countries involved – and not by way of a legal procedure with clear rules. It follows that the OECD recommends all countries provide access to MAP and adopt minimum standards for MAP in line with its recommendations.

Additionally, in the past, tax authorities of the countries involved in the dispute were only obliged "to endeavor" to resolve the dispute by way of mutual agreement between the two countries. Consequently, there was no obligation to actually resolve the matter. The OECD recommendation now calls for a "commitment" of the two countries to seek a resolution of the dispute within an average timeframe of 24 months – and to subsequently implement the mutual agreement. Whether a "commitment to seek to resolve" is equivalent to an "obligation to resolve" is not clear from the final report and appears somewhat open for interpretation.

It is our belief that if the intention of the OECD was only to reconfirm the current situation regarding this issue, it should not have been highlighted as a recommendation. There are also important questions about the exact meaning of an "average" timeframe.

The recommendations in Action 14 are supported by various measures to ensure global compliance with the recommendations, such as timely reporting requirements by countries, peer reviews and monitoring, enhancing tax authority relationships by way of membership in the OECD's Forum on Tax Administration, sufficient staffing of the MAP offices and their independence regarding MAP, etc.

All in all, Action 14 appears to be a step in the right direction. And the timing is right as well. MAPs soared to 4,566 pending cases in 2013 – almost double the amount seven years ago –with a rate of approximately 1,200 completions each year.

Action 15: Multilateral Instrument

Action 15 provides for an analysis of the tax and international law issues related to the development of a multilateral instrument that would enable willing countries to implement measures developed as part of the BEPS Project and expediently amend bilateral tax treaties. Development of such an instrument would facilitate an innovative approach to international tax policy, taking into account the rapidly changing nature of the global economy and streamlining the implementation of the tax treaty-related BEPS measures and generally avoid the need to individually amend approximately 3,000 tax treaties and agreements around the world – a seemingly insurmountable task.

There has been strong involvement in this effort by nearly all of the affected countries, but with some exceptions.

The trend toward universal involvement might be accelerating. For example, consider recent remarks that Robert Stack, US Deputy Assistant Treasury Secretary for International Tax Affairs and leader of the US BEPS efforts, made just last week. According to Mr. Stack, the US agreed to participate in Multilateral Instrument discussions "because it is the best way for the United States to advance its interests in mandatory binding arbitration as the optimal method for resolving disputes and improving tax administration." He went on to caution, however, that such participation "by no means foreshadows any decision about whether to eventually join in signing such an instrument."

This is of course a big change from US non-participation in Action 15 work up to this point. Indeed, as recently as this summer, US Treasury official Danielle Rolfes questioned "what's in it for us" and suggested the US had chosen not to participate because the multilateral instrument would cover only treaty-related items and, when the US considered which treaty-related items were likely to be included in the instrument, it did not seem like a good use of scarce US resources to participate in the Action 15 discussions.

Conclusion

While these OECD reports may now be in final form, they are in fact only recommendations that individual countries will need to implement. The next phase of this overhaul of the global tax system will require significant legislative actions in each participating jurisdiction. Some countries will undoubtedly act quickly (e.g., the UK, as mentioned above), while other countries may struggle to find the necessary consensus in their jurisdiction to make the suggested changes (e.g., the US which has found it difficult to achieve any meaningful tax reform for many years). Therefore, the release of these final BEPS reports are likely just the beginning of interesting and challenging work required to achieve the OECD's goals.

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