Base Erosion and Profit-Shifting (BEPS): OECD and Ways & Means start taking action

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In brief

Base erosion and profit-shifting (BEPS) continues to be a high priority for the Administration, Congress, and leading international economic organizations. We have recently seen significant action seeking to address BEPS concerns. On June 13, the House Ways and Means Committee held a hearing in which Committee Chairman Dave Camp (R-MI) discussed the anti-base erosion options included in his international tax reform discussion draft released on October 26, 2011. On July 19, the Organisation for Economic Cooperation and Development (OECD) issued a Comprehensive Action Plan (Plan) to address BEPS issues. The Plan follows from the OECD's February 2013 BEPS report and outlines 15 separate workstreams under five broad categories.

The Ways and Means Committee's hearing focused in particular on the "carrot-and-stick" approach in the discussion draft's Option C. As Chairman Camp said,

> Although the merits of each option remain open for debate, Option C (the carrot and stick proposal) received, and continues to receive, the most support from the business community. And our close work with the staff of the Joint Committee on Taxation leads us to believe it is an effective safeguard.

Skadden Arps attorney Paul Oosterhuis, one of the three witnesses at the hearing, said that Option C could help level the playing field between US and foreign manufacturing businesses. USC law professor and former Joint Committee on Taxation (JCT) Chief of Staff Edward Kleinbard raised concerns about Option C's administrability. The third witness was Pascal Saint-Amans, Director of the OECD's Center for Tax Policy and Administration, which issued the OECD BEPS Plan.

Observation: In the context of broad concerns about BEPS, this hearing takes on added significance. It provides insight into the approach that the Ways & Means Committee may prefer, and shows that Chairman Camp gives some weight to the business community's view.

The OECD BEPS Plan reflects the concerns of many countries in the G-20 group of major economic powers, some of which (such as India and China) are not OECD members. Unlike other OECD initiatives, all members of the G-20 will participate in the Plan's workstreams. The G-20 finance ministers have already endorsed the Plan, which will be formally submitted to the G-20 government heads in September.

The Plan suggests that political leaders are dissatisfied with the approaches that the OECD's technical tax experts have advanced previously, and they are seeking more radical action. The Plan's view is that the international tax environment has not kept pace with developments in global business, resulting in certain income being taxed at inappropriately low rates, if it is taxed at all. Thus, the Plan seeks fundamental changes to some current tax regimes. The OECD believes that swift action is needed to avert uncoordinated unilateral government actions. In general, the Plan suggests that it can address BEPS within the existing international tax architecture, including the arm's-length standard for intercompany pricing and existing standards for allocating taxing rights on cross-border income. The Plan also emphasizes the importance of increased taxpayer transparency.

The Plan approach relies in part on the adoption of new consensus-based mechanisms, including anti-abuse provisions, designed specifically to prevent BEPS. The Plan's primary emphasis is on ensuring sufficient substance in business locations to justify the income allocated to those locations.

The five broad Plan categories are

1. address the digital economy's tax challenges
2. establish the international coherence of corporate income taxation
3. restore the full effects and benefits of international tax standards
4. ensure transparency (promoting increased certainty and predictability)
5. swift implementation of the measures

The Plan approaches these categories through a number of mechanisms, including possible revisions to controlled foreign corporation (CFC) rules, criteria for permanent establishments (PEs), 'harmful' tax regimes, requirements for taxpayer transparency, tax treaties, and transfer pricing (TP) rules.

The BEPS Plan has set an ambitious timeline of 12-27 months for completing the workstreams, but it may take longer to reach the consensus required to conclude on certain points. In any case, the OECD cannot impose its recommendations; they must be ratified or enacted by each member country separately. However, the BEPS project may embolden some governments to act unilaterally on certain international tax issues.

Observation: The OECD BEPS Plan is unusual in bringing non-OECD G-20 countries to the table. Their inclusion will create additional challenges, because their perspective on international tax issues tends to be different than the OECD members' views. In addition, the BEPS initiative is distinctive because it directly involves the G-20 political leadership. Thus, it is less balanced than most OECD initiatives as between the public and private sectors. The Plan does not include formal business advisory groups, although we anticipate some consultation with the business community this autumn.

In detail

The OECD BEPS Plan

The Plan lists its 15 BEPS workstreams, called 'actions', under the five categories. Each of the workstreams has a specified timeline ending sometime in 2014 or 2015. In order to meet the Plan's ambitious deadlines, the working parties will need to find new ways to reach consensus, such as the use of small focus groups and remote working.

1. Addressing the digital economy's tax challenges

This first category contains only one workstream, a task force to study the issues specifically raised by e-commerce and the digital economy. The OECD considered this issue previously in a study conducted from 1997 to 2002. Unlike many of the other workstreams, the goal of this initiative is not to issue immediate recommendations but only to identify options. Specifically, the Plan seeks to "[i]dentify the main difficulties that the digital economy poses for the application of existing international tax rules and develop detailed options to address these difficulties, taking a holistic approach and considering both direct and indirect taxation." In particular, the Plan calls for a review of different business models and a better understanding of value generation in the digital sector. The technical tax issues to be addressed include PE criteria, attribution of profits, character of income, and sourcing rules. The Plan timeline seeks to complete this study by September 2014.

Observation: The US government did not want the OECD to radically change its existing recommendations regarding e-commerce and the digital economy. The OECD's decision to limit this workstream to a study means that companies with significant digital business will likely not see major OECD policy changes in this area in the near term.

2. Establishing the international coherence of corporate income taxation

As the Plan states, "the increasing interconnectedness of domestic economies has highlighted the gaps that can be created by interactions between domestic tax laws." The plan outlines four workstreams to address these gaps: (1) neutralize the effects of hybrid mismatch arrangements; (2) strengthen CFC rules; (3) limit base erosion via interest deductions and other financial payments; and (4) counter harmful tax practices more effectively, taking into account transparency and substance.

Neutralize the effects of hybrid mismatch arrangements

This workstream also follows on a previous OECD study, which culminated in a March 2012 report, *OECD Report on Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues*. The Plan views the use of hybrid entities and instruments as a major source of 'double non-taxation,' where no country would tax certain income attributable to that entity or instrument. The plan uses the examples of double deductions for the same expense, deductions generated without corresponding income inclusions, and long-term deferral.

The Plan envisages that this workstream will recommend changes to the OECD Model Treaty to prevent undue benefits under treaties for hybrid arrangements (e.g., denial of withholding tax relief). This workstream will also recommend changes to domestic laws, such as (i) preventing the exemption or non-recognition of deductible payments, (ii) denying deductions for payments not includible in income, (iii) preventing double deductions, and (iv) providing tie-breaker rules.

The Plan also specifies that the hybrid work will be coordinated with the workstreams on interest expense deduction limitations, CFC rules, and tax treaty modifications (see below).

The deadline for this workstream is September 2014.

Observation: Because many US multinationals use hybrid instruments or entities in global tax planning, changes resulting from this workstream could have a significant impact.

Strengthen CFC rules

The Plan says little about CFC rules, but expresses "the possibility of creating affiliated non-resident taxpayers and routing income of a resident enterprise through the non-resident affiliate," because "the CFC rules of many countries do not always counter BEPS in a comprehensive manner." The Plan mentions that CFC rules have positive "spill-over" effects for source countries since taxpayers would have less incentive to shift profits into a low-tax jurisdiction.

This workstream will coordinate with other, related workstreams and result in recommendations regarding the design of CFC rules. Its deadline is September 2015.

Observation: The Plan does not acknowledge the European Court of Justice decisions setting limitations on CFC rules. This workstream likely targets the United States, given other OECD countries' concerns about subpart F exceptions such as same-country transactions, CFC look-through rules, and the impact of the check-the-box rules. Note that, if the United States expanded subpart F, creating an intangible income category 1, that income would be subject to US tax and would not necessarily benefit other jurisdictions concerned about current US CFC rules. There is also a BEPS workstream specifically targeted at intangibles.

Limit base erosion via interest deductions and other financial payments

The Plan explains another BEPS concern: "excessive deductible payments such as interest and other financial payments." The reason is that interest expense deductibility can lead to non-taxation in both inbound and outbound tax planning.

The Plan concludes that rules for expense deductibility should take into account that (i) the related interest income may not be fully taxed, or (ii) the underlying debt may be used to inappropriately reduce the issuer's earnings base (or finance deferred or exempt income).

This workstream will evaluate different types of limitations. It will initially develop best practice recommendations for domestic law limitations on related and unrelated interest expense and economically equivalent payments. The deadline for those recommendations is due September 2015.

The workstream will then develop TP guidance in this area, due by December 2015.

Observation: The application of this workstream to the financial services sector should be closely monitored, as a bank's interest expense is essentially equivalent to a manufacturer's cost of goods sold.

Counter harmful tax practices more effectively

Unlike the other Plan workstreams, this one regarding preferential tax regimes addresses the actions of governments, not taxpayers. It notes that some concerns raised in a 1998 OECD report on harmful tax practices are still relevant. Specifically, the Plan refers to a "'race to the bottom' on the mobile income tax base."

However, the Plan recognizes that traditional ring-fencing, which was a major target of the previous report, has now largely given way to across-the-board tax rate reductions on particular income types. The February BEPS report called for solutions to counter harmful regimes more effectively, accounting for factors such as transparency and substance.

The OECD's Forum on Harmful Tax Practices will now refocus its work to develop more effective solutions. The BEPS workstream will place a priority on "improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes," and on requiring substantial business activity to qualify for any preferential tax regime.

The workstream will generate three results: (1) a review of member country tax regimes (due September 2014); (2) a strategy to expand participation in this area to non-OECD members (due September 2015); and (3) revised criteria on harmful tax practices (due December 2015).

Observation: This workstream's first and second results may not be excessively controversial, but the revised criteria may generate some resistance from certain OECD members, meaning that consensus could be difficult to reach.

3. Restoring the full effects and benefits of international standards

According to the Plan, current international tax rules may not prevent BEPS resulting from interactions among more than two countries and from the actions of global value chains. The OECD believes this action could eliminate frictions between different tax systems.

The Plan specifically references the use of third-country arrangements for "schemes such as low-taxed branches of a foreign company, conduit companies, and the artificial shifting of income through transfer pricing arrangements."

In general, the Plan seeks to revise existing domestic and international tax rules so they more closely align the allocation of income with the economic activity that generates that income.

Prevent treaty abuse

The Plan notes that tax treaty abuse is a source of BEPS concerns. It specifically identifies treaty-shopping as a problem and calls generally for "tight treaty anti-abuse clauses coupled with the exercise of taxing rights under domestic laws."

This workstream seeks first to clarify the policy behind bilateral tax treaties and the criteria for entering into them. In addition, it aims to develop best practice anti-abuse clauses for use within bilateral treaties and best practice anti-avoidance rules for domestic tax systems to prevent inappropriate treaty benefits.

The deadline for this workstream is September 2014.

Prevent artificial avoidance of PE status

The Plan states that the definition of a PE must be updated to prevent abuses. It identifies two specific issues in this area: (i) commissionaire arrangements in which a profit shift may occur without a substantive change in functions, and (ii) artificial fragmentation of a multinational's operations among group entities to qualify for the "preparatory and auxiliary" exception to PE status.

The workstream will seek to redefine PEs so as to prevent PE status avoidance through using commissionaires (as dependent agents) or specific activity exemptions. This effort will also address related profit attribution issues.

The deadline for this workstream is September 2015.

Observation: Redefining PEs to include commissionaires and locations of preparatory and auxiliary activities could result in substantial additional tax burdens for multinationals that have relied on the traditional PE definition.

Assure that transfer pricing outcomes are in line with value creation

Workstreams 8-10 are all focused on assuring that TP outcomes align with value creation, specifically with respect to intangibles, risks and capital, and other high-risk areas, respectively.

The key principle in this area is to ensure that the attribution of value for tax purposes is consistent with the economic activity generating that value. In particular, the Plan seeks to ensure that value arises from the activities of personnel, not merely from legal ownership or assumption of economic risk.

Observation: The focus on value creation, and specifically the activities of people, has some hallmarks of formulary apportionment. The Plan specifically states, "Alternative income allocation systems, including formula based systems, are sometimes suggested". Although this may seem to be a drastic departure from traditional contractual risk allocation, it is not an entirely new approach. In 2008, the OECD 'KERT' approach to profit attribution relied heavily on 'people' functions. Some observers felt that this approach, which primarily affected the financial services industry, overly diminished the value capital plays.

In the intangibles area, the Plan seeks to define 'intangibles' more broadly than the OECD has defined it in the past. The workstream will also develop TP rules for hard-to-value intangibles and will update cost-sharing guidance. Note that the OECD has released a report specifically on intangibles since issuing the BEPS CAP (see *OECD project on intangibles: Revised Discussion Draft released*).

In the workstream for "other high-risk areas," the Plan aims to develop rules to prevent BEPS resulting from transactions that "would not… occur between third parties." This workstream will also provide rules for (i) when to recharacterize transactions, (ii) how to apply TP methods (especially profit splits) to global value chains, and (iii) how to protect against base erosion through management fees and head office expenses.

The deadline for these workstreams is generally September 2015, although the initial intangibles workstream results are due by September 2014.

Observation: The general thrust of these workstreams is to ensure that entities and locations earning income have sufficient substance to justify that income. However, some of the approaches demonstrate an apparent misunderstanding of TP principles. In particular, the effort to address transactions that would not arise between third parties seems misdirected, since TP would generally deal with whether the value generated by such transactions realistically reflects third-party attributions of value. That is, the arm's length standard does not require related parties to mimic transactions between unrelated parties. It generally accepts whatever transactions related parties engage in (if they have economic substance) and only requires them to reach the prices that unrelated parties would have reached in similar transactions. The effort to challenge management fees and head office expenses also seems somewhat out of place here; in US federal income tax law, such expenses are generally subject to the rules for allocation and apportionment, not TP rules.

4. Ensuring transparency while promoting increased certainty and predictability

The Plan emphasizes that preventing BEPS requires transparency at different levels. Four workstreams aim to establish and maintain such transparency

Observation: The Plan is concerned primarily with taxing authorities having transparency for taxpayer data, and to a lesser extent governments having transparency towards one another. This effort does not involve public transparency of taxpayer data.

Establish methodologies to collect and analyze data on BEPS and the actions to address it

The Plan states that improving the availability and analysis of BEPS data is critical, in part to monitor implementation of the Plan itself.

The Plan laments the lack of hard evidence to quantify the amount of corporate tax revenue lost due to global tax planning that uses BEPS.

The BEPS data workstream will develop recommendations for which data types tax authorities should gather and which BEPS analysis methodologies they should use. The workstream will take into account taxpayer confidentiality and administrative costs. It will also analyze the scale and impact of BEPS, including any spillover effects.

The deadline for this workstream is September 2015.

Require taxpayers to disclose their aggressive tax planning arrangements

The Plan notes that tax authorities need transparency on certain tax planning and transactions that is often unavailable to them. Accordingly, one BEPS workstream will develop best practice recommendations for designing mandatory domestic 'disclosure initiatives.' These rules will require taxpayer disclosure of aggressive planning transactions, intended to provide a 'tax benefit' (using a wide definition).

The workstream will consider administrative costs and seek to maximize consistent reporting among different countries, with models for information sharing. The project will also encourage other potentially useful measures, including cooperative compliance programs between taxpayers and tax administrations.

The workstream will use a modular approach that allows countries to keep (and add to) existing measures. Some countries' experience will provide best practice models.

These recommendations are due September 2015.

Observation: There will be a particular focus on international tax structures and information-sharing, using models such as the Joint International Tax Shelter Information Centre (JITSIC) which now includes the United States, United Kingdom, Canada, Australia, Japan, and China. Existing US rules related to disclosure, e.g., Schedule UTP, are also likely to provide models for domestic disclosure recommendations.

Re-examine TP documentation

The Plan states that rapidly spreading local TP documentation requirements, and the complexity of the TP rules, result in significant compliance costs that may not be commensurate with the benefits created. The OECD sees potential for standardization to reduce compliance costs for taxpayers and contemplates further work on a 'global documentation package.'

The Plan also states that transparency also relates to TP and value-chain analyses. The OECD views the asymmetry of information between taxpayers and tax authorities as a key issue, which is exacerbated by differences between countries' requirements for TP documentation.

The Plan proposes to re-examine TP documentation to ensure transparency for the tax administration, bearing in mind the costs for business. New rules will provide a common template on which multinationals can provide all relevant governments with full information on global allocation of income, economic activity, and taxes paid among countries.

Observation: The work on a global documentation package could be useful if there is consensus on the package's substance and if countries would change domestic rules on documentation accordingly, but that result may be unlikely. However, the work on information regarding global allocation of income, economic activity, and taxes paid across countries foreshadows the introduction of country-by-country reporting requirements, as outlined in the BEPS Plan. Another area of the Plan that contemplates a move away from the arm's-length standard, edging closer to a new set of transfer pricing rules that rely more on the use of formulas to allocate profits globally, and could result in more pressure on taxpayers to align profits and taxes paid with the location of employees, assets, or sales.

The deadline for this workstream is September 2014.

Make dispute resolution mechanisms more effective

The OECD recognizes that the Plan must complement actions to counter BEPS with actions that ensure certainty and predictability for business.

Because it is responsible for the Model Tax Treaty that is generally used as a basis for bilateral tax treaties, the OECD has done considerable work in the area of dispute resolution among tax authorities. Specifically with respect to the mutual agreement procedure (MAP), the OECD has created a Manual on Effective Mutual Agreement Procedures.

Because the MAP is sometimes unavailable, or does not work effectively for taxpayers, this BEPS Plan workstream will aim to improve the MAP's efficiency. The workstream will also seek to increase access to MAP or, in the alternative, binding arbitration.

The deadline for this workstream is September 2015.

Observation: This workstream reflects comments by the Business and Industry Advisory Committee to the OECD and various tax authorities on dispute resolution difficulties. Note that current US treaty policy is to include binding arbitration as part of the MAP process.

5. Developing a multilateral instrument

Unlike international trade law, which uses the multilateral World Trade Organization (WTO) agreements as a basis for regulating much of global commerce, international tax law is still enacted on a country-by-country basis. Accordingly, tax policy recommendations arising from OECD reports or other studies are not self-executing and must run the gauntlet of domestic politics in every relevant jurisdiction.

This workstream focuses on developing a legal basis to implement the BEPS Plan recommendations. The ability to override or alter existing bilateral tax treaties would make it easier for jurisdictions to implement the necessary changes.

Thus, this workstream will first analyze the relevant tax and public international law issues related to the development of a multilateral tax convention. After establishing the appropriate legal parameters of this effort, the working party will then develop a multilateral instrument that allows signatories to make immediate changes to OECD-based tax treaties, without the need for bilateral renegotiation.

The deadline for this workstream is December 2015.

Observation: The idea of a multilateral income tax treaty is very ambitious in light of strong national sovereignty issues. Even within the European Union, it has not yet been possible to begin harmonizing income tax systems.

General observations

The OECD's Plan is extraordinarily ambitious in its scope and timing. Many of the issues that it seeks to address have been sources of profound disagreement among OECD countries. The addition of G-20 nations such as China and India will make the process even more challenging, as they are likely to have very different views on some issues than the countries that usually drive the OECD agenda. Moreover, timelines of 12-27 months are extremely tight for addressing fundamental tax issues, even if working parties can divide into focus groups and use remote meeting technology.

Although the OECD BEPS process intends to forestall unilateral action, its outlines are likely to confirm or encourage such action by certain countries that may feel they have the correct policy basis for their preferred approach to certain international tax issues.

The Plan declares an intention to maintain the arm's-length TP standard and existing international tax architecture, just improving them to eliminate abuse. Whether the workstreams follow these guidelines is another question. It may be difficult for some of the working parties to achieve consensus if the members represent countries with conflicting interests.

In any case, global adoption of any BEPS Plan recommendations will take time, since countries will need to enact the rules through domestic legislation or agree politically to sign on to a multilateral instrument.

Finally, the Plan seems to view US multinationals as the primary perpetrators of BEPS. Thus, many of the Plan's changes appear to target US-based global groups and their tax planning arrangements.

The Ways & Means BEPS Hearing

In recent years, base erosion and profit-shifting has become a central issue for tax policymakers in the United States. The past four Obama Administration budgets have proposed a specific anti-base erosion provision: a new category of subpart F income for 'excess returns' of CFCs that use intangible property (IP) transferred from a related US person and have low effective tax rates.

Chairman Camp's 2011 international tax discussion draft included a proposal similar to the Administration's as one of three anti-base erosion options (Option A). Critics have noted that this approach could drive US companies to move significant research and development operations outside the United States, which would be contrary to the objective of keeping economic activity and IP in the United States.

Option B would create a subpart F income category for CFC income taxed at an effective tax rate below ten percent (determined on a country-by-country basis), with an exception for same-country active income.

The Administration also proposed a minimum tax on foreign income as part of its February 2012 tax reform framework.

Camp discussion draft Option C

The 'stick' in Option C would create a new category of subpart F income for a CFC's 'foreign base company intangible income' (FBCII). 'Intangible income' is defined in the discussion draft as gross income from goods and services to the extent attributable to IP. For this purpose, IP is defined broadly as under Section 936(h)(3)(B), which includes essentially all forms of IP except for goodwill and going-concern value. Under Option C, 60% of the usual high-tax exception to Subpart F income treatment would apply to FBCII, i.e., 60% of 90% of the top statutory corporate tax rate.

The 'carrot' in Option C would allow a US corporation to deduct a substantial percentage of 'foreign intangible income' earned either (i) directly (e.g., as a result of exports or foreign-source royalties) or (ii) through a CFC, to the extent attributable to foreign intangible income. 'Foreign intangible income' in the discussion draft is defined as intangible income derived from (i) property sold for use, consumption, or disposition outside the United States and (ii) services provided with respect to persons or property outside the United States. The discussion draft tentatively uses 40% as the deduction level.

The effect of Option C would be to make US companies generally indifferent from a tax perspective regarding the location of their IP. Unless the high-tax exception applied, the US tax rate on IP income would be 25% if the income is connected with sales into the US market and (tentatively) 15% if connected with sales into foreign markets. There would be no deferral of tax for foreign intangible income.

Commentators have identified various issues with Option C. Option C requires taxpayers to measure the portion of income from sales of goods and services that is attributable to IP and to determine whether the place where use, consumption, or disposition occurs is within or outside the United States. Professor Kleinbard expressed a concern that the provision as written could not be administered by the IRS. Paul Oosterhuis disagreed with that view but noted that there could be a need for transition rules to address the application of the 'stick' aspect of this approach. Some observers have expressed concern that Option C might not be consistent with WTO rules.

Observation: Congressional staff members have indicated that they will correct the omission of a requirement to allocate and apportion expenses against foreign intangible income earned directly by a US taxpayer. The high-tax exception possibly could become mandatory. In addition, Option C's final form possibly may include a safe harbor mechanism that identifies IP income and simplifies its technical application. The concern about WTO-consistency echoes previous disputes over the US foreign sales corporation and extraterritorial income rules that WTO panels found to be prohibited export subsidies. Specifically, Option C may be controversial because it apparently provides export-contingent tax relief.

Other issues raised in the Ways & Means hearing

Members and witnesses generally agreed that the current US international tax rules are not efficient, although they did not all agree on the preferred response. Professor Kleinbard favored repeal of deferral for all income earned by CFCs while Paul Oosterhuis urged adoption of a territorial tax system like most other OECD countries.

Pascal Saint-Amans discussed the ongoing OECD intangibles project and the view of some countries that value should not be assigned to the transfer of risk among related parties unless there are sufficient personnel to manage this risk.

The takeaway

Base erosion and profit shifting continues to be a high priority for the Administration, Congress, and leading international economic organizations. In the United States, since both sides of the aisle have offered US anti-base erosion proposals, there is a real possibility that they may find common ground. Anti-base erosion provisions form just one part of possible overall corporate tax reform, and the legislative process for considering reform is still in its early stages.

Taxpayers should also monitor the OECD workstreams' progress, especially with regard to the OECD's specific focus areas.

With the OECD BEPS Plan in mind, taxpayers should perform internal risk assessments of their existing and planned structures. These assessments should consider the increased focus on substance and the potential for more transparency and public disclosure of tax return information and allocation of profits around the world.

In addition, taxpayers should engage with domestic policymakers quickly and explain the potential impact of these changes on business, since this project is moving on a more accelerated timetable than traditional OECD projects. Because the Plan aims many of its changes at US-based businesses, it might affect those businesses more than businesses based in other countries.

Let's talk

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