Multinationals receive OECD recommendations on BEPS proposals for G20 and wider take-up

5 October 2015

In brief

Multinational enterprises (MNEs) received on 5 October final recommendations from the OECD's base erosion and profits shifting (BEPS) project. This week the G20 Finance Ministers are likely to agree on these OECD recommended changes to the international tax rules and to implementation plans. A number of non-G20 countries have also been involved in work on the Action Plan and contributed to the proposals.

The OECD's BEPS Action Plan categorised its various areas of focus into three themes: addressing substance; coherence of the international tax system; and transparency. Substance actions seek to align taxing rights with the relevant value-adding activity. Coherence actions aim to remove gaps and 'black holes'. Transparency actions look to provide significant additional disclosure. In addition to the various actions grouped under these three themes, the BEPS Action Plan also seeks to address digital business, improve dispute resolution and create a multilateral instrument for rapid updating of bilateral tax treaties. Finalised proposals on all of these areas are now included in the package of measures just released by the OECD.

We see three fundamental ways in which this OECD BEPS work will have a practical impact. First, and most obvious, there will be the direct application of the BEPS package itself, whether in the shape of changes to tax treaties (through amendment of the OECD Model Tax treaty and/or the multilateral instrument) and the Transfer Pricing Guidelines or through changes to domestic legislation as a result of individual recommendations of the BEPS action points. Second, there will be the change the OECD does not want to see, namely unilateral actions by states. Countries adopting such alternative unilateral measures will typically be doing so because they disagree with the direction the BEPS package is taking or think the recommendations don't go for enough. Third, and in our view perhaps the most important direct impact of BEPS, is its behavioural impact – specifically in emboldening the behaviour of tax administrations the world over. This is likely to lead to tougher and more protracted anti-avoidance challenges, higher thresholds for rulings, etc.

The policy formulation stage of BEPS Action Plan will conclude at the end of this year, although it has been agreed that certain follow-on actions will take place during 2016 and beyond. The major focus of 2016 however will shift to the implementation and monitoring of the package.

In detail

The totality of the BEPS package

Changes recommended under the BEPS Action Plan will fundamentally alter the international tax rules. There will also be a renewed vigour to some of the challenges made by tax authorities in applying revised OECD guidelines, the proposed new multilateral treaty and existing or new domestic legislation.

We expect to see more tax disputes arising in the short term.

- There may well be some differences in the ways that 'consensus' countries make the agreed changes that could itself still lead to dispute. The timing may also differ, which could add to the potential problem.
- There will be some countries or economic communities that take alternative 'unilateral' measures because they disagree with the direction the Action Plan has taken or think that the recommendations don't go far enough. These outliers could be developed countries, emerging nations or developing countries.
- We've already been seeing changes in the attitudes of various tax authorities toward particular activity. We've noticed this particularly in relation to permanent establishment (PE) challenges and transfer pricing (TP) discussions. This will inevitably spread more widely.

BEPS Action Plan themes

In overview, the issues being addressed by the recommendations fall into the following categories.

- Substance actions, aligning taxing rights with value-adding activity – treaty abuse, some of the TP changes and PE deliverables.
- Coherence actions, removing gaps and 'black holes' – matters affecting hybrid arrangements, interest and other financial deductions, controlled foreign companies (CFCs) and Harmful Tax Practices.
- Transparency actions, with significant additional disclosure required – country-by-country reporting to tax authorities and TP documentation, data on BEPS and 'Tax scheme' reporting.
- Digital business – VAT and other specific measures notwithstanding the acceptance of digital as just part of business as a whole.
- Other – potential improvements to dispute resolution processes and the development of a multilateral instrument to amend or overwrite a number of bilateral treaties in one instrument.

Future work post-2015

Some countries have already begun to take action, but the majority of changes will take place in the coming months.

Whilst the OECD'S 2015 BEPS objectives are overwhelmingly now delivered by the release of the 5 October package, some related work by the OECD will also go on during 2016 and beyond. This relates to the following:

- TP aspects of financial transactions – essentially, this is a new project.
- Attribution of profit to PEs –no changes are anticipated in the authorised OECD approach (AOA) but additional guidance will be needed in how this is applied in the case of commissionaire structures, etc.
- Use of profit split methods – this is likely to be largely clarification of existing guidelines.
- Implementation of hard to value intangibles proposals – again clarification is required of the practical approach that will be required.
- Other related work – this might include, for example, details of how to apply rules to tackle treaty abuse and hybrid arrangements.

The monitoring of the effects of changes made by the BEPS project is also likely to be a major area of work by the OECD for years to come.

Some of the key areas of impact on MNEs are discussed below.

TP/PE

There are various TP changes proposed by the final package but it is worth highlighting certain general areas where changes will be felt:

- Relevance of Conduct - there will clearly be greater scrutiny on the part of the tax authorities on the actual conduct of parties to a TP arrangement and this will mean less automatic acceptance of the mere contractual or legal arrangements. People functions that relate to decision making will be of particular interest to the tax authorities.
- Delineation of arrangements – how to properly interpret the TP arrangements entered into by taxpayers will also be another area of focus; tax authorities will be interested in how risk is dealt with and allocated in the arrangements and whether 'control' (e.g., of

assets) is exercised in the way that the TP assumes.

- Transparency - there is obviously a huge increase in transparency obligations on taxpayers (and some on states). This is commented on separately below.
- The TP/PE relationship - the BEPS changes to the PE rules are clearly not in themselves a TP development as such, yet the expected increase in focus in this area seems likely to mean that some tax authorities may view the PE rules as an alternative to the TP rules. This raises questions as to how well taxpayers are equipped to deal with such challenges in the context of the TP arrangements adopted.

Given the increased profile of PE issues and the lowering of the threshold in some cases, it remains likely that the PE rules will feature commonly in future dispute and controversy.

Financing implications

The treatment of debt and the financing of operations and investments will be one significantly impacted area. The treatment of capital markets still needs to be addressed.

The rules for hybrid instruments and entities are likely to be the most widely adopted of the coherence actions, even though they are enormously complex (but should lead to replacement of some existing rules). They would apply automatically, without a motive or purpose test. They rely on counteraction, based on the nature or effect of the arrangement and the approach of the 'other' territory – so one side or the other may take the appropriate action. This would apply to 'payments', including interest, royalties and payments for goods, but not to deemed payments like notional interest deductions.

Interest deductibility recommendations represent a best practice approach, so there is some flexibility in the way of their adoption. They refer to interest expense and similar payments, particularly among related parties, although a de minimis monetary threshold may be applied. The choice of a company restriction primarily based on a maximum interest/ EBITDA ratio per year, subject to any higher external threshold debt mix, or alternatively based on a group-wide ratio reflects the options a number of countries have pursued recently. More countries may be spurred into action.

Treaty changes may also prevent or restrict access to reduced rates of withholding tax (WHT) on interest.

The pricing of financing arrangements is to be considered further.

Holding and repatriation

The application of bilateral tax treaty benefits may be harder to secure in relation to dividends and interest and will inevitably lead to increased uncertainty.

The proposals for tackling perceived treaty abuse will place considerable reliance on the Commentary. In this respect the behavioural response of the tax authority in a particular territory will be significant. Many states will in practice ignore the limitations on benefits (LOB) test and opt for the principal purpose test (PPT).

A possible knock-on effect may be the increased focus given to beneficial ownership issues. OECD guidance in this area at the moment is too vague to support a robust and consistent approach.

The CFC discussions are the least likely of the coherence action points to lead to material change. Some countries, like China, may be encouraged to take-up the recommendations but those with existing regimes are unlikely to change.

Transparency and disclosure

Apart from the TP and related reporting to tax authorities of master file/ local file and country-by-country information, MNEs should note the perceived importance of greater transparency and sharing of information. These transparency requirements also potentially apply to tax authorities, in relation to certain rulings given to MNEs, etc., and potentially, arrangements by taxpayers that constitute reportable 'tax schemes'.

Actions have already been developed on intellectual property/ patent box regimes, leading to a commoditisation of relevant requirements – in particular, the modified nexus approach. But wider progress (i.e., chiefly in the prescription of general substance requirements) seems likely to be very challenging for the OECD. There is a wide range of possible competitive incentives and some states remain un-cooperative in this area.

The range of options discussed for mandatory reporting of domestic 'tax schemes' is not likely to lead to major changes. The fate of the proposals for international schemes seems uncertain on account of the lack of a pragmatic solution to the inherent uncertainty of how any such regime could work.

MNEs are unlikely to be asked to report additional information in order for the OECD to estimate the impact of the BEPS actions.

Significant changes since latest consultations

There are over 1600 pages in the BEPS package published on 5 October. We have discussed in some detail in earlier Tax Policy Bulletins the previously outlined proposals. The sections below focus on the main changes reflected in the current deliverables.

They include, in effect, four levels of action (with examples specified by the OECD):

- new minimum standards to tackle issues where no action by some countries would have created negative spillovers on other countries (including adverse impacts of competitiveness), e.g., treaty shopping, country-by-country reporting, harmful tax practices and dispute resolution
- revision of existing standards, where not all BEPS participants have endorsed the underlying standards, e.g., on tax treaties or transfer pricing
- common approaches where countries have agreed on a general tax policy direction, e.g., hybrid mismatch arrangements and interest deductibility, which will facilitate the convergence of national practices and guidance drawing on best practices
- best practice guidance aimed at supporting countries intending to act on other areas, e.g., mandatory disclosure initiatives or CFC legislation.

Action 1 - Digital

As expected, the main conclusions on digital are in line with the previous work and announcements to date, namely that:

- it is impossible to ring fence the digital sector for purposes of applying separate tax rules, and
- business models involving the digital sector raise complex issues relating to both BEPS practices (given the exacerbating effect of digital issues on such practices) and broader tax challenges irrespective of any BEPS issues.

The OECD has sought to address the relevant BEPS issues in digital by a combination of its TP, PE and CFC proposals.

On the broader tax challenges, there has been a VAT response, but otherwise there is no fully-formed consensus on actions related to corporate income taxation that can be taken in response to digital challenges to the international tax system.

Somewhat alarmingly however, the finalised position of the OECD seems open to countries adopting a variety of possible new measures in this area with a view to monitoring individual country experience on what options might in the future be worth considering more widely. Although the OECD position is caveated on the basis of needing to comply with existing tax treaties, we are concerned that this OECD position opens the door to a range of unilateral measures based on, for example, digital nexus, data collection levies, withholding tax, etc. This may materially complicate the task of maintaining an orderly approach by states to the highly complex tax challenges of digital business.

Action 2 – Hybrid mismatch arrangements

The final Report confirms an agreed outcome of the September 2014 deliverable recommending domestic rules to neutralise the following results arising from hybrid mismatch arrangements:

- deduction with no taxable inclusion (D/NI)
- double deduction (DD)
- indirect D/NI (imported mismatch).

There is now much enhanced guidance on both the implementation of the rules and transitional arrangements. These cover the complex situations that may arise in the appropriate counteraction measures. This depends on the arrangement and its effect, so that in essence the payer jurisdiction denies deduction for payment or the payee jurisdiction includes payment as income.

Many more examples show how it might apply to structures involving 'payments' of interest, or royalties or for goods (but not notional interest deductions).

There are still outstanding issues for a number of matters including in particular stock lending, hybrid regulatory capital and interaction with CFC regimes.

Action 3 – CFC rules

No consensus was agreed on the Action on CFC rules. The final recommendations in the form of the six building blocks reflect the situation as previously reported, covering:

- definition of a CFC
- CFC exemptions and threshold requirements
- definition of income
- computation of income
- attribution of income
- prevention and elimination of double taxation.

The Report more clearly identifies that there are different policy drivers

for CFC regimes. It also recognises that there is no 'one size fits all' solution even then, so provides only a more co-ordinated approach to countries looking to introduce CFC rules in the future. Those with existing regimes are unlikely to introduce changes as a result solely of this Report.

Action 4 – Interest deductions, etc.

The perceived risks identified in the BEPS Action Plan have been addressed by linking net interest deductions to taxable economic activity, although the proposals do not represent a required minimum standard and are only a recommendation by the OECD.

The proposed primary fixed ratio rule has been confirmed with a range of acceptable EBITDA thresholds for countries to adopt between 10-30%. The Report now identifies various factors which it hopes will help countries set the appropriate ratio. It also provides optional elements for a de minimis floor below which all interest could be allowed plus carry forward and carry back provisions.

A group ratio rule which could be adopted alongside the fixed ratio rule would allow for net interest expense above a country's fixed ratio to be deductible up to the level of the net interest/ EBITDA ratio of its worldwide group. The earnings-based worldwide group ratio rule could also be replaced by different group ratio rules, as already adopted by some countries providing a lot of flexibility for existing regimes.

The Report now includes specific rules to prevent circumvention of the basic rules.

More work is anticipated in 2016 on the worldwide group ratio.

Action 5 – Harmful Tax Practices

Since the September 2014 report on Harmful Tax Practices, the February 2015 follow-up on the nexus approach to IP regimes also provided a few indications of updated thinking. In looking at the need for substance in preferential regimes, nexus in the form of using expenditure as a proxy for activity has come to the fore.

Since February, the IP box approach has been finessed so tracking and tracing of expenditure has been agreed. On qualifying assets, definitions now seek to bring into scope patents, copyrighted software and similar assets but rule out marketing intangibles like trademarks. There are tighter transitional rules as well.

Automatic exchange of rulings has been confirmed in relation to various named areas of particular risk, with clarification of the exchange being with the countries of the immediate parent and the ultimate parent plus residence countries of affected related parties (and those of the corresponding head office or PE for PE rulings). This compulsory exchange must take place within three months for rulings issued after 1 April 2016 (rulings from 1 January 2010 still extant at 1 January 2014 need to be exchanged by 31 December 2016).

The review of the non-IP regimes in the list of 43 preferential regimes originally identified appears not to have made much progress. This review will continue in 2016 along with the development of a strategy for wider implementation which draws in more non-OECD countries plus a clearer statement of the new criteria for what is 'harmful' (and an ongoing monitoring mechanism).

Action 6 – Treaty abuse

The final recommendations amount to a minimum standard to counter treaty shopping but with some flexibility in the implementation of that standard to allow adaptation to each country's specific circumstances and negotiated bilateral tax treaties.

In addition to an express statement to be added to treaties, the range and combination of options – for a LOB plus anti-conduit rule, PPT or both – remains the same as in the latest revised discussion draft of 5 May 2015. So too, in most respects do the specific rules on various dividend transfers, shares taking their value from immovable property, dual residence and third country PE exempt income situations.

The other issues, including changes to the Model Tax Convention (the preamble and Commentary on interaction with domestic anti-abuse rules) and the tax policy considerations to consider before entering into a bilateral treaty, round off this Action item as before.

Examination of the treaty entitlement of investment funds and US work on amending its current LOB position are reasons this report will be revisited in the first part of 2016.

All the required treaty changes will then be incorporated into the work on Action 15.

Action 7 – PE status

The final PE report is broadly in line with the earlier proposals in BEPS and therefore proposes: a widening of the dependent agent test; a narrowing of the independent agent exemption; a tightening of the specific activity exemptions from PE status for facilities used for storage, display or delivery of goods, etc. (including an anti-fragmentation test to prevent activities being split across separate legal entities); and certain measures to prevent abuse of the 12 month building site PE rule.

As had already been disclosed, the earlier proposal to develop a special PE rule for the insurance sector is not being progressed. It has also been re-confirmed that further work on the allocation of profits to PEs, which had originally planned for completion with all these other measures, will not be addressed until 2016.

The major difference in these finalised PE proposals is that the OECD has backed away from extending the scope of the dependent agent PE rule so that it expressly includes certain contract negotiation activities (the previous proposal encompassed "negotiating the material elements of contracts"). However, the new test is arguably only a little less open-ended given that it focuses on agency activities that involve concluding contracts or playing "the principal role leading to the conclusion of contracts that are routinely concluded without material modification [by the principal]". The relevant proposed guidance on what these tests amount to is somewhat foggy, probably because of the last minute nature of the agreement reached for this new approach. This explains why the OECD has indicated the guidance will be reviewed in 2016.

It seems likely that these finalised PE rules will lead to significant dispute in practice.

Actions 8-10 – Transfer pricing outcomes

The OECD's thinking on a number of matters covered by Action Points 8-10 has evolved in recent months and some parts of the finalised proposals (in particular, relating to the fundamentals of the arm's length approach) are appreciably different from what has previously been seen, though some of the reports that have already been released in draft are not materially changed (e.g., the work on intangibles). The TP output of the BEPS project is significant by any measure with separate workstreams and reports on: the fundamentals of the arm's length principle; commodity transactions; profit splits; intangibles; low value-adding intra-group services; and cost contribution arrangements. This makes it difficult to provide an overall perspective. However, it is worth noting that perhaps the major theme of the whole TP package relates to aligning the substance (i.e., real value contribution) with the location of profits for tax purposes and there has been a particular emphasis on the treatment of the returns associated with risks, capital and intangibles (including now a new multi-step approach to dealing with risk for TP purposes).

Key aspects of this theme are as follows:

- Taxpayer reliance on legal contracts alone is not enough - rather the arrangements should be tested by a focus also on the relevant conduct of the parties. Under this approach, the accurate delineation of the transaction is fundamental. Where contracts appear to be inconsistent with the conduct of the parties, the OECD papers authorise adjustments to be made based on the conduct, not legal form.
- The provision of funding alone without control over the underlying risks does not entitle the funder to anything above a risk-free return. In particular the OECD has gone further than in previous drafts to give specific examples of functions which do not evidence control. These include: meetings organised for formal approval of decisions that were made in other locations, minutes of a board meeting and signing of the documents relating to the decision, and the setting of the policy environment relevant for the risk.

The new approach is intended to materially impact artificial arrangements. Given these themes, which tax authorities likely will want to take up in practice, taxpayers should put greater emphasis on the functions performed and on evidencing the location in which the control of risks and intangibles, etc. is exercised in supporting their transfer pricing arrangements. This will be of particular importance to entities that earn a return for setting group strategy/ policies and place a heavy reliance on sub-contractors (e.g., sub advisors).

Action 11 – BEPS analysis

One significant development is that the OECD has carried out its own research and now estimates that BEPS may result in corporate tax losses of 4-10% (which at 2014 levels it calculates as USD 100-240bn).

There are two main areas of focus for the necessary supply of data for ongoing BEPS analysis which place reliance under this Action firmly on tax authorities:

- information already collected by tax administrations which has not been used effectively, and
- new data proposed to be collected under Actions 5, 13 and, where implemented, Action 12 of the BEPS Project.

The OECD has carved out a role for itself in working with governments to analyse these two forms of data in an internationally consistent manner.

The Report specifically recognises the need to maintain appropriate safeguards to protect the confidentiality of taxpayer information.

Action 12 – Disclosure of aggressive tax planning

Countries are still free to choose whether or not to introduce mandatory disclosure regimes.

For domestic arrangements, the recommendations are not materially different and aim to provide options on how to balance a country's need for better and more timely information with the compliance burdens for taxpayers.

The Report's specific recommendations for rules targeting international tax schemes have been considerably reined in. They refer now to situations in which a country has particular concerns in relation to cross-border BEPS outcomes. The Report also now limits the recommendation to disclosures only where a taxpayer in that country enters into a transaction with material domestic tax consequences for it:

- if it was aware or ought to have been aware of the cross-border BEPS outcome, or
- if, after making reasonable enquiries, it becomes aware that it is an intra-group transaction that forms part of an arrangement that includes a cross-border BEPS outcome that would have been domestically reportable.

Greater reliance is, as a result, placed on specific recommendations for the development and implementation of more effective information exchange and co-operation between tax administrations. The Joint International Tax Shelter Information Centre (JITSIC) network of tax administrations will be used as a platform for such sharing.

Action 13 – TP documentation and CbC reporting

The work on TP documentation was started early on in the project and has been the subject of intense - and sometimes controversial - discussion in the BEPS consultation process. So, not surprisingly there are no material additional issues emerging in the finalised package which has just been released.

However, this is not to understate the significant obligations that are contained within these BEPS transparency requirements - and which will inevitably fall on taxpayers.

Further, given the required timescales involved (the country-by-country (CbC) reporting requirements go live from 1 January 2016), this will be one of the earliest tasks that taxpayers will necessarily face in getting to grips with the BEPS package.

The relevant obligations will require a three-tiered approach to documentation, comprising:

- the high-level CbC report which is to be made available via treaty exchange to taxing authorities in each country in which a MNE operates (a brand new report)
- a master file giving an overall perspective on the business, and
- a local file which contains specific TP information for each relevant country of operation.

The OECD has an agreed template for the CbC report and has introduced a new master file requirement and new standards for the local file.

Early experience has suggested that most taxpayers seeking to ensure they will comply with the rules on a timely basis are finding the systems tasks required to knit the relevant information together somewhat daunting. There have also been concerns about ensuring the continued confidentiality of commercially-sensitive information.

Action 14 – Dispute resolution

We now have more details to add to the political commitment in the form of a minimum standard to enable taxpayers to access improved cross-border tax dispute resolution on bilateral treaty matters (via the mutual agreement procedure, or MAP) and the specific procedural measures that will give effect to it. Adding to the commitment to adequate resourcing, there is in particular a set of 11 best practices that cover things like training of dispute resolution staff, implementation of advance pricing agreements (APAs) and a number of items that should be included in countries' published MAP guidance. A monitoring process will be agreed in 2016 in conjunction with the Forum on Tax Administration.

Notwithstanding the minimum standard, a group of 20 states has also committed to a program of developing improved measures. This includes mandatory binding arbitration, which is likely to lead to a potentially broad coverage of open issues (e.g., according to the OECD it would cover something in the order of 90% of outstanding MAP cases).

Work is underway to enable the work in both these areas to be implemented under the multilateral instrument developed under Action 15.

Action 15 – Multilateral instrument

The development of the multilateral instrument for overriding bilateral tax treaties for BEPS changes is being taken forward by an ad hoc Group. Its Chair Mike Williams (UK) had previously said the group would aim to have the instrument ready for signature by the end of 2016.

The Group of about 90 countries is due to meet on 5-6 November 2015 (back-to-back with the 20th Annual Tax Treaty Meeting for government officials). One significant development is that we understand the US is now participating, although it had initially said it was not ready to do so. A number of international organisations will be invited to participate in the work as Observers.

The takeaway

There are a number of legislative and other regulatory changes which will result from the BEPS package. But the biggest issue is likely to be the impact on the behaviour of tax authorities, which are increasingly emboldened in their approach to dealing with MNEs.

For taxpayers, the most significant impacts are likely to be in the following areas:

- tax treaty access being more widely constrained and in some cases uncertain
- huge system requirements for TP documentation and the wider transparency agenda
- an increased focus on conduct as a relevant test in assessing TP compliance
- materially wider PE risks and challenges – especially the increased proliferation of PEs and erratic interpretation of PE attribution rules
- a wide variety of responses related to restrictions in the relief for interest and other financial payments
- overall, a significant rise in the levels of controversy and numbers of disputes.

All taxpayers will be affected in some way by the BEPS package. Typically, we would expect one or more immediate vulnerabilities will need urgent consideration and possibly remediation (e.g., specific treaty access or PE issues). There will of course also be the need to address general systems issues raised by the broad transparency and documentation requirements. A wider consideration of the business of the group and group structure and financing arrangements, etc., in light of the BEPS changes is also likely to be warranted. It will also be useful to monitor the response of the tax authorities in the states where businesses conduct key operations given the possible variety in standards of enforcement and application of the BEPS package from country to country.

Tax departments will need to ensure they are equipped to deal with the expected uptick in levels of controversy and dispute in the post BEPS environment. Finally, it will be important to ensure all parts of business understand the general impacts of the BEPS project regarding required substance and other standards underpinning their tax and business strategy.

Let's talk

For a deeper discussion of how these issues might affect your business, please call your usual PwC contact. If you don't have one or would otherwise prefer to speak to one of our global specialists, please contact one of the people whose details are set out below.

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