The UK diverted profits tax: final legislation published

The Finance Bill to enact the "Google Tax" has been published today. Properly known as the diverted profits tax (DPT). Once enacted, for the first time companies outside the UK could be subject to UK tax merely for doing business with the UK. The Government say the tax is aimed only at artificial and contrived arrangements – we think it is much wider.

How does the tax work and when will it apply? Will it tax only the companies it is aimed at? Or will ordinary commercial arrangements and transactions be caught in the crossfire? And is it compatible with EU law and the UK's double tax treaties?

Executive summary

We said back in December this was an extra-territorial tax of unprecedented novelty and breadth. That remains the case.

As a high level summary, we believe businesses will need to consider whether the diverted profits tax applies in all scenarios involving:

- a foreign company doing business which has a presence in the UK (itself, or through affiliates or third parties) but which does not currently give rise to a permanent establishment (save where an express exemption applies); or
- a UK company (or a UK branch) having arrangements with foreign affiliates which have the effect of reducing the UK taxable profits.

Only in some of these cases will DPT liability arise, but complex businesses may have to undertake significant work to determine that.

The DPT is a highly complex tax – as will be appreciated from the fact that this high level summary runs to ten pages.

The following paragraphs set out the background to the DPT, how the tax works, and who it is likely to affect. We then consider potential challenges to the tax under double taxation treaties and EU law.

HMRC says the tax only impacts contrived arrangements used by large groups to erode the UK tax base. We do not agree. The legislation could, in our view, be used to aggressively expand the scope of UK tax.

Whether HMRC will do this remains to be seen, and there will be considerable uncertainty for businesses until the scope is clarified.

Why a new tax?

The last few years have seen increasing press and political focus on perceived avoidance by multinational companies. There has, in particular, been criticism of the use by US technology companies of the so-called "double Irish" structure to extract profits from their European businesses without paying tax in either Europe or the US.

At the Conservative Party Conference, the Chancellor announced that a new tax would be introduced to counter the

"double Irish" structure. In the Autumn Statement the tax was given a name – the "Diverted Profits Tax", and we were told it would be targeted at multinationals who use artificial arrangements to divert profits overseas in order to avoid UK tax. The rate of the tax would be 25% and it would apply from 1 April 2015.

The Finance (No. 2) Bill 2015 has now been published including the final draft DPT legislation. Given the imminent General Election, it is likely the Bill will receive Royal Assent in the next few days with no material amendments.

The DPT represents a radical departure from the principle that the UK will not tax the profits of foreign companies doing business with UK clients/customers, unless those companies have a UK "permanent establishment".

The UK and other OECD countries have kept to that principle for over a century. Many thought that the OECD's BEPS project would lead to a gradual move away from that principle – it was not expected the UK would do so unilaterally.

We believe the DPT will apply in a wide variety of circumstances. Together with the complexity and novelty of the tax, that makes it hard to understate its potential effect for those doing business with the UK.

Two DPT flavours

The DPT applies in two distinct cases:

- where a foreign company structures its affairs to avoid a UK taxable presence; or
- where a company, which is taxable in the UK, creates a tax advantage by involving entities or transactions with a "lack of economic substance".

Avoided PE

This case will apply where the following conditions are met:

- there is a non-UK resident company (the "foreign company") carrying on a trade;
- a person (referred to as "the avoided PE") is carrying on activity in the UK in connection with supplies of services, goods or other property by the foreign company;
- it is reasonable to assume that the activity of the avoided PE is designed to ensure that the foreign company does not carry on a trade in the UK for corporation tax purposes; and
- the "mismatch condition" or the "tax avoidance condition" are met.

The **mismatch condition** is met if:

- in relation to supplies of goods, services or other property, arrangements are in place as a result of which provision (the "material provision") is made or imposed between the foreign company and another person ("A") by means of a transaction or series of transactions;
- the participation condition is met in relation to the foreign company and A (i.e., broadly speaking, the parties are connected);
- there is an "effective tax mismatch outcome" resulting from the material provision between the foreign company and A (see below), which is not an excepted loan relationship outcome; and

Key issues

- Entirely new tax to be imposed on cross-border businesses and transactions
- Relevant to all foreign trading companies with UK activity but no PE
- Relevant to all UK companies making tax-deductible payments to foreign affiliates
- Companies required to notify HMRC if reasonable to assume they will be subject to the DPT
- In practice, likely to override existing double taxation treaties
- Likely contrary to EU law, and challenges are to be expected

- the insufficient economic substance condition is met (again, see below).

The mismatch condition will not be met where both companies are small or medium sized enterprises.

The **tax avoidance condition** will be met where there are arrangements in place in connection with the supply of goods, services or property, the main purpose, or one of the main purposes, of which is to avoid or reduce a charge to corporation tax.

The avoided PE provision will, however, not apply if:

- sales related to UK activity by the foreign company and connected persons do not, in aggregate, exceed £10m; or
- expenses related to UK activity by the foreign company and connected persons do not, in aggregate, exceed £1m.

Entities or transactions lacking economic substance

This case applies in relation to a company (C) if:

- C is UK resident or a non-resident carrying on a trade through a UK permanent establishment;
- there is a provision (the "material provision") made or imposed between C and another person (P) by means of a transaction or series of transactions;
- the participation condition is met in relation to C and P (i.e., broadly speaking, the parties are connected);
- the material provision causes an "effective tax mismatch outcome" between C and P, which is not an excepted loan relationship outcome; and
- the "insufficient economic substance condition" is met.

In most cases, P will be a non-UK person, but the legislation expressly applies in the case where P is a UK person.

As with the avoided PE there is an exception where both C and P are small or medium sized enterprises.

Key concepts

Effective tax mismatch outcome

There will be an "effective tax mismatch outcome" where the material provision results in an increase in expenses/deductions or a reduction in income for one party and the reduction in that party's tax liability is greater than any resulting increase in the other party's total liability to corporation tax, income tax or any non-UK tax.

This is subject to an "80% test" which provides that there will not be a tax mismatch outcome where the amount of tax paid by the second party is at least 80% of the corresponding reduction in the first party's tax liability.

So, for example, a royalty paid by a UK company to an affiliate in a tax haven will result in an "effective tax mismatch outcome" because the UK company will likely obtain a tax deduction for the royalty payment, but the affiliate will not be taxed on its receipt.

Whether the deduction actually saves tax for the first party is not relevant. For example, if the UK company is loss-making even before the royalty deduction there will still be an effective tax mismatch outcome (but the calculation provisions will result in no actual liability).

There are several exclusions that prevent an effective tax mismatch outcome arising.

The exclusion for "excepted loan relationship outcomes" applies if the increase in expenses or reduction in income arises wholly from something that would (if a company within the charge to corporation tax were party to it) produce debits or credits under the loan relationships rules and/or (where there is a hedging derivative) the derivative contract rules. The stated intention of this is to exclude financing arrangements from the DPT.

There are other exclusions where a mismatch arises solely from:

- contributions paid by an employer under a pension scheme;

- a payment to a charity;
- a payment to a person who benefits from sovereign immunity;
- a payment to an offshore fund or authorised investment fund which meets the genuine diversity of ownership condition in existing legislation; or
- a payment to an offshore fund or authorised investment fund at least 75% of the investors in which are registered pension schemes, overseas pension schemes, charities or persons benefiting from sovereign immunity.

These exclusions are presumably included because the involvement of an entity of any of these kinds would almost inevitably give rise to a mismatch (because they are generally not taxed); that is not the kind of mismatch the DPT is aimed at.

It is, therefore, unfortunate, that there are not exclusions for other types of entities whose nature will often give rise to mismatches, such as capital markets issuer SPVs and patent box companies.

Insufficient Economic Substance Condition

This condition will be satisfied if either of the following apply:

- It is reasonable to assume the arrangements were designed to secure the tax reduction arising from the tax mismatch outcome, unless at the time of making the material provision, it was reasonable to assume that the overall non-tax financial benefits of the transaction would exceed the overall financial benefit of the tax reduction.

  So even very significant non-tax financial benefits won't prevent the DPT applying if the tax benefits are more significant. And any non-financial benefits (e.g. lifestyle choices of key personnel) are ignored when making this determination.
- It is reasonable to assume that the involvement of a person who is party to the transaction was designed to secure the tax reduction, unless either:
  - at the time of making the material provision, it was reasonable to assume that those non-tax financial benefits of the transaction referable to the contribution of the person's staff, would exceed the overall financial benefit of the tax reduction; or
  - the income attributable to the contribution of person's staff in an accounting period (excluding holding, maintaining and protecting assets) exceeds other income attributable to the transaction.

How DPT is calculated

The rate of DPT is 25%, which is applied to the company's **taxable diverted profits**.

Avoidance of a UK Taxable Presence

These rules rely on several new concepts:

The **notional PE profits** are the profits that would have been the chargeable profits of the foreign company, attributable to the avoided PE, had the avoided PE been a permanent establishment in the UK through which the foreign company carried on a trade.

Where there is a "material provision" which meets the mismatch condition, then one must determine the **relevant alternative provision**. This is the alternative provision which it is just and reasonable to assume would have been made or imposed as between the foreign company and one or more companies connected with that company, instead of the material provision, had tax (including non-UK tax) on income not been a relevant consideration for any person at any time.

This necessitates a difficult exercise of constructing a counter-factual set of arrangements in the unreal commercial world where tax does not exist. To say the application of this rule is uncertain is an

understatement, and we therefore expect it to be heavily disputed between HMRC and taxpayers.

If the relevant alternative provision would have resulted in the foreign company having expenses of the same type and the same purposes as the actual material provision, and wouldn't have resulted in a connected company having UK taxable income, then the **actual provision condition** is satisfied. The purpose of this concept is to identify arrangements that are not tax erosive.

The rules to determine the DPT charge are then as follows:

If the DPT is applying only because the tax avoidance condition is met, then the taxable diverted profits of foreign company are the notional PE profits.

If the mismatch condition is met, but the actual provision condition is met, then again the taxable diverted profits are the notional PE profits.

If the mismatch condition is met and the actual provision condition would have been met, but the relevant alternative provision would have resulted in UK taxable income of a connected company, then the taxable diverted profits are the notional PE profits plus that UK taxable income.

In other cases, the taxable diverted profits are the notional PE profits that would have arisen were the material provision replaced with the relevant alternative provision, plus any UK taxable income of a connected company that would have resulted from the relevant alternative provision.

Entities or Transactions Lacking Economic Substance

The same **relevant alternative provision** concept and **actual provision condition** concepts are used here, with minor modifications.

There is no DPT charge if the actual provision condition is met and either the material provision is at arm's length (and hence not subject to transfer pricing) or a transfer pricing adjustment is made in the company's self assessment return before the end of the DPT "review period".

In other cases where the actual provision condition is met then the taxable diverted profits are equal to any corporation tax profits that result from a transfer pricing adjustment to the material provision (save to the extent that adjustment is made in the company's self assessment return before the end of the DPT "review period").

If the actual provision condition would have been met, but the relevant alternative provision would have resulted in UK taxable income of a connected company, then the taxable diverted profits are the transfer pricing adjustment profits plus that UK taxable income.

In other cases, the taxable diverted profits are the additional chargeable profits that would have arisen if the material provision (together with transfer pricing adjustments made in the self assessment return) was replaced with the relevant alternative provision, plus any UK taxable income of a connected company that would have resulted from the relevant alternative provision.

So in the simple case of arm's length royalties being paid by C to a tax haven affiliate, if the alternative provision is that the royalties would have been paid to a US affiliate (which would have been fully taxed on them) then C will have no DPT charge. But if the alternative provision is that the royalties would have been paid to a UK company, or that no royalties would have been paid at all, then DPT will be charged at 25% of the amount of the royalties.

Credit for UK or foreign tax

There are obvious cases where the DPT could give rise to double taxation, for example where a foreign company that becomes subject to the DPT is also subject to tax in its home jurisdiction. The DPT therefore permits such credit as is "just and reasonable" against DPT liability where a company has paid corporation tax (or corresponding foreign taxes) calculated by reference to its

profits (taxed profits), and the company subsequently has DPT liability in respect of the taxed profits.

This is extended to two more difficult cases. First, where the party subject to the DPT does not pay tax itself, but (perhaps because it is disregarded, or a member of a fiscal unity) another company pays tax in respect of the same profits on which the DPT is charged. Second, where another company pays tax under the UK controlled foreign company rules (or the CFC rules of another jurisdiction) in respect of the profits that are subject to the DPT.

There are three significant caveats. First, the tax must be "paid". So if a foreign company is loss-making in a particular year, or uses historic losses to shelter its tax liabilities, then the DPT will not be creditable. Second, there is no credit for tax paid after the end of the review period. Third, there is no procedure for cash refunds – hence if the DPT is paid first, and then foreign tax is paid, then a taxpayer would seem to have a credit that could possibly be carried-forward against future DPT liability, but is otherwise worthless.

An entirely separate question is whether other jurisdictions will give credit against their corporation taxes for DPT. This is a question that we suspect will create disputes between taxpayers and foreign tax authorities and potentially also between foreign governments and the UK (because if the DPT is fully creditable then the cost is being borne by the foreign government and not the company). We are considering the position in a number of jurisdictions, and (in particular) have reached the preliminary conclusion that in appropriate circumstances the DPT should be creditable against the US federal corporate income tax.

Procedure

Most UK taxes are self-assessed. The DPT is quite different.

Notification requirement on companies

A company must notify HMRC if it is potentially within the scope of the DPT.

Notification must be made within 3 months of the end of the relevant accounting period – but there is a grace period for accounting periods ending on or before 31 March 2016, for which notification can be within six months of the end of the period.

A company is obliged to notify HMRC if the DPT would apply, but with the following modifications:

- the avoided PE charge is modified by disregarding the question of whether the arrangements are designed to avoid a PE;
- the "tax avoidance condition" for the avoided PE charge is replaced with an objective test of whether there are arrangements that result in the overall reduction in the amount of tax (including foreign tax) that would otherwise have been payable in respect of the relevant activity; and
- the "insufficient economic substance" condition (for the avoided PE charge and the lack of economic substance charge) is replaced with a simple test of whether the financial benefit of the tax reduction is significant relative to the non-tax benefits of the material provision.

This is, however, subject to three exclusions.

- First, where it is reasonable for the company to conclude that no DPT charge will arise (ignoring the possibility of future transfer pricing adjustments);
- Second, where an officer of HMRC has confirmed that the company does not have to notify because HMRC has been provided with sufficient information to determine whether to give a preliminary notice, and HMRC has examined that information; and
- Third, where it is reasonable to assume that HMRC have been provided with that information, and have examined it. Some have suggested that this could mean that where the relevant

facts have been set out in documentation historically provided to HMRC (e.g. in APAs) then the exclusion applies – we think this is doubtful.

The notification requirements in the original draft DPT legislation were extremely harsh; these new requirements seem to us much more workable.

How HMRC trigger the DPT

Where a designated HMRC officer determines a company has DPT liability, he or she will issue the company a "preliminary notice". This will explain why HMRC considers that the tax applies and include an estimate of the taxable diverted profits.

The estimate has to be the "best estimate" that the relevant HMRC officer considers can be reasonably made.

However, this is subject to the **inflated expenses condition**. This is met if the mismatch condition is met, and (broadly speaking) the officer considers the material provision provides the company in question with deductions that "might be greater" than they would have been under an arm's length arrangement.

In such a case, the best estimate is made on the assumption that 30% of those deductions are disregarded (but with no further transfer pricing adjustment).

Following receipt of the notice, the company has 30 days to make representations. Curiously, the HMRC officer can only consider representations made on certain specified grounds – so, for example, if a taxpayer believes the DPT does not apply because the arrangement was not designed to avoid a permanent establishment, that will not prevent DPT being charged.

Having considered any such representations, HMRC must then either issue a charging notice or confirm that no charging notice will be issued. If a charging notice is issued then the DPT (plus interest) must be paid within 30 days. The taxpayer is free to appeal the DPT in the usual way, but this will not delay the obligation to pay the tax.

All charging notices are required to be reviewed by HMRC within a year (the **review period**), and at this point all representations previously made by the taxpayer are taken into account. The officer's initial best estimate can then be replaced with a more finely-worked result, and a balancing payment of additional tax or tax refund made.

When is the DPT intended to apply?

HMRC set out a number of examples, some of which are similar to cases which have been in the media:

Sales of goods

A foreign company in a tax haven acquires widgets from a third party and sells them in the UK. Its UK subsidiary provides sales support services, but is careful to never conclude contracts with customers. Under the current law, that means the foreign company is not subject to UK tax on its profits.

HMRC say that if this results from intentional structuring then the "tax avoidance" condition will be met and so the "avoiding a taxable presence" DPT charge will apply.

We would say there are a great many companies in this category. If you are a business selling goods or services cross-border then you likely are careful to comply with local laws around permanent establishment. That compliance would now seem to potentially subject you to the DPT.

Online services

A foreign company (FCo) provides online services to UK customers. A UK affiliate provides marketing and support services but is careful to never conclude contracts with customers. FCo is in principle subject to tax on its profits, but shelters those profits with a large royalty payment to a tax haven affiliate.

HMRC say the mismatch condition could be met or, failing that, the tax avoidance condition. The "avoiding a taxable presence" DPT charge will again apply.

This scenario is similar to the "double Irish" structure it was expected the DPT would counter.

This result is therefore not a surprise. Whether the whole framework of the DPT is necessary to bash these structures is another question.

Leasing

A company in the UK needs to invest in new plant and machinery. An affiliate SPV in a tax haven purchases the equipment and leases it to the UK company. Large lease payments then erode the UK company's profit. The SPV has no other activity.

HMRC say the contribution by the SPV's staff is of little economic value when compared with the UK tax reduction. It is reasonable to assume that the SPV's involvement was designed to secure the tax reduction. The "involvement of entities or transactions lacking economic substance" DPT charge therefore applies.

It is clear why HMRC would object to such a structure; however the DPT is not the obvious vehicle to counter it. A withholding tax on payments to tax havens would achieve a similar result with considerably more simplicity and certainty.

IP development

A UK company (UKCo) jointly develops IP with a third party company in the UK. UKCo has the opportunity to buy out the third party once the development is completed. Instead, a new connected company in a low tax jurisdiction (IPCo) is established. IPCo acquires the IP which is subsequently licensed to UKCo. UKCo makes royalty payments in respect of that IP. IPCo provides IP protection and management activities and takes the risk of ownership.

HMRC say it is reasonable to assume that the acquisition of the IP would have been made by UKCo and the inclusion of IPCo was to secure the tax reduction. Hence the "involvement of entities or transactions lacking economic substance" DPT charge applies.

HMRC also outline an alternative scenario in which IPCo actively develops the IP itself; in that case they say the DPT does not apply.

In what other cases could the DPT apply?

It is unclear how far the DPT is intended to extend and, in particular, whether it captures (intentionally or by mistake) widely used structures which facilitate investment into the UK.

For example, various questions and uncertainties arise in relation to fairly plain vanilla asset finance/leasing structures, real estate development structures, financing structures (other than those involving a creation of a loan relationship), captive insurance structures and securitisation structures.

When won't the DPT apply?

There are some cases where it seems clear the DPT won't apply.

- It is common for UK investment managers and brokers to enter into transactions on behalf of non-resident financial institutions, funds, SPVs and others. There are specific statutory exemptions which (provided certain conditions are met) prevent this giving rise to a permanent establishment. Where these exemptions apply, the DPT is expressly disapplied.
- The "avoidance of a UK taxable presence" DPT charge won't apply to a company that already has a UK permanent establishment as a result of the activity carried on in the UK. This will be the case even if the arrangement has been structured so the taxable profits are very limited (although if payments are being made to affiliates then the "involvement of entities or transactions lacking economic substance" DPT charge may apply instead).
- The "involvement of entities or transactions lacking economic substance" DPT charge will not apply where a provision results in a tax mismatch, but the provision is made between unconnected parties

(save where the special financing rule mentioned above applies).

How much will the DPT raise?

We see the DPT as a radical new tax that will apply in a great many cases and/or prompt businesses to rearrange their affairs and as a result pay significantly more corporation tax.

Surprisingly, the Chancellor seems to disagree – the forecasted annual revenue is only around £300m. This suggests either that the Chancellor is being extremely cautious, or that the breadth of the tax is unintentional.

Unintended consequences

Will other countries retaliate?

It is possible that the Government discussed the DPT with other OECD governments, and even that there is agreement that others will take similar steps (through the BEPS Project or otherwise). Australia has already suggested it will follow suit.

But if this is not part of a coordinated action then other governments may take a dim view of the UK taking such a dramatic unilateral action. We could see retaliatory measures introduced, particularly in the US.

The existing consensus around taxation of non-residents has been supported by successive Governments in the belief that it benefitted inward investment; and in particular that if everyone were to tax non-residents more aggressively then the UK economy, and the UK Exchequer, would lose more than they would gain. We hope the Treasury has considered the impact on UK exporters of similar taxes being imposed on them by the jurisdictions in which they operate, and the knock-on effect on corporation tax receipts.

Will some businesses leave the UK?

Amongst all the uncertainty, one thing is clear – the easy way to escape the DPT is to simply have no UK presence at all.

For some this will not be possible – for others it will be easy, particularly those providing electronic rather than physical goods and services. These companies could continue to provide goods and services to UK customers, pay no UK tax on profits, and be entirely outside the DPT.

If the DPT remains as currently drafted, and HMRC enforce the tax aggressively, then we may see a number of multinationals reducing or even eliminating their UK presence. This is presumably not the result the Treasury intends.

Does the DPT breach the UK's double tax treaties?

In taxing foreign companies that do not have a UK permanent establishment, the DPT will apply in cases where the UK's double tax treaties with other jurisdictions prohibit the UK from taxing their residents.

Apparently the HMRC view is that the DPT is not "corporation tax" and so not covered by the UK's double tax treaties. We would disagree. Many of the UK's double tax treaties – for example those with France, Germany, Jersey, Luxembourg, The Netherlands, Singapore and the US – apply to corporation tax, income tax **and other similar taxes**. In our view, in taxing corporate profits, the DPT is similar to corporation tax and so does fall within these treaties. It is also arguable – albeit less clear – that even a treaty that only applies to "corporation tax" should be read to apply to DPT as well given the nature of the tax.

It therefore seems to us reasonably clear that the DPT does breach many of the UK's double tax treaties.

Unfortunately, as a matter of UK law a double tax treaty only creates enforceable rights for taxpayers to the extent it is implemented in domestic law. The relevant provision of UK law

(s6 TIOPA 2010) has not been (and will not be) amended to refer to the DPT.

Hence, in principle we believe the DPT is a breach of international law, but the only parties with standing to litigate the breach are the affected other States. Taxpayers have no recourse. This has been the result when the US, Germany and other countries have developed domestic laws that override treaties, and we expect it would be the result here too.

Does the DPT breach EU law?

This is a more difficult question.

In the *Cadbury Schweppes* case, the Court of Justice of the European Union (CJEU) considered the legality of the UK's "controlled foreign company" rules, which (very broadly) imposed UK tax on the profits of foreign subsidiaries of UK companies if those subsidiaries paid less tax than they would have done were they established in the UK.

The CJEU held that the CFC rules were an unlawful infringement on the EU freedom of establishment unless they only applied to "wholly artificial" arrangements. The UK responded by rewriting its CFC rules (although whether the new rules have fixed the problem is in our view very much open to doubt).

When imposed on EU companies, the DPT would seem to raise similar issues to the CFC rules. In taxing EU companies that do business with the UK, the DPT potentially infringes their freedom of establishment and/or the freedom of movement of goods, services or capital. This would not be problematic if the DPT were limited to "wholly artificial arrangements", but it will be seen from the summary of the DPT above that even arrangements with a very significant non-tax purpose can be subject to the DPT.

The fact that the 25% rate of DPT is higher than the 20% rate of corporation tax, and the highly unfavourable rules around estimation and payment, also raise the question of whether the DPT is discriminatory, i.e. because foreign companies doing business in the UK will potentially be subject to harsher treatment and tax at a higher rate than UK companies carrying out the same activity.

Other elements of the DPT, particularly the "material provision" rules, also seem discriminatory in practice, given that (for example) an arrangement with a fully tax-paying Irish company will generally cause a mismatch and trigger the DPT, but an arrangement with a fully tax-paying UK company would not.

We see EU law challenges as inevitable, and our expectation on the basis of the current CJEU caselaw is that the UK could lose these challenges.

Further information

If you would like further details on any aspect of the DPT, or how it applies to your institution or transactions, please speak to your usual Clifford Chance contact or any of those listed overleaf.

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