The BEPS final reports – practical implications for business

On 5 October 2015, the OECD published the final package of recommendations to reform the international tax system – the "BEPS" Project. Together they represent the most dramatic change to the international tax system in sixty years.

We summarise below the final recommendations and ask what the practical implications will be for business.

The scope of the BEPS Project

The BEPS project was launched by the OECD and G20 in 2013 to tackle "base erosion and profit shifting" – tax planning strategies that shift profits from high tax jurisdictions to low tax jurisdictions.

The Project is divided into fifteen "Actions", with separate recommendations for each:

Action 1 – Digital Economy

It is appropriate that this is the first Action, given that much of the impetus for the BEPS Project was provided by press coverage of tax avoidance (and supposed tax avoidance) by internet/digital companies. Some will therefore be surprised at the lack of concrete recommendations in this Action.

The essential challenge to tax systems of the digital economy is that it allows multinational and smaller enterprises to tap into demand across different jurisdictions without having a significant physical presence in those jurisdictions.

The OECD considers that, while the growth of the digital economy does not necessarily pose its own unique tax risks, it exacerbates some of the risks identified in the context of other Actions, particularly in the context of treaty abuse (Action 6) and the artificial avoidance of PE status (Action 7). While the OECD therefore did not recommend any specific measures designed to target the development of the digital economy, it took the risks posed by it into account when considering how best to implement those Actions.

In other words, it would clearly be distortive to create tax rules applying only to technology companies. However it is sensible for other rules to be designed having regard to the issues created by technology companies and the structures they employ.

Action 1 therefore makes two points, neither of which require actions unique to the digital economy:

- First, that countries should apply the principles of the International VAT/GST Guidelines to Business to consumer transactions (which the EU VAT system generally already does).
- Second, that the Action 7 recommendations (preventing artificial avoidance of PE status) should counter some of the well-reported tax planning undertaken by some technology companies.

Action 2 – Hybrids

Our detailed analysis is here – a short summary follows below.

The proposals outlined under Action 2 are intended to combat "hybrid mismatch structures". Broadly, these include arrangements which operate to create an artificial tax advantage through the use of hybrids. "Hybrids" is broadly defined and includes both hybrid instruments (e.g. instruments treated as debt in one jurisdiction but as income in another) and hybrid entities (e.g. entities that are treated as being transparent for tax purposes in certain jurisdictions but opaque in others).

The tax advantages these proposals are intended to catch include:

- generating a deduction in one jurisdiction without any corresponding income recognised in the recipient's jurisdiction;
- generating deductions in two jurisdictions in respect of the same item; and
- enabling multiple tax credits for one amount of foreign tax.

Achieving the mismatch does not have to be one of the taxpayer's purposes in setting up the arrangements, so the proposals could catch arrangements put in place for reasons completely unrelated to tax.

The rules will apply to hybrids within a group (applying a 25% ownership test) and to "structured arrangements" outside a group (i.e. an arrangement which has been designed to produce the tax mismatch or where the mismatch has been priced into the terms of the arrangement).

The main proposal (the "primary response") is to disallow a deduction in situations where that deduction has no corresponding income. There is also a "defensive rule" which provides that, in situations where a deduction has not been disallowed under the primary response because a jurisdiction has not implemented the BEPS proposals, tax will be imposed by the other relevant jurisdiction.

The "defensive rule" is necessary given the general expectation that the US will not sign up to BEPS (and certainly not to the hybrid recommendations). Hence, without the defensive rule, US multinationals could continue to obtain tax advantages through hybrid arrangements.

The proposals also include rules designed to reduce the likelihood of mismatches arising in the first place, e.g. by limiting foreign tax credits.

Our predictions and recommendation

We expect the proposed hybrid rules to be fairly widely adopted.

We would therefore advise all multinational businesses to start considering whether there are any financing or other arrangements in their group that could fall within the scope of the rules. This is particularly likely for US-headquartered groups (or other groups with a significant US presence) given the flexible manner in which the US tax system characterises entities and financing arrangements.

Action 3 – CFCs

Many jurisdictions already have controlled foreign company (CFC) rules to prevent tax avoidance by companies through the use of low-taxed non-resident affiliates.

Action 3 aims to strengthen these rules and provide more consistency. It does so by looking at the various building blocks of a CFC regime and making recommendations in the form of specific rules, which include:

- Defining CFCs broadly, thereby extending the application of the regime from corporate entities to include partnerships, trusts, and permanent establishments, if those are owned by CFCs or taxable separately from their parent in the parent's jurisdiction.
- Introducing rules and guidance on how to define, compute and apportion interest.
- The inclusion of a rule to prevent differential treatment between jurisdictions by using hybrid mismatch arrangements (see also Action 2).
- Ensuring that CFC rules are appropriately targeted by excluding low-risk companies from the regime by only applying the rules to companies that benefit from low tax rates.
- The measure of control should be assessed using (at least) both a legal and an economic control test to ensure broader reach for the CFC regime. Countries should also ideally look at other measures of control (e.g. de facto control).
- The definition of control should include both direct and indirect control, and should apply a 50% threshold for the CFC rules to be triggered (with some exceptions).

To avoid CFC rules resulting in double taxation, credits should be available for foreign taxes paid, and the dividends and gains on disposition of CFC shares should be exempt from tax on the condition that tax has already been paid on the income of that CFC.

Our predictions and recommendation

The CFC recommendations run into serious practical difficulties with EU law.

In the Cadbury Schweppes case, the Court of Justice of the European Union found that CFC rules could only lawfully be applied within the EU to counter "wholly artificial arrangements".

The Report acknowledges this is a problem for both countries in the EU and those outside (given they will not want to create a CFC regime that puts their residents at a disadvantage compared to EU residents).

The Report makes three suggestions to overcome this difficulty.

First, by including a substance condition that only subjects taxpayers to CFC rules within the limitations imposed by the *Cadbury Schweppes* case. The problem with this is that "wholly artificial" is a very high bar, and many of the arrangements tax authorities will wish to counter with a CFC rule are not "wholly artificial".

Second, to apply CFC rules to arrangements that are "partly wholly artificial". The Report suggests that this could be consistent with EU law in light of the *Thin Cap Group Litigation* case. We do not agree.

Third, to expand CFC rules to include local subsidiaries, not just non-residents. The advantage is that this potentially avoids difficulties with EU law. The disadvantage is that it is wildly impracticable, from the perspective of taxpayers and tax authorities. We would be surprised if any jurisdiction were to seek to construct CFC rules that work in this manner and, given the short amount of space the Report devotes to this possibility, we expect its authors agree.

We therefore expect the implementation of Action 3 to be limited.

Action 4 – Interest Deductions

Our detailed analysis is here – a short summary follows below.

This Action aims to limit base erosion achieved via interest deductions and other financial payments. The OECD has identified the following main concerns:

- Excess interest deductions, which reduce taxable profits in operating companies, even in cases where the group as a whole has little or no external debt.
- Debt financing to produce tax exempt or deferred income, which allows a deduction for interest expense while the related income is taxed later (or not at all).
- Payments under financial instruments such as guarantees and derivatives.

The key recommendation made is to limit an entity's net deductions for interest (and payments economically equivalent to interest) to a percentage of the entity's EBITDA. The latest report recommends that this percentage should range between 10-30%, subject to certain exemptions which would allow the entity to exceed this percentage.

Recommendations have also been made on:

- the definition of interest and financial interests that are economically equivalent to interest;
- who the rules should apply to (as a minimum to entities which are members of multinational groups);
- exceptions to the rules (which include a de minimis threshold and where interest is paid to third party lenders in respect of funds used in public benefit projects);
- situations in which there should be targeted rules.

The OECD has pledged to continue its work in this area, and will in particular draw up specific rules for the banking and insurance sectors.

Our predictions and recommendation

Some jurisdictions, such as Germany, already have "interest barrier" rules and other restrictions on interest deductibility very similar to those proposed here. Others, such as the UK, Ireland, Luxembourg and The Netherlands, do not.

On its face, therefore, Action 4 represents a hugely significant change for many jurisdictions. That change would be particularly keenly felt by sectors where a high level of leverage is commonplace: such as real estate, or securitisation/capital markets issuances (where SPV issuers are usually almost entirely debt capitalised). Indeed Action 4 would seem to make it impossible to establish an SPV securitisation issuer.

For these reasons, we do not expect Action 4 to be adopted by many (or perhaps any) jurisdictions that do not already have interest barrier rules.

Action 5 – Harmful Tax Practices

The aim of Action 5 is to combat harmful tax practices by prioritising the consideration of transparency and substance when examining the use of preferential regimes. This involves a three-pronged strategy, which involves:

- finalising the review of member country preferential regimes;
- expanding participation to non-OECD member countries; and
- reviewing and amending the existing framework.

Emphasis under the first head has been put on requiring substantial activity to qualify for any preferential regime, as well as compulsory spontaneous exchange on rulings relating to preferential regimes to improve transparency.

The OECD has achieved agreement on a general substantial activity approach: the "nexus" approach. Broadly, in order to be able to benefit from a preferential regime, an entity would need to have undertaken related activities and to have incurred expenditure on those activities.

Agreement has also been reached on which types of rulings are likely to give rise to BEPS concerns, and exchange of information on these rulings is set to start in April 2016.

Next steps identified include an ongoing review of preferential regimes of associate countries and beginning work on the second head of the three-pronged strategy.

Our predictions and recommendation

We expect most jurisdictions will resist the suggestion that they have preferential regimes, and that they give rulings that could give rise to BEPS concerns. Accordingly, whilst businesses should watch the progress of this Action, we expect it will have relatively little impact.

Action 6 – Treaty Abuse

Our detailed analysis is here – a short summary follows below.

The key target of Action 6 is "treaty shopping" – where a person who is not entitled to the benefit of a tax treaty invests via an entity in another jurisdiction which does benefit from the treaty.

The proposals are also aimed at preventing treaty benefits being granted in "inappropriate circumstances", in particular where a person:

- seeks to use the provisions of a tax treaty to circumvent limitations of the treaty itself; or
- seeks to use a treaty to circumvent domestic law provisions.

The Action 6 proposals include three different approaches (the principal purpose test, the detailed limitation on benefit rule and the simplified limitation on benefits rules) and OECD member states will be free to adopt different combinations of these rules (expected to be implemented in the OECD jurisdictions under the multilateral instrument).

The limitation on benefit rule (or "LOB") is particularly controversial, as it permits treaty relief only where the ultimate beneficial owners of an entity would themselves be entitled to treaty relief. Often it is difficult or even impossible to ascertain who the ultimate beneficial owners of an entity may be. For example, where a securitisation SPV has issued cleared bonds, the issuer has no way of determining who its bondholders are.

Our predictions and recommendation

For the reason noted above, the LOB looks impracticable or even impossible to implement. It would, if adopted, be widely disruptive to the asset management industry, the securitisation industry and the capital markets.

However that very difficulty means we expect it is highly unlikely many countries will adopt the LOB.

The principal purpose test is, however, likely to be widely adopted. Whilst the UK and some other countries have had a "main purpose" test for some time, the practical effect of a "principal purpose test" will be unclear unless and until we have indications as to how different jurisdictions will implement it.

We would therefore recommend corporate groups and fund/capital market participants monitor implementation, and input into the process so that common and inoffensive international structures are not inadvertently affected by these new rules.

Action 7 – Artificial Avoidance Of PE Status

Our detailed analysis is here – a short summary follows below.

Action 7 seeks to prevent the avoidance of permanent establishment status using either agency or similar ("commissionaire") arrangements, or by relying on exemptions from the current definition of permanent establishment, particularly the exemptions relating to "preparatory and auxiliary" activities. Currently, a permanent establishment will arise in a country if a non-resident company has either a fixed place of business there or a dependent agent which concludes contracts on its behalf, unless that agent is legally and economically independent of the principal company and is acting in the ordinary course of its business.

The proposals would amend the concept of "agency" permanent establishment such that a permanent establishment will arise if the agent concludes or negotiates the material elements of contracts in the name of the enterprise, unless it is an independent agent. An agent will not be independent for these purposes if it acts exclusively (or almost exclusively) on behalf of an enterprise to which it is connected, which will make it harder for enterprises to argue that the agents acting on their behalf do not create a permanent establishment by virtue of being independent.

The OECD also aims to strengthen the rules relating to the avoidance of permanent establishment status in the following ways:

- Strengthening the requirement that activities must be "preparatory and auxiliary" in order to fall within one of the specific exemptions.
- Prevention of the artificial fragmentation of cohesive business operations between related parties to get within the "preparatory and auxiliary exemption".
- Prevention of contracts being artificially split up into shorter contracts of less than 12 months with the purpose of benefitting from a specific exemption.

Our predictions and recommendation

If Action 7 is widely implemented it may represent a major change to international businesses, as they may find themselves inadvertently having permanent establishments in many of the jurisdictions in which they currently do business. The "preparatory and auxiliary" change in particular represents a dramatic change.

In due course, businesses will need to respond by revising historic group structures and arrangements. In some cases they may wish to change their activities to prevent a permanent establishment arising. In other cases they may wish to create a permanent establishment in a controlled manner, on their own terms.

At this point we would recommend:

- reviewing your existing business structures – even if it is too early to make final decisions, you should start work on assessing the potential impact of the proposals now;
- making sure you take the proposals into account when drafting contractual documentation (e.g. when documenting new agency-type arrangements and when drafting any permanent establishment undertakings in contracts); and
- monitoring implementation in the jurisdictions in which you do business

Actions 8, 9 and 10 – Transfer Pricing

The objective of Actions 8, 9 and 10 is to ensure that transfer pricing outcomes are in line with the value creation of that economic activity.

Action 8 – Transfer Pricing Aspects of Intangibles

The OECD aims to prevent BEPS achieved by moving intangibles among group members. This will involve:

- adopting a broad and clearly delineated definition of intangibles;
- ensuring that profits associated with the transfer and use of intangibles are appropriately allocated in accordance with (rather than divorced from) value creation;
- developing transfer pricing rules or special measures for transfers of hard to value intangibles; and
- updating the guidance on cost contribution arrangements.

Various discussion drafts have been published in connection with the transfer pricing-related Actions. The discussion draft on arm's length pricing of intangibles explains how information asymmetry makes it difficult for tax administrations to evaluate the reliability of the information on which pricing has been based by the taxpayer. The draft provides guidance on how to deal with arm's length pricing when valuation is highly uncertain at the time of the transaction and guidance on how to deal with "hard to value intangibles". The OECD considers intangibles to fall within the category of "hard to value" if they are:

- only partially developed at the time of the transfer;
- are not anticipated to be exploited commercially until several years following the transaction;
- separately are not hard to value but are connected with the development or enhancement of other intangibles which are; or
- intangibles that are anticipated to be exploited in a manner that is novel at the time of the transfer.

In the discussion draft on cost contribution arrangements, the OECD provides general guidance for determining whether the conditions established by associated enterprises for transactions covered by a CCA are consistent with the arm's length principle. The OECD defines a CCA as a contractual arrangement among business enterprises to share the contributions and risks involved in the joint development, production or the obtaining of intangibles. The OECD is seeking to enforce the arm's length principle by ensuring that each participant is taxed on their proportionate share of the overall expected benefits under the arrangement.

Action 9 – Transfer Pricing Risk and Capital

Action 9 is aimed at preventing the occurrence of BEPS by transferring risks among, or allocating excessive capital to, group members. The OECD seeks to adopt measures to ensure that inappropriate returns will not accrue to an entity solely because it has contractually assumed risks or has provided capital. The rules to be developed will require alignment of returns with value creation.

Action 10 – Transfer Pricing – High Risk Transactions

Action 10 looks specifically at high risk transactions and will develop rules to prevent BEPS by engaging in transactions which would not, or would only very rarely, occur between third parties. This will involve adopting measures to:

- clarify the circumstances in which transactions can be recharacterised;
- clarify the application of transfer pricing methods, in particular profit splits, in the context of global value chains; and
- provide protection against common types of base eroding payments such as management fees and head office expenses.

Discussion drafts on cross border community transactions, profit splits in the context of global value chains and low value adding-intra group services were published at the end of 2014 and in early 2015.

The discussion draft on cross border community transactions considers pricing issues in relation to commodity transactions that may lead to BEPS. The problems reported by OECD members involve difficulties in determining adjustments made to quoted prices, verifying the pricing date and accounting for the involvement of other parties in the supply chain. The OECD is seeking to protect the tax base of commodity dependent countries by ensuring that parties who perform value adding functions in relation to the commodity being transferred are remunerated with arm's length compensation.

The discussion draft on profit splits in the context of global value chains provides guidance as to the most appropriate method for assessing profit splits across multi-national groups. The aim is to ensure that transactional profit splits are based on the outcome of a functional analysis that determines how value is created in an MNE group and that the group approximates the division of profits that would have been agreed at arm's length.

The discussion draft on value adding-intra group services proposes an approach which:

- identifies a wide category of common intra-group services fees which command a very limited profit mark up on costs;
- applies a consistent allocation key for all recipients; and
- provides greater transparency through specific reporting requirements including documentation showing the determination of the specific cost pool.

Our predictions and recommendation

There had been some suggestions that the arm's length approach had had its day, and there should be a wholesale rewriting of OECD transfer pricing guidelines. That has clearly not happened. Instead, we have a series of tweaks and modifications which, in certain cases, may transfer pricing closer to the underlying economics, and further from the legal form of the arrangements.

The UK and Australia have already pre-empted elements of this by adopting rules that specifically attack arrangements between related parties that divert profits from the jurisdiction. These rules go further than the recharacterisation proposed in Action 10, and potentially permit arrangements to be disregarded if they were put in place for tax purposes, even if they are in principle at arm's length.

The question is whether we will see more jurisdictions joining the UK and Australia in introducing new rules outside the traditional transfer pricing framework (it has been six months since these rules were introduced and, nobody else has done so).

Businesses will want to review their historic transfer pricing position in light of these proposals, and identify areas of particular vulnerability, as well as to engage with policymakers to help identify how the proposals are likely to be applied in practice.

Action 11 – BEPS Data Collection

This Action aims to improve the way data on BEPS is collected and analysed through ongoing monitoring of both the scale of BEPS and the effectiveness of the actions taken to combat BEPS.

Various areas are identified where tax authorities can improve their data gathering and analysis. Action 11 is likely to be of relatively little interest to taxpayers.

Action 12 – Disclosure Of Aggressive Tax Planning

This Action proposes to impose an obligation on taxpayers to disclose any aggressive tax planning they are engaged in. The published materials set out three strategic objectives for work under Action 12:

- recommendations for a modular design of a mandatory disclosure regime, which can be adapted to cohere with existing disclosure rules in member countries, in particular with regards to the control of quantity and type of disclosure. It is important to note that member countries can choose whether or not to adopt mandatory disclosure regimes;
- prioritisation of disclosure relating to international tax schemes and consideration of a wide definition of tax benefit to capture a broader range of transactions;
- designing and implementing improved information-sharing models for international tax schemes.

Our predictions and recommendation

Many jurisdictions already have rules requiring disclosure of tax avoidance schemes. It is therefore somewhat surprising that these recommendations are optional rather than mandatory.

We believe in the current environment there are few if any large businesses which enter into tax avoidance schemes. Accordingly, we expect this measure to have little practical effect.

Action 13 – Transfer Pricing Documentation

Action 13 may be the BEPS report with the most significant long term impact.

The aim of Action 13 is to create a framework under which tax authorities receive sufficient information from taxpayers to enable them to assess transfer pricing risks and identify when companies have sought to use transfer pricing to artificially shift income into tax-advantaged environments. This will involve the taxpayer providing three reports to tax authorities:

Country by country reporting: A report in which MNEs provide information on each jurisdiction they do business in, identifying in particular the activities carried out by each entity in each jurisdiction, as well as figures such as the revenue generated and the amount of income tax paid in each jurisdiction. This report is to be filed in the jurisdiction of the ultimate parent entity and shared between relevant jurisdictions.

Master file: Contains some high level information about the MNE's global business operation, and will be available to all relevant tax administrations.

Local file: Transactional transfer pricing information (e.g. identifying related party transactions and the applicable transfer pricing analysis) specific to each jurisdiction.

Taken together, they aim to require taxpayers to articulate consistent transfer pricing positions, provide tax administrations with useful information to assess transfer pricing risks, make determinations about where audit resources can be more effectively deployed and provide information to commence and target audit enquiries. This information should make it easier for tax administrations to identify whether companies have engaged in transfer pricing and other practices that have the effect of artificially shifting substantial amounts of income into tax advantaged environments. The content of documents reflects an effort to balance tax administration information needs, concerns about inappropriate use of the information and compliance costs imposed on the business.

The OECD has recently published three Model Competent Authority Agreements, designed to facilitate the exchange of country-specific reports between tax authorities.

The OECD intends to monitor the implementation of these rules, and intends to assess whether they require modification by 2020.

Our predictions and recommendation

Action 13 is, we believe, likely to achieve wide take-up amongst tax authorities.

In the short term, it will impose a compliance requirement which most businesses will find onerous and expensive to satisfy.

The longer term implications are more significant. Tax authorities will receive much more information about group structures than they ever received in the past. They will likely see arrangements they view as tax avoidance (often incorrectly) and audits/enquiries will in many cases follow.

We are also concerned that, given the number of tax authorities that will receive the reports, some will be leaked to the Press (e.g. again because of perceived tax avoidance). The volume of sensitive information which will be contained in businesses' reports makes this potentially highly problematic.

Businesses may therefore wish to construct their Action 13 reporting in a particular careful and cautious manner and, at every stage, consider how tax authorities and other readers are likely to interpret what is written, and how misunderstandings can be avoided.

Action 14 – Dispute Resolution

The aim of Action 14 is to improve the effectiveness of the mutual agreement procedure ("MAP") in resolving treaty-related disputes. The OECD recognises that there is no consensus between member states to adopt universal mandatory binding MAP arbitration. Instead, the aim is to address the challenges that currently prevent member states from utilising MAP effectively, including the difficulties around access to MAP and the denial of arbitration in certain cases.

Countries have agreed to adopt a "minimum standard" and a series of best practices with regards to treaty-related disputes, which include actions such as ensuring that taxpayers have access to the MAP when eligible, and adopting administrative processes to ensure disputes are resolved in a timely manner. A number of countries (including the UK and the US) have also committed to including binding MAP arbitration in their tax treaties.

Our predictions and recommendation

We wholeheartedly welcome the introduction of binding arbitration – anything that reduces the delays and costs associated with international treaty disputes has to be a good thing. Unfortunately the jurisdictions where delays are most prevalent are also likely to be those that do not adopt arbitration. We understand there was resistance to spelling out what a "timely manner" actually means. Hence, in these jurisdictions, we fear, nothing will change.

Action 15 – Multilateral Instrument

The OECD has recognised that implementing the BEPS project will require substantial amendment of member states' tax treaties, which has the potential to result in protracted and burdensome negotiations. In response, the OECD considered the negotiation of a multilateral instrument which simultaneously amends multiple bilateral treaties.

Our predictions and recommendation

It was hoped that today's publication would give the first insights as to what the Multilateral Instrument would look like. Unfortunately, the Action 15 Final Report simply confirms that the ad hoc group developing the Multilateral Instrument started work in May 2015 and confirming the intention to have a final form of the Instrument ready for signature by 31 December 2016. As a result, we still have no insight as to how the optionality that is now part of a number of the other Actions will be accommodated within a single Multilateral Instrument.

There are several possibilities. One is that the multilateral instrument implements only those elements which are agreed by all the countries involved; however given there are 90 countries discussing the multilateral instrument, it seems unlikely there could be unanimity on many points. Another is that the multilateral instrument itself contains optionality, so that bilateral treaties are amended in accordance with those issues where both contracting parties agree (although how this would work in practice is unclear). Less ambitious would be for the multilateral instrument to simply be a framework to enable countries to amend multiple treaties by mutual agreement without needing to go through the ratification process each time.

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