

International Tax Insight

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Editorial

Welcome to the latest edition of Baker Tilly International's premier tax publication. In an increasingly globalised world, the following content aims to cover key tax topics which should be of interest to businesses operating internationally.

This edition features recent international tax developments emanating from Australia, Canada, the European Union, India, Ireland, Liechtenstein, New Zealand, the Organisation for Economic Co-operation Development (OECD) and the US.

Should you require further information regarding any international tax matters, please do not hesitate to contact a specialist from one of our member firms, which can be located within our Worldwide Directory at www.bakertillyinternational.com.

I hope you find this document informative.



Chris Danes

International Tax Executive,
Baker Tilly International

Australia

Australia Planning Its Own BEPS Response: ATO's Konza

On 22 May 2014, Mark Konza, the Australian Deputy Commissioner, discussed Australia's proposed response to the OECD's base erosion and profit shifting (BEPS) action plan.

Mark Konza is responsible for developing and implementing the Australian Tax Office's (ATO) domestic and international response to BEPS. He made the comments during a presentation at a BEPS conference organised by The Tax Institute. He told attendees that Australia "has already acted against possible corporate tax erosion and avoidance through various policy reforms in the past two years".

Konza said that, although "the delivery of the Action Plan will most

likely propose further reforms for our Government to consider in addressing risks to our corporate tax base", the OECD's work is to only advise countries on policy, and "it will be for the Australian Government to decide what, if any, changes it will make".

Speaking on the OECD's work on the digital economy, Konza said: "We have undertaken some initial analysis on these options, and will continue to provide ongoing advice to Treasury, especially in regard to the administrative and compliance issues of these options. Our advice and compliance work will help us identify and address BEPS risks in a digital context under our current law. We will also be keeping a close eye on the work of the action plan to address issues related to the digital economy, and work with Treasury on areas where our current law may need to be looked at".

Moving on to discuss hybrid mismatch arrangements, he said: "From Australia's point of view, we don't currently have any anti-hybrid mismatch rules, and therefore Treasury is interested in the work of the OECD in developing proposals for internationally accepted domestic rules".

On BEPS Action 6, on preventing treaty abuse, Konza said: "Australia supports the work of the OECD in developing internationally agreed anti-treaty abuse rules". He said: "It is important the proposed limitation of benefits and main purpose tests are clear, carefully focused and provide certainty for taxpayers and tax administrations".

"Treasury will also have to ensure that any proposed future new anti-treaty abuse rules do not restrict the ability for cross-border trade and investment in and out of Australia and that they

deal with instances of intended treaty abuse, and do not deny benefits to those doing the right thing.”

On transfer pricing documentation and country-by-country reporting, Konza said that Australia “welcomes the work on establishing standardised approaches to transfer pricing documentation, as long as the right information is being captured to ensure compliance with the arm’s length principle”.

“Treasury will consider Australia’s future policy response to transfer pricing documentation and country-by-country reporting once the guidelines are finalised by the OECD, with a key consideration to striking the right balance between taxpayers providing useful information and the associated cost of compliance”, he added.

Looking forward, Konza said the ATO would focus on three areas. First, the International Structuring and Profit Shifting (ISAPS) initiative, a four-year programme that “focuses on companies that indicated in their international dealings schedule that they have undertaken an international business restructure or have significant related party cross-border arrangements”.

Second, the need to “take the lead on driving collaborative approaches on international taxation matters through engaging with a number of jurisdictions both multilaterally and bilaterally to foster greater co-operation between tax administrations”.

Last, seek to enhance “the ability of tax administrations to exchange

information between each other”, which Konza said is “a very important element in tackling BEPS-related issues, and also wider tax evasion”.

Australia is the current President of the G20 nations, until the end of November 2014. Seven of the 15 action items in the OECD’s BEPS work are expected to be addressed through ‘deliverables’, from the OECD before the end of Australia’s term, by September 2014.

In his concluding remarks, Konza said: “While Australia’s taxation system remains relatively robust, it is important that we participate in the international discussions in order to protect Australian’s national interest, contribute to the development of a fairer system for developing countries, and support Australia’s presidency of the G20”.

Canada

TEI Responds to Canadian BEPS Consultation

The Tax Executives Institute (TEI) has said that Canada should only act on the OECD’s BEPS recommendations after careful consideration of the potential impact on its domestic economy and industries.

The call is made in the TEI’s response to the Government’s consultation on tax planning by multinational enterprises (MNEs). The consultation was launched to help the Government “set its priorities and inform Canada’s participation” in international discussions.

The Government has made a series of reforms aimed at tackling BEPS, and

has adopted limitations on interest deductibility, sought to curb hybrid mismatches, enhanced disclosure rules, and amended the controlled foreign affiliate rules. It is in the process of reviewing its options for anti-treaty shopping measures.

As the TEI points out, “Canada is at the forefront of curbing perceived BEPS”. It urges that, “before considering additional BEPS-related initiatives recommended by the OECD, the Government should consider the individual and combined effects of its actions to date as well as their potential interaction with the OECD initiatives”.

When participating in the BEPS discussions or evaluating the possible implementation of proposals in Canada, the Government should consider the consistency and speed of adoption, and the cost of compliance. It is also urged to take into account the likely economic impact, the effects on specific industries, and the need for appropriate transition rules.

A phased roll-out would be preferable, TEI said, as would precautions to ensure there is the flexibility in place to afford taxpayers the best means to choose to comply with local laws. For instance, taxpayers should be permitted to choose the best source from multiple data sources to satisfy transfer pricing documentation and country-by-country requirements.

In their relationships with businesses, the TEI suggests that, “since tax authorities do not deal with complex business issues on a day-to-day basis, they are at a disadvantage when

assessing the underlying reasons for a business decision. For this reason, tax authorities may assume that a decision was motivated solely or primarily by tax planning. Business decisions, however, are essentially driven by economic and strategic considerations. Tax considerations are secondary”.

The Institute contends that MNEs already provide a substantial amount of information to the Canada Revenue Agency (CRA) that enables the authorities to conduct risk assessments of transfer pricing practices in particular. Canadian taxpayers must maintain contemporaneous documentation to support the transfer prices for all cross-border transactions and produce documentation on demand.

The TEI warns that before adding to already substantial reporting and documentation burdens, the Government should assess whether the CRA needs any additional information to conduct risk assessments or evaluate the arm’s length nature of transactions. It stresses that an MNE “should only be required to provide sensitive information to tax authorities in the MNE’s home country, and that such information should only be shared with other tax authorities pursuant to exchange of information agreements where adequate safeguards for protection of the data are in place”.

In turn, the CRA “should be encouraged to pursue and expand the use of co-operative compliance models and other streamlined approaches to audit protocols”. This is seen as especially important in respect

to transfer pricing risk assessment and transfer pricing documentation requirements for low-risk taxpayers, low-risk transactions, or other entities or transactions for which scrutiny can be reduced through the adoption of a materiality threshold.

It argues that reducing the domestic tax burden could also help to level the playing field between the perceived advantages of MNEs over local businesses. The Government could adopt the lowest possible statutory corporate income tax rates consistent with its revenue needs, while accelerated capital cost allowance rates could stimulate investment in Canada.

The TEI encourages the Government to maintain a regular dialogue with taxpayers, taxpayers groups, and practitioners affected by the OECD’s plans, and says that it should be prepared to revisit its views and conclusions as the BEPS project continues to unfold.

Finally, the Institute cautions against immediate or unilateral actions in respect of BEPS. The Government should instead “consider a deliberate and measured implementation approach taking account of the effect on Canada’s competitiveness and the actions of Canada’s principal trading partners”.

European Union

EU Releases Transfer Pricing Guidelines for Member States

The European Commission has adopted a new communication (MEMO/14/394) including guidelines on three aspects of the treatment

of transfer pricing transactions to encourage member states to adopt more uniform rules.

The guidelines relate to risk management in dealing with transfer pricing, the application of secondary adjustments, and the use of compensating adjustments. They have been released in response to the OECD’s ongoing work on BEPS, and draw on the work of the EU Joint Transfer Pricing Forum (JTPF). The communication includes an update on the implementation of the JTPF’s work programme, which runs until March 2015.

The communication notes that the interpretation and application of the arm’s length principle varies amongst EU member states — from one tax administration to another and between tax administrations and businesses. It highlights that this can result in uncertainty, increased costs and administrative burdens, and can lead to potential double taxation or double non-taxation. These aspects impact negatively on the smooth functioning of the internal market.

The Commission explained that secondary adjustments are transfer pricing adjustments made in some cases by tax authorities to reconcile the financial situation of an enterprise following an initial (primary) transfer pricing adjustment — that is, an adjustment made by the taxpayer in its tax return to bring the price of an inter-company transaction in line with the market price. The guidelines on secondary adjustments are addressed to member states and contain recommendations on

how to avoid double taxation and to resolve disputes related to secondary adjustments. Where secondary adjustments are not compulsory, the guidelines recommended not to impose them in order to avoid double taxation. Where secondary adjustments are compulsory, means to relieve double taxation should be provided, the guidelines advise.

Compensating adjustments are transfer pricing adjustments used by taxpayers to report transfer prices for tax purposes. Compensating adjustments are a tool for taxpayers to report to tax authorities a transfer price for an inter-company transaction that is a market price, even though this reported price differs from the amount actually charged.

The guidelines note that member states have different practices with respect to compensating adjustments. They provide practical guidance on avoiding double taxation and double non-taxation in the application of these adjustments in spite of the different practices of member states. In particular, they recommend that member states should accept a compensating adjustment initiated by the taxpayer for the purpose of filing the tax return, if the taxpayer has fulfilled a set of conditions, which include for example the requirement that the profits of the concerned related enterprises are calculated symmetrically, ie enterprises participating in a transaction report the same price for the respective transaction in each of the member states involved.

The guidelines on managing transfer pricing risk are based on the general

principles of co-operation between taxpayer and tax administration(s), identification of high and low risk areas as well as well-targeted, timely and appropriate actions. Best practices are identified for each of the three possible phases of examining a transfer pricing file — pre-audit, audit and dispute resolution. The Commission said these are extremely concrete; they contain an example of a detailed work plan for a transfer pricing audit. For example, member states are advised to carry out simultaneous audits of both sides of a transfer pricing case as authorised under the Administrative Co-operation Directive.

Providing an update on the JTPF's work, the Commission said the Forum is currently monitoring the practical functioning of Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (Arbitration Convention), and the revised Code of Conduct for the effective implementation of the Arbitration Convention, as well as the Code of Conduct on transfer pricing documentation for associated enterprises in the EU.

The Commission revealed that, in the coming months, the JTPF will complete its work on the monitoring of the practical functioning of the Arbitration Convention and the revised Code of Conduct for the effective implementation of the Arbitration Convention. It may also propose possible improvements to the Code of Conduct on transfer pricing documentation for associated enterprises in the EU.

G5 Discuss Actions at EU Level on BEPS

On 28 April 2014, Ministers from the G5 nations held a meeting in Paris plotting out a strategy to address inter alia issues relating to transfer pricing, treaty abuse and challenges posed by the digital economy.

Ministers from France, Germany, Italy, Spain, and the United Kingdom reiterated their support for the OECD's BEPS project, calling for a single set of global rules with a view to modernising outdated rules in the area of corporate and international taxation.

They agreed that “[the] BEPS project must develop, by end-2015, a comprehensive approach to modernising outdated rules, closing the loopholes of the current international tax system, and developing a single set of global rules”.

On transfer pricing matters, they affirmed that the specific challenges raised by new business models in the area of the digital economy must be addressed through effective measures. To achieve a ‘fair share of tax’, the G5 Ministers agreed on the need for a flexible interpretation of the currently acknowledged territoriality rules, while new concepts such as the Digital Tax Presence could also be contemplated if necessary.

They agreed that transfer pricing rules must be adapted to ensure that profit and value creation are aligned. “National tax administrations must be able to better set into question transactions or corporate structures, often relating to the location of

high value intangibles or excessive risk and capital in a low or no tax environment, in the situation where they are not economically justified and allow groups to minimise drastically their global tax rate”, they said. Additionally, the G5 Ministers also highlighted the need to tackle tax avoidance through hybrid mismatch arrangements.

Equally, with respect to tax treaties, the G5 Ministers affirmed that access to the benefits of these must be restricted to companies engaged in genuine economic activity and that comprehensive measures should be introduced to prevent abuse.

They agreed that the Forum on Harmful Tax Practices must continue its work, in particular on substantial activities, conditions for preferential regimes and on transparency (in particular in the case of Rulings regimes).

The G5 Ministers had a particular discussion on country-by-country reporting. They stressed the importance of this tool, and agreed that it should provide all relevant tax administrations with the information necessary to complete a high level risk assessment.

As a conclusion, they stressed that the international developments on BEPS must be reflected at the EU level. In this context, they decided to encourage the Commission to review EU law, assess its impact on aggressive tax planning practices and, on this basis, propose necessary measures. As a first step in this direction, they agreed to support the

appropriate changes to the directives on corporate taxation. Moreover, they looked forward to the conclusions of the EU high level expert group on taxation of the digital economy, which will present effective solutions.

India

India May Adopt Risk-Based Transfer Pricing Audit Approach

The Indian tax authority is contemplating doing away with the mandatory requirement that transactions between connected entities above a certain value threshold must be subject to a transfer pricing audit.

India’s Central Board of Direct Taxes (CBDT) is likely to make a transition from the existing value threshold-based approach to the risk-based approach recommended by the OECD.

Currently, Indian tax law provides for compulsory transfer pricing scrutiny where the value of an international transaction exceeds INR150m (US\$2.47 m). This is governed by section 92CA of the Indian Income Tax Act 1961 (ITA), and Instruction No. 10/2013, released in August 2013.

A risk-based approach was included in the recommendations of the OECD on Action 13 of its BEPS project on transfer pricing documentation and country-by-country reporting. Country-by-country reporting in particular would improve Indian transfer pricing authorities’ ability to select risk-prone transactions below the existing threshold, and begin to reduce the compliance burden on large

multinationals caught by the existing mandatory audit requirement.

Ireland

Irish Tax Institute Meets OECD to Discuss BEPS

Members of the Irish Tax Institute (ITI) met with Pascal Saint-Amans, Director of OECD’s Centre for Tax Policy and Administration, at the OECD headquarters in Paris, to discuss the organisation’s work on BEPS from Ireland’s perspective.

At the meeting ITI members talked with senior OECD officials, including OECD Deputy Director Grace Perez-Navarro, and Raffaele Russo, the OECD’s head of the BEPS project, on the project’s impact on smaller territories; the overall goals of the BEPS project; and the implementation of recommendations.

On the first matter — the BEPS project’s impact on Ireland and similar states — the ITI delegation said:

- Any changes to tax treaties, as part of the BEPS Project, must recognise that businesses in countries like Ireland frequently have to raise finance and equity outside their borders, and changes to tax treaties should recognise this fact
- Any new rules need to reflect the special circumstances of the funds sector, and also recognise where the value is created within the financial services industry. This is particularly important in Ireland given the contribution of the sector to the economy

- Ireland recognises some of the sensitivities in relation to the current permanent establishment rules, but notes that care needs to be taken if changes are made to these rules to not hinder the growth of international business. This is particularly important for exporting economies
- Any shift in profit attribution towards a market-based approach could seriously impact small countries like Ireland. Representatives said concerns about base erosion in large markets would be better addressed through indirect tax policy initiatives.

The delegation also raised some general issues that concern businesses and their advisers in relation to the implementation of the BEPS project. These issues include:

- The need for any new rules to balance the administrative obligations of business, particularly in relation to the proposals for country-by-country reporting
- The importance of certainty and strong guidelines to provide for consistent interpretation by countries
- A structured framework so that changes occur multilaterally and in a coordinated way
- The importance of a strong dispute resolution mechanism
- The need to get the balance right between an ambitious timetable and fully thought-through,

technically sound and workable proposals.

The ITI has engaged the OECD in the development of BEPS deliverables in three detailed responses: on addressing the tax challenges of the digital economy; preventing treaty benefits in inappropriate circumstances; and transfer pricing documentation and country-by-country reporting.

Ireland Launches BEPS Consultation

The Irish Government is seeking views on how the country's domestic tax system might best respond to a changing international tax environment and the OECD's ongoing work on BEPS.

As part of his Budget 2015 preparations, Finance Minister Michael Noonan is examining ways in which the competitiveness of Ireland's regime can be enhanced and its reputation protected. He has launched a consultation that will run for eight weeks.

The consultation document explains that although the OECD is conducting its own consultation process, a separate consultation on the implications of the broader BEPS project in the Irish context is considered necessary because domestic tax reforms may be needed.

At this stage, the emphasis is on the BEPS Actions with a 2014 deadline, but the Government will also accept comments on 2015 Actions. The 2014 Actions include treaty anti-abuse provisions, country-by-country reporting, hybrid mismatch arrangements, and preferential regimes. Also of interest are company residence

rules and stakeholder attitudes toward taxation in the digital economy.

Specifically, the Government is seeking responses to the following questions:

- Which of the international tax issues identified in the BEPS Action Plan would need to be considered the highest priorities for Ireland for examination with a view to action?
- Are there other current international tax proposals that would be of concern to Ireland?
- In a changing international environment, what's the best way for Ireland to ensure that its taxation provisions, for example in relation to intangible assets, are competitive?
- Are Ireland's company residence rules appropriate in the context of BEPS and other international tax developments?
- What are the critical considerations in shaping Ireland's response to current international developments — either in general or with respect to particular issues?
- Are there any other priority areas or future challenges that should be considered as part of this process?

The consultation closes on July 22.

Liechtenstein

Liechtenstein to Set Up BEPS Working Group

The Liechtenstein Government plans to set up a working group to closely

monitor and recommend domestic tax policy responses to the OECD's BEPS project.

The Government anticipates that the OECD's work will have a significant impact on the territory's economy, which is going through something of a transformation after the adoption of tax information exchange agreements to create a transparent and conducive environment for businesses. It highlighted that the project has a particular focus on boosting the taxing rights of the country in which a business has a physical presence — its office space, property and employees — and the location from which value is created.

The Government said that it expects as a result of recommendations to be released in September 2014, and to be finalised by the end of 2015, that international tax transparency will be intensified; there will be an increased use of multilateral instruments; and there will be significant changes in the apportionment of taxing rights.

The OECD's BEPS project has a particular focus on enhancing nations' transfer pricing regimes by enhancing transfer pricing documentation and country-by-country reporting, tackling tax treaty abuse, addressing the tax challenges of the digital economy and tackling hybrid mismatch arrangements.

The working group would be in charge of recommending amendments to the territory's legislation to bring the territory's regime into line with any new standards or rules that might emerge as a result of the project, to

ensure legal certainty for businesses in tax matters.

New Zealand

New Zealand Active in OECD BEPS Talks

Senior New Zealand tax officials have been working with the OECD in Paris to support its efforts to develop 'deliverables' to propose to G20 leaders in September, as part of its action plan to counter Base Erosion and Profit Shifting, Revenue Minister Todd McClay said.

A 15-point action plan was proposed by the OECD late last year to counter international tax planning that was said to be eroding nations' tax bases. "Now that we are nearing completion of the first parts of the plan, our officials are at the OECD supporting their delivery", Mr McClay said.

The first seven deliverables from the OECD action plan are scheduled for September this year. McClay said: "Decisions by the OECD can have an impact on the interpretation of tax treaties and can affect the allocation of taxes amongst countries. Inland Revenue has been participating in the OECD's work to ensure that they apply properly in the New Zealand context".

"Designing, running and maintaining a tax system is a very different business today from what it was just a few decades ago. Advances in electronic communications and changed business practices mean that opportunities for tax avoidance and evasion arise more commonly due to differing tax treatments across jurisdictions", he

said. "For that reason, it makes sense for nations to collaborate and share information appropriately."

"By contributing to discussions on the growth of the digital economy, its impact on tax bases and possible solutions to combatting the BEPS problem, New Zealand is playing a very active role in dealing with these global issues", McClay concluded.

OECD

OECD Provides BEPS Update

The OECD has published a note reporting progress on the comprehensive action plan (CAP) to address BEPS, following the 2014 Ministerial Council Meeting held in Paris in May 2014.

In addition to reporting progress made on the CAP to address BEPS, the note also provides an update on the key work streams of the OECD tax agenda of particular relevance to the meeting.

The note identifies a total aggregation of 19 BEPS deliverables to be produced by the OECD over three year period ending December 2015, in the form of reports, recommendations, changes, rules, and strategies. The remaining BEPS deliverables for 2014, planned for delivery by September 2014, include:

- A report identifying tax challenges raised by the digital economy and the necessary actions to address them (Action 1)
- Recommendations regarding the design of domestic and tax treaty

measures to neutralise the effects of hybrid mismatch arrangements (Action 2)

- The completion of the review of member country regimes in order to counter harmful tax practices more effectively (Action 5)
- Recommendations regarding the design of domestic and tax treaty measures to prevent the abuse of tax treaties (Action 6)
- Review transfer pricing rules in relation to intangibles — phase 1 (Action 8)
- Re-examine transfer pricing documentation and country-by-country reporting template (Action 13)
- A report on the feasibility of a multilateral instrument to implement BEPS measures (Action 15).

According to the note, “the work to progress the deliverables on BEPS is now being undertaken at a rapid pace”.

“The OECD is actively sharing updates and seeking input from all stakeholders including developing countries, business and industry (through the Business and Industry Advisory Committee), civil society, labor (through the Trade Union Advisory Committee) as well as relevant regional and international organisations. There is a transparent process of public consultation including through the release of discussion drafts for comment, information webcasts and meetings,

all promoted through the BEPS website and in other media”.

“The United Nations and the International Monetary Fund are also developing work on BEPS issues, and the OECD Secretariat is liaising with them to avoid duplication and ensure complementarity of each organisation’s work streams”.

On progress towards tax transparency, the note says: “The Common Reporting Standard will be complemented in mid-2014 with guidelines and an IT architecture which will ensure an effective implementation of the standard in a cost efficient way for both the financial industry and governments”.

“The OECD has also promoted a multilateral legal basis with the Convention on Mutual Administrative Assistance in Tax Matters (the Convention) concluded under the auspices of the OECD and Council of Europe”, the note adds.

The note also touches upon the OECD’s work on the Tax and Development Programme. “The Tax and Development Programme will continue to grow its transfer pricing programme, expanding in accordance with demand to also cover broader BEPS issues. The reviews of tax incentive regimes will continue, including greater coordination of regional approaches on this important issue for developing countries”, it adds.

In the context of Tax Inspectors Without Borders (TIWB), a project initiated under the TDP, the note states: “[TIWB] will facilitate pilot

programmes of targeted tax audit assistance using a ‘learning by doing’ approach, and the OECD will use the feedback from those pilots to refine and improve the TIWB model. A review of TIWB’s mandate is anticipated before the end of 2014”.

The note also states: “The OECD is also moving forward its efforts to address illicit financial flows under the OECD’s Oslo Dialogue on Tax Crimes and Other Crimes. This initiative is founded on a whole of government approach aimed at improving effective inter-agency co-operation, sharing of information between countries, and capacity building based on the latest risks and techniques to fight financial crime”.

“Capacity building foundation courses bringing together officials from OECD and non-OECD Member countries began in 2012, and an intermediate level course will also be held for the first time in 2014”, it adds.

Looking forward, the note envisions: “The next 12 months, and in particular to the end of 2014, will see some significant milestones in the OECD’s tax agenda”.

The progress note was published further to requests from countries at the 2013 Ministerial Council Meeting on the Declaration on BEPS, inviting OECD’s Secretary General to report on progress in developing and taking forward the CAP at the meeting.

OECD Forum Urges Coordinated BEPS Response

The 2014 OECD International Tax Conference in June 2014, provided an opportunity for businesses to discuss

the OECD's work on tackling base erosion and profit shifting, and to air their views on its recommendations concerning country-by-country reporting, taxing the digital economy, and tackling treaty abuse and hybrid mismatch arrangements.

The Conference provided an opportunity for the OECD to recount work to hone its proposals ahead of the release of a package of 'deliverables' due in September. It also provided insight into the work that it is scheduled to undertake over the coming year.

Pascal Saint-Amans, Director of the OECD Centre for Tax Policy and Administration, said: "With the OECD's member countries, G20 countries, and stakeholders, we share the goal of limiting uncertainty in tax systems. In the long run, the best way to make sure that global businesses can operate smoothly, [and are] taxed appropriately and not more than once, is for countries to work together rather than take uncoordinated, unilateral actions".

"That's what we're working at the OECD to facilitate, and we are fortunate to have so many interested and invested partners as part of this conversation", he said.

John Koskinen, the IRS Commissioner, reiterated this message in his keynote speech: "My hope would be that policy and legal determinations [should] not be made without thoroughly considering the practical implications of these decisions, not only for businesses, but for tax administrations".

Will Morris, director of global tax policy at General Electric (GE) International and chair of the Business and Industry Advisory Committee (BIAC) on Taxation and Fiscal Affairs, added: "There is a danger to the OECD's central mission of promoting cross-border trade and investment if the focus of the BEPS project becomes solely anti-abuse, rather than about improving the international tax system".

"Unilateral action by states is a real risk. It's in the interest of business to have as broad an agreement as possible, for the sake of certainty", he added.

Meanwhile, Carol Doran Klein, vice-chair of the BIAC Committee on Taxation and Fiscal Affairs and the United States Council for International Business's (USCIB's) vice-president, called for greater private sector participation in the BEPS process. "Events like this provide a good opportunity for OECD governments and secretariat officials to hear from the business community", she said. "And we need to ensure that the private sector can contribute meaningfully to the detailed technical work being done across a range of areas."

Backing the work of the OECD, Bill Sample, corporate vice-president for worldwide taxes at Microsoft and chair of USCIB's Taxation Committee, said: "This conference underscores the importance and complexity of the debate around BEPS and global tax policies, and the OECD's centrality in it. The OECD process gathers the most important government officials,

and benefits from strong business participation. While there have been differences of opinion, it is clear that the OECD offers the best forum for such discussions".

OECD Holds Public Consultation on BEPS Action 2

On 15 May 2014, the OECD held a public consultation meeting at the OECD Conference Centre in Paris on BEPS Action 2: Neutralise the Effects of Hybrid Mismatch Arrangements.

The consultation addressed key issues raised in the comments received from various stakeholders, in relation to the discussion drafts of 19 March 2014.

The public consultation, lasting seven hours, was divided into two sessions. The morning session kicked off with opening remarks by Marco Heutinck, The Netherland's Ministry of Finance, and Marco Iuvinale, Director of International Relations at the Ministry of Finance, Italy, which were followed by comments from the OECD Secretariat.

The morning session focused on the following aspects of hybrid mismatch arrangements:

- Implementation issues such as transition and the need for consistency and coordination
- Impact of financial markets including instruments that are widely held, regularly traded, and repurchase agreements (repos) or share-lending transactions
- Issues raised by the ten percent related party threshold.

The afternoon session focused on the treaty issues identified in the discussion draft relevant to Action 2. Commentators expressed their concerns in an exchange with the OECD about the two discussion drafts released.

Andrew Roycroft of the UK's Chartered Institute of Taxation (CIOT) raised concerns over hidden obstacles surrounding investment regimes in countries because of rising tax competition between different jurisdictions as a result of non-implementation of hybrid mismatch rules by non-OECD members. He urged that "the rules must not impact genuine commercial transactions or transactions [that] are not tax motivated".

The public consultation was hosted by OECD Working Party 11, which is a new subsidiary group with responsibility for the work on hybrid mismatch arrangements.

The discussion will be used to inform the OECD's work towards issuing so-called deliverables on the matter in September 2014.

OECD Forum Held on CbC Reporting

On 19 May 2014, the OECD held a public consultation at the OECD Conference Centre in Paris on BEPS Action 13: Transfer Pricing Documentation and Country-by-Country Reporting.

The consultation addressed key issues raised by various stakeholders in relation to the discussion draft of 30 January 2014.

This discussion draft proposed a two-tier approach to transfer

pricing documentation, and placed an emphasis on establishing tests to increase oversight on whether appropriate transfer pricing methodologies are used, discussed exemptions from documentation requirements, and considered a reduction in documentation-related penalties, amongst other things.

The public consultation, lasting seven hours, was divided into three main segments, kicked off with opening remarks by Michelle Levac, the Chair of the OECD Working Party 6, and Alan McLean of the Business and Industry Advisory Committee (BIAC) to the OECD.

In particular, discussions focused on the following aspects of transfer pricing documentation and country-by-country reporting:

- The content of the country-by-country report, included reporting rules concerning assets, accumulated earnings, and intra-group service fees; and preventing the misuse of reported data
- How country-by-country reports will be filed and shared, including consideration of the pros and cons of a treaty-based sharing system; timing issues relating to filing obligations and the sharing of country-by-country reports; and consideration of the support that developing countries will need if a treaty-based system is adopted
- The content of the master and local files, including defining materiality; making the amount of information required proportionate

to the needs of tax authorities; and how to ensure consistency amongst different countries' domestic requirements.

The consultation also focused on other aspects of the discussion draft, such as possible guidance on documentation-related penalties or incentives for compliance; updating comparables searches or use of regional comparables, and other possible simplification measures.

The discussion, which was attended by a number of representatives who have fought for an improved say for developing nations, is to be used to inform the OECD's work towards issuing the deliverables on the matter by September 2014.

US

US Should Safeguard Its Taxing Rights in BEPS Talks

The United States House of Representatives Ways and Means Committee Chairman Dave Camp (Republican, Michigan) and Orrin Hatch (Republican, Utah), the Senate Finance Committee's Ranking Member, have released a statement questioning the current path of the OECD's work on BEPS. Their comments have been supported by a letter from the Business Roundtable (BR), an association of chief executive officers from leading US companies.

As the OECD held a BEPS conference in Washington, Camp and Hatch, the top two Republican lawmakers on the congressional tax-writing committees, expressed their concern that its project

“is now being used as a way for other countries to simply increase taxes on American taxpayers”.

“When foreign governments — either unilaterally or under the guise of a multilateral framework — abandon long-standing principles that determine taxing jurisdiction in a quest for more revenue”, they stated, “Americans are threatened with an un-level playing field. Such actions put pressure on the US government to respond by asserting taxing authority over foreign activity generating US-source income on similar grounds”.

“In addition to the aggressive actions by some foreign countries to levy more taxes on US taxpayers before a consensus has been reached”, Camp and Hatch added, “the process established by the OECD raises serious questions about the ability of the US to fully participate in the negotiations”.

“The extremely ambitious time frame for conclusion of the 15 different work plans limits (congressional) ability to review, analyse, and comment on the rules being proposed”, they continued. “The issues under negotiation are complex and can have far reaching and negative consequences for the competitiveness of US workers. We are willing to work through these issues until an international consensus exists and we have achieved the right

answer, but we will not be rushed into a bad outcome”.

They gave their full support to the US Treasury in the BEPS negotiations, while looking for it to consult with Congress as the BEPS discussions proceed. However, they reiterated that “the focus needs to return to BEPS — not on ways foreign countries can raid the American Treasury”.

Camp and Hatch also concluded that, “ultimately, the best way for the US to address the potential problem of BEPS is to enact comprehensive tax reforms that lower the corporate rate to a more internationally competitive level and modernise the badly outdated and uncompetitive US international tax structure. Such reforms would put American companies on a more level playing field with their foreign competitors”.

In a letter to the US Treasury Secretary Jacob Lew, the BR, also confirmed that there are “serious concerns amongst the US business community” that the BEPS project is “being used by some governments for the purpose of imposing extraterritorial taxes on US business income”.

Louis Chênevert, Chairman and CEO of United Technologies Corporation, and the Chair of BR’s Tax and Fiscal Policy Committee, wrote that the BR

“strongly urges the US to draw a firm line against tax changes that would target US business and slow US and global economic growth”.

While praising the OECD’s previous efforts to prevent double taxation by developing international standards, Chênevert commented that the BEPS project, which “was ostensibly initiated to address potential gaps in the taxation of cross-border income, ... at a minimum, is increasing business uncertainty on that taxation. At its worst, it will result in the imposition of new, unprecedented taxes on trade and investment that will freeze business investment and slow economic growth”.

The BR urged the US Government “to stand firm in opposing the use of the BEPS project by other governments to redraw the international standards on the jurisdictional authority to impose taxes, (while) if US businesses holding valuable trade names, trademarks, patents and other intellectual property rights are targeted abroad, this will disadvantage US enterprises relative to their foreign competitors”.

In a similar vein, the letter pointed out BR’s “grave concern about information reporting proposals that could result in the harmful disclosure of confidential and proprietary details of US business operations to competitors or other inappropriate parties”.

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