

Dbriefs Bytes Transcript

16 May 2014

For comments on Action 2, see [the highlighted text below](#).

BEPS

(i) Two conferences

Well, in this last week, there have been two very important public conferences in the BEPS world.

First and foremost, there was the G20 Symposium in Tokyo on 9 & 10 May.

Also on 10 May, Robert Stack (a US Treasury official), was as informative as usual during an American Bar Association meeting in Washington, D.C.

Let me combine the insights from both of these conferences, in regard to each of the five Actions which are firmly in the public domain.

Let me start with **Action 8** (the transfer pricing aspects of intangibles).

According to Robert Stack, the Bermudan cash box is proving a difficult issue to resolve, for a number of reasons:

- Firstly, there's a difference of opinion between the US and other countries. The US view is that a Bermudan cash box company, which has funded the acquisition of valuable intangibles by using its significant share capital, should be entitled to a risk-based return on that capital – and the only debate should be, according to the US, as to how you should work out that risk-based return. However, he said that other countries argue that a zero return should be given to the cash box.
- Secondly, Stack says that there are difficulties distinguishing between the Bermudan cash box example (where there might be just two employees), from the situation where “you move that cash into Ireland with a few more people, and a 12.5 percent rate”.

The intangibles draft is scheduled to be presented to the Committee on Fiscal Affairs in June.

However, Stack says that, for the reasons he has given, the US is trying to have section B of the draft pulled out and recirculated for further comment by business. Section B is the section which deals with identifying the parties who are entitled to intangible related returns.

Let's move to **Action 13**: country-by-country reporting.

In the G20 Symposium, business representatives identified and discussed their two key concerns with country-by-country reporting:

- Firstly, compliance cost. In particular, there were numerous requests to apply some type of materiality level, so as to avoid having to report down to the last dollar.
- And the second issue, of course, is confidentiality.

Meanwhile, in Washington, Robert Stack was declaring success in achieving a reduction in the number of

data points in the CbC template, from 17 to 7.

He said that there are at least two remaining significant issues:

- The first is to provide companies with instructions on how to complete the template.
- And the second is to determine the mechanism for sharing the information amongst tax authorities: should it be based on double tax treaties or something else?

Now for Action 1: the digital economy.

From both conferences, it's obvious that this is the most difficult of all the BEPS Actions.

And that's not because it's impossible to define the digital economy – everyone seems to agree that this BEPS Action was badly named: instead of “the tax challenges of the digital economy”, it should have been called “the tax challenges of the digitalization of the economy”.

There are two reasons why I think it's the most difficult:

- Firstly, this topic is the one which most challenges the status quo in regard to international tax – and, in particular, the PE definition which is at the heart of double tax treaties.
- And secondly, rightly or wrongly, the discussion in this area has been impacted by a subtle debate on the “source versus residence country” division of taxing rights.

Both of these elements were there to see at the two conferences.

At the G20 Symposium, the “source versus residence” debate could be seen in the discussion about the concept of taxing only where the economic activities (which add value) occur. But where is that? One speaker expressed this issue in terms of supply and demand. Depending on the industry, he said, the real value might be added by the supply side or alternatively by the demand side. A demand-side position can be equated with an increase in source country taxing rights.

And in regard to the PE definition: there was a discussion of the options set out in chapter VII of the Action 1 discussion draft. The options concerning “virtual PEs” and a nexus based on “significant digital presence” were criticized from the perspective of profit attribution: it would be relatively easy to attribute the revenue, but how do you attribute the deductions?

At the ABA meeting in Washington, Robert Stack indicated that the digital economy task force will likely finalise its report by saying: “We will come back in a year and see what the other action items did on digital.”

The fourth Action in the public domain is **Action 6** (prevent treaty abuse).

Of course, the big issue with Action 6 is the question concerning the LOB Article and the main purpose rule.

Should there be:

- Both an LOB Article and a main purpose rule?
- Or should there be only an LOB Article?
- Or should there be only a main purpose rule?

And there are some subsidiary questions which follow:

- In regard to a main purpose rule: should it be “one of the main purposes” or “the main purpose”?
- And in regard to an LOB Article, does it need to be as tough as the version used in the discussion draft or should it be somewhat friendlier?

At the G20 Symposium, there was a spirited debate as to whether either or both the LOB Article and

main purpose rule should be used – with no clear winner.

But there clearly was support for changing the main purpose rule to “the main purpose”, and also for adopting a friendlier version of the LOB Article.

In Washington, Robert Stack acknowledged that there is some sense in including a main purpose rule (in addition to the LOB Article).

However, he then said that the current US position is that it would not accept a main purpose rule.

It sounds like there is still some arm-twisting to go.

And the fifth and final Action fully in the public domain is **Action 2** (hybrid mismatch arrangements).

This topic was not covered in the G20 Symposium, possibly because the OECD public consultation meeting on Action 2 was scheduled for yesterday.

However, Robert Stack did refer to it.

He said that the two main areas of concern were:

- Firstly, in determining the scope of the proposed law changes, should a so-called bottom-up approach be used, or alternatively a top-down approach? A bottom-up approach would require the identification of the specific arrangements which would be covered. In contrast, a top-down approach would prima facie cover all arrangements, but then there would be exceptions for specific arrangements. Everyone expects that the scope would be much wider with a top-down approach, than with a bottom-up approach.
- And secondly, if a bottom-up approach is used, and the objective is to catch related party arrangements, then what should be the definition of related party? The Action 2 discussion draft uses a threshold of just 10 percent ownership, to be a related party.

(ii) Comments (and public consultation) on hybrids draft

Now, speaking of hybrid mismatch arrangements, the OECD’s public consultation meeting on **Action 2** was held yesterday.

The discussion covered the main topics which were highlighted in the 457 pages of public comments on the discussion draft.

Those main topics include:

- The two topics that I just referred to: the bottom-up approach versus the top-down approach, and the definition of related party.
- Potentially adverse effects on regulatory capital and widely held instruments.
- Interaction with other BEPS Actions – particularly Action 3 on CFC rules, and Action 4 on limitation of base erosion via interest deductions.
- The need for a co-ordinated approach.
- And questioning why the “imported mismatch” rules are appropriate.

(iii) Upcoming OECD consultations and webcast

A reminder in regard to upcoming BEPS events:

- Next week, on Monday, 19 May, the OECD will be conducting its public consultation meeting on **Action 13**: country-by-country reporting and the master file / local file approach to standardized transfer pricing

documentation. This consultation meeting will be broadcast live on the internet.

- And on the following Monday, 26 May, the next OECD BEPS webcast will be held.

For information on both of these events, go to BEPS Central.

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