

Dbriefs Bytes Transcript

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For comments on Action 9, see [the highlighted text below](#).

BEPS

A few BEPS stories this week:

Firstly, Pascal Saint-Amans gave testimony to the US Senate Committee on Finance on 22 July. As you would expect, he focused on the policy drivers behind the BEPS project. If you would like to obtain a copy of his 7 pages of testimony, please follow the link in the summary slides at the end of this video.

And also this week, a number of BEPS officials spoke at a conference in Washington, D.C. I thought the presentation by Michelle Levac (who chairs OECD Working Party 6) quite interesting. She discussed the issue of so-called "special measures", which are a part of the three transfer pricing BEPS Actions: 8, 9 and 10.

She made two interesting points:

- **Firstly, she indicated the types of criteria which the OECD is considering for when the use of special measures may be appropriate. She identified six criteria :**
 - **Intangibles with exceptionally high value.**
 - **An entity with no history of revenue and profitability**
 - **Highly uncertain future exploitation of an intangible**
 - **No reliable information for forecasted valuation (which she described as a key concern)**
 - **An entity with minimal functions.**
 - **And a transferee in a low-tax jurisdiction**

In answer to a question, she said that these six criteria should not be applied in isolation.

- **Secondly, she indicated the types of special measures which the OECD is considering. These include :**
 - **The use of the profit split method**
 - **Contingent payments or an earn-out arrangement based on milestones**
 - **Price adjustment clauses**
 - **And the use of the Article 7 "authorized OECD approach", to Article 9 situations.**

Now, I must say, I am particularly intrigued by this last idea. The Article 7 "authorized OECD approach" to determine the profits attributable to a PE, starts by identifying the significant people functions performed by the employees who are based at the PE. It then allocates to the PE the legal entity's assets and risks to which those significant people functions relate. That methodology is designed to ensure that the significant people functions, and the assets and risks to which they relate, are placed in the same tax jurisdiction.

That is not necessarily the case when you apply Article 9 to two related companies. Because you do have two separate legal entities, you can allocate assets and risks to one legal entity, even though the significant people functions in regard to those assets and risks are substantially performed by the other legal entity – for example, under a service contract. If the OECD is considering applying the Article 7 approach in Article 9 situations, this could effectively require the alignment of significant people functions with their related assets and risks.

And if you were to achieve that, you might not need to "push the envelope" on the Article 5 definition of PE.

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