

Ireland



BEPS: Recent OECD Updates

Introduction

The OECD continues to focus its attention on its Base Erosion and Profit Shifting (BEPS) 15 Point Action Plan. On 26 May, the OECD held another in its series of webcasts. During the webcast, the OECD confirmed that the actions under the BEPS plan are broadly in accordance with the ambitious timetable set down by the OECD.

Discussion drafts have been issued by the OECD on the following four BEPS Action Points;

- Action 1: Tax Challenges of the digital economy
- Action 2: Hybrid mismatch arrangements
- Action 6: Preventing the granting of treaty benefits in inappropriate circumstances
- Action 13: Re-examine transfer pricing documentation (on Country by Country reporting)

Summary information on these documents are outlined below including related web links for further information on these topics.

Action 1: Tax Challenges of the digital economy.

Action 1 calls for the main difficulties that the digital economy poses for the application of existing international tax rules to be identified by the OECD and for holistic options to address these difficulties to be developed. Issues noted include “the ability of a company to have a significant digital presence in the economy of another country without being liable to taxation..., the attribution of value created from the generation of marketable location relevant data through the use of digital products and services, the characterisation of income derived from new business models, the application of related sources rules, and how to ensure the effective collection of VAT/GST with respect to the cross-border supply of digital goods and services”.

The potential options to address the broader tax challenges raised by the digital economy include amendments to the definition of permanent establishment, withholding taxes on digital transactions and consumption tax (VAT) options.

Please click the attached **alert** link to obtain more analysis and commentary on the proposal or **here** to read the comments received by the OECD in relation to the discussion draft.

On a related note, on 28 May, the European Commission received the final report of the High-level Expert Group on Taxation of the Digital Economy. This independent group was asked to examine key issues related to taxing the digital economy in the EU, and to present their ideas on the best approach to various challenges and opportunities in this field. Click [here](#) for more detail. The Commission will now consider the report and decide on policy orientations in due course.

Action 2: Hybrid mismatch arrangements

Two discussion drafts were released by the OECD in relation to Action 2 (Hybrid Mismatch Arrangements) of the BEPS Action plan. The two main mismatches identified are payments deductible under the rules of the jurisdiction of the payer and not included in the income of the recipient, and the payments that give rise to duplicate deductions.

The recommendations for domestic law target three categories of hybrid mismatch arrangement; hybrid financial instruments (including transfers), hybrid entity payments, and reverse hybrid and imported mismatches. The discussion draft identifies design principles to minimise disruption to existing domestic law, to be clear and transparent, to be comprehensive, to be easy for tax authorities to administer along with other criteria.

Banking and Insurance

The consultation document is explicit that the rules only seek to address the tax treatment of instruments that are hybrid for tax purposes, and target the tax treatment of such arrangements. Thus, for example, third party debt raised by a bank or insurer on terms which enable it to be treated as capital for regulatory purposes but which is treated as debt for tax purposes for the borrower should not be impacted by the BEPS anti-hybrid proposals.

Treaty issues

The Discussion Draft looks at the options available for relief of double taxation on dividends under the exemption method or credit method. The Discussion Draft includes a proposal for a new model treaty provision which sets out that an entity that is fiscally transparent under the tax laws of either country will be treated as if it is resident in the recipient country for the purpose of accessing the treaty, but only to the extent that the recipient country, in its domestic law, treats the entity as a resident in respect of the income concerned (and therefore taxes it). Please click the attached [alert_link](#) to obtain more analysis and commentary on the proposal or [here](#) to read the comments received by the OECD in relation to the discussion draft.

Action 6: Preventing the granting of treaty benefits in inappropriate circumstances

Action 6 identifies treaty abuse, and in particular treaty shopping, as one of the most important sources of BEPS concern. The draft proposals include the following.

Section A – Limiting Treaty Benefits in “Inappropriate Circumstances”

A specific anti-abuse rule is proposed based on the limitation on benefits provision already included in many US treaties. The rule is designed to limit treaty benefits to companies (and individuals, not for profits, pension funds and government bodies) with sufficient presence in the relevant country. The rule operates based on the legal nature, ownership in, and general activities of, residents of a treaty country. One of the matters discussed is whether the rule should include a ‘derivative benefits’ clause to allow a treaty country to look through to the shareholders where they would also be entitled to benefits under a treaty.

Purpose rule: In addition to the limitation on benefits clause, the Discussion Draft proposes a broadly drafted general purpose rule aimed at removing treaty benefits from income where one of the main purposes of the arrangements or transaction was to obtain treaty benefits.

Determining treaty residence: The Discussion Draft proposes removing the place of effective management tie-breaker clause for determining treaty residence (where different domestic rules would treat an entity as resident in two countries). This will be replaced by a requirement that the competent authorities of the two countries endeavour to determine residence, by reference to place of effective management, place of incorporation/constitution and any other relevant factors.

Section B – Clarifying Treaties Are Not Intended to Create Double Non-Taxation

The title and preamble to the OECD Model Tax Convention will be amended to clarify that a purpose of tax treaties is to prevent tax evasion and avoidance by countries that enter into such treaties, as well as the elimination of double taxation on income and capital

Section C- Tax Policy Considerations for Entering into a Treaty

The avoidance of double taxation remains a key objective of tax treaties, it is proposed that the model tax treaty would include points for countries to consider in relation to the conclusion, modification (or termination) of a tax treaty including the ability to eliminate double taxation domestically, increased risk of non-taxation, excessive taxation from high withholding tax rates, increased certainty and cross-border dispute resolution for taxpayers and the ability of prospective treaty partners to provide assistance in the collection of taxes and exchange of information.

Read more. Deloitte has issued an **alert** analysing and commenting on the proposals. Click **here** to read the comments received by the OECD in relation to the discussion draft.

Action 13: OECD to amend proposed country-by-country reporting template

The OECD transfer pricing unit have announced via one of its webcasts several changes to the proposed draft transfer pricing documentation rules and country by country (CbC) template (click **here** to see more information on the Discussion Draft issued in January) to make reporting less burdensome for taxpayers concerned. The OECD will change the proposed CbC template to require aggregate countrywide reporting instead of entity-by-entity reporting.

A discussion draft released by the OECD on Action 13 of the BEPS Action plan calls for a review of existing OECD transfer pricing documentation rules and the development of a CbC reporting of income taxes, and economic activity for tax administrations, with the goal of enhancing “transparency for tax administration, taking into account the compliance costs for businesses”.

Although the OECD will not require an entity-by-entity reporting of financial data, a second page of the CbC template will require a listing of all group entities by country that are aggregated into the country number. The list should include codes reflecting the business activities of the entities. The CbC template should report significant financial data, including revenue, profit before tax, cash taxes paid, current year tax accrual, number of full time equivalent employees, tangible assets, and capital and accumulated earnings for the entities in each country.

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