



Tax Lab BEPS unplugged

Base Erosion & Profit Shifting

Maarsse, 26 March 2015

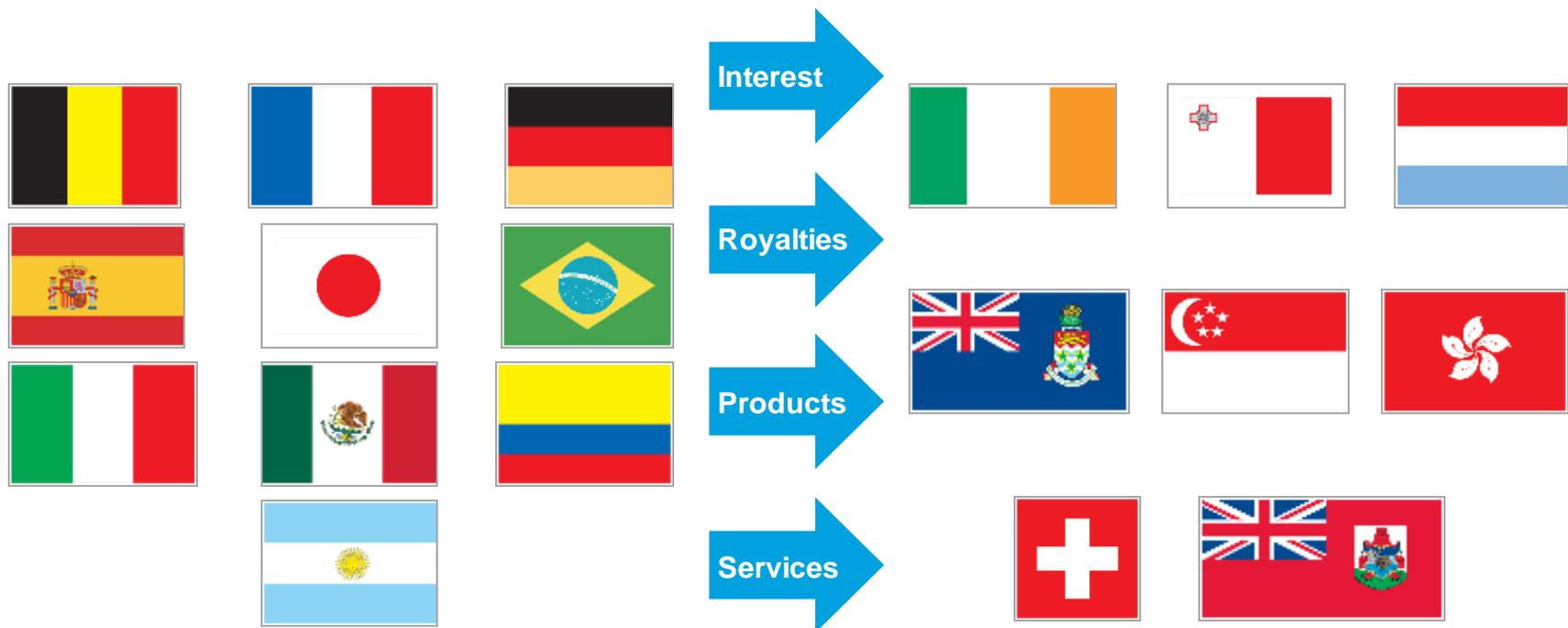


Introduction

- One hour of your time: BEPS unplugged
- Agenda: set the stage in 15 minutes - introductory presentation - and then panel discussion
- Interaction with audience!
- The main actors:
 - Jeroen Lammers – Manager Fiscaliteit, VNO-NCW – MKB Nederland
 - Arjen van der Linde – Tax Director at GE Corporate Tax & Tax Committee AMCHAM
 - Godfried Schutz – Director International Tax at Deloitte, specialized in US corporate clients
 - Aart Nolten – Partner, leading International Tax and Transfer Pricing at Deloitte
- Facilitated by Live Mind Mapping

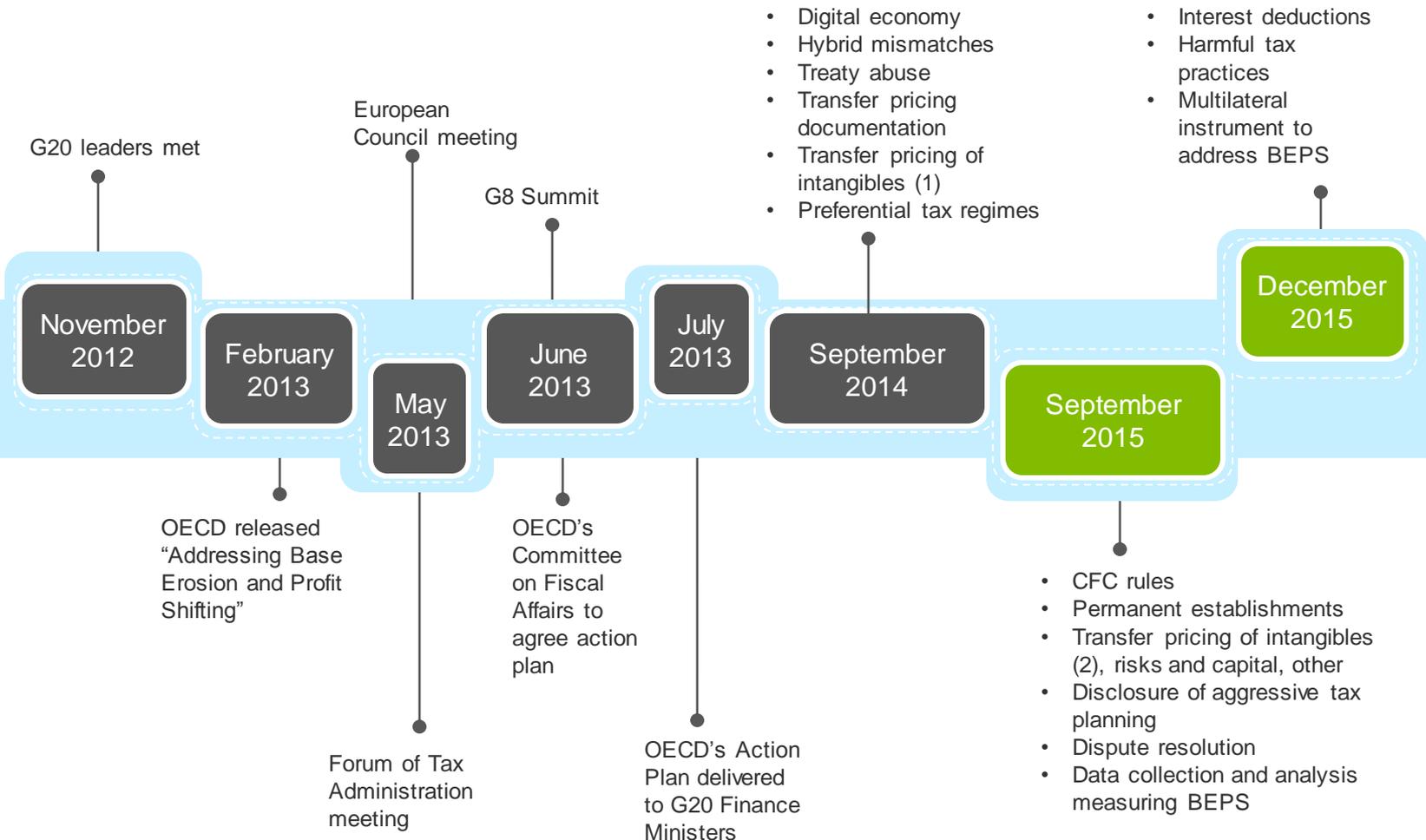
What is the debate all about?

Cross border income shift
Intercompany loans, licensing, production and
sale of products and provision of services



Is each country engaged in these transactions receiving their fair share of revenue?

BEPS Action Plan - Timetable



BEPS 15 Action Items



1. Digital economy

2. Neutralising hybrids
3. Strengthen CFC rules
4. Limit interest/finance deductions
5. Counter harmful tax practices – substance

Establishing international coherence of corporate income taxation

6. Prevent treaty abuse
7. Prevent PE avoidance
8. Value creation – intangibles
9. Value creation – risk & capital
10. Value creation – high-risk transactions

Restoring the full effects and benefits of international standards

11. Data collection/analysis
12. Disclosure (aggressive tax planning)
13. Transfer pricing documentation
14. Dispute resolution

Ensuring transparency while promoting increased certainty and predictability

15. Multilateral instrument

From agreed policies to tax rules: the need for a swift implementation of the measures

Unilateral Actions

Where is BEPS going?

US treasury deputy assistant secretary Robert Stack statements:

“If we don’t fix BEPS, companies are going to be playing whack-a-mole for the next 15 years”

“We are not willing to make the transfer pricing rules into a pretzel and then hand that pretzel to the world’s tax administrators so they can go after”

“Stateless income gave us BEPS, the status quo is not sustainable”

Pointing to the UK proposed diverted profit tax “That is a portent of things to come if we don’t do better”

“I have been dubious all along about whether or not a multilateral BEPS treaty is doable,”

“BEPS failure is an option”





Unilateral Actions

Where is BEPS going?

- Base erosion and profit shifting is on the political agenda
 - Change is inevitable
 - The timetable is driven by political environment
- Aggressive timetable for the OECD to adhere to
 - Timeframe for consultations with business will be short
- Balance
 - Can every country 'win'?
- The Action Plan is a package, signed up to by OECD Member States and the G20
- Independent measures already being taken:
 - Germany new rules on hybrids
 - China position on location savings + TP rules on royalties and service fees
 - Finland court decision on location savings
 - Australia new rules on transparency
 - Canada – treaty shopping/GAAR
 - UK diverted profit tax + CbCR + Hybrid Mismatch
 - Spain introduce their own CbCR

EU Presidency ROADMAP

- Already done: amendment of the PS Directive: anti-abuse + hybrid debt
- Interest and Royalty Directive: implementation of anti-abuse clause similar to PS Directive
- Transparency of Tax Rulings: implementation per 1/1/2016
- CCTB: revisited → 1. anti-BEPS directive 2. renewed proposal
- Hybrid Mismatch
- Patent Boxes
- Early EU adoption of CbCR

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CCCTB Revisited

Background

- In March 2011 a draft proposal for a CCTB Directive was published. On 19 April this was approved by EU Parliament. Accordingly, WPTQ became responsible for the technical analysis.
- Compromises reached in 2012 and 2013. Allocation key as a subject is not touched – Netherlands is an obvious opponent. 2013 Syntheserapport: eerst grondslag en dan (evt) consolidatie.
- 2014 development is that under the Italian Presidency a new proposal is launched: meer resultaten rond grondslag, allocation key is niet benoemd.
- Mid 2015: Further development by focus on anti-BEPS aspects of the CCCTB proposal: CFC, anti-abuse measures, hybrid mismatches, interest limitation rule and definition of PE.
- Letter from France, Germany and Italy for anti-BEPS Directive to be implemented before the end of 2015.
- CCCTB is opgenomen in het werkprogramma van de Latvian Presidency (1e halfjaar 2015). European Commission announces a “relaunch”
- Nederlandse Staatssecretaris (FD januari 2015) is nog steeds terughoudend en verwijst impliciet naar de allocation key discussie, welke eerst moet worden opgelost.
- VNO-NCW – MKB Nederland have expressed that they cannot support the CCTB unless 4 conditions are met: 1 optional, 2 consolidation of profits and losses throughout the EU, 3 sovereignty regarding tax rate, 4 one stop shop compliance.

UK diverted profits tax

Background

- Government announced in Autumn Statement 2014 a Diverted Profit Tax (“DPT”) to apply at 25% from 1 April 2015. A detailed review of this measure is outside the scope of this report and is advisable.
- The tax is distinct from corporation tax and is intended to encourage companies to amend their tax position to reflect expected outcomes from the BEPS project.
- Companies are required to notify HMRC of their chargeability to this tax. There are tax geared penalties for failure to notify.
- Important relaxation announcement on 25 March: notification is not required if the information is already available to the HMRC through other means (or in case the diverted profit tax does not apply – TP defense line seems not sufficient)

UK diverted profits tax (cont.)

Application

- The DPT will apply in 2 scenarios:
- *Where a foreign company has artificially avoided having a taxable presence (PE)*
- *Where the group has a UK company (or UK PE of an overseas company) and there is a tax advantage as a result of an entity or transaction that lacks economic substance*
- Broadly speaking there is a tax advantage where the overseas tax is less than 80% of the UK tax that would have applied.
- Given the short timescale before DPT applies, we recommend reviewing the group's current structure urgently in light of the proposed changes. In particular, the sales structure, FWP and use of commissionaires and non-US owned IP should be considered.

Nederlandse Innovatie Box impact

BEPS action 5: Harmful tax practices



A. Substantial activity requirement (cont'd)

- Nexus approach is to only grant benefits to income arising from IP when research and development (R&D) activity creating that IP is undertaken by the taxpayer
- Allows preferential tax treatment where income is generated by “qualifying expenditures”
- Aims to limit concession for mere contribution of capital

• **Formula for benefits**

$$\frac{\text{Qualifying expenditures to develop IP}}{\text{All expenditures to develop IP}} \times \text{Overall income from IP Asset} = \text{Income receiving benefits}$$

- No benefits for acquired IP, only expenditure to enhance IP

Nederlandse Innovatie Box Impact

BEPS action 5: Harmful tax practices



Joint proposal by UK and Germany for substantial activity test

- UK/Germany proposal recommends
 - Uplift of qualifying expenditure
 - Closure and abolition of existing IP regimes by 2021 (no new entrants after 2016)
 - Grandfathering
- UK/German proposal endorsed by all OECD and G20 countries
- Nexus approach as laid down in discussion draft maintained, with following amendments:
 - A 30% increase in qualifying expenditures - the expenditures that a taxpayer incurs on IP and which can be taken into account in the nexus approach calculation can, in limited circumstances, be increased by 30%
 - Closing old regimes to new entrants – countries that have IP regimes that are inconsistent with the nexus approach are expected to take steps to amend those regimes and the process to do this should commence in 2015. In addition there can be no new entrants to such IP regimes after 30 June 2016
 - Grandfathering and transition – taxpayers benefitting from existing regimes that do not comply with the nexus approach will not be able to receive any additional tax benefits from those regimes after 30 June 2021

Impact op Nederlandse verdragen

BEPS action 6: Prevent treaty abuse



Principal Purpose Test (“PPT”)

- Subjective test
 - *“Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention”*
- Difficulty in determining principal purpose
- Tax benefits usually a consideration

Limitation on Benefits test (“LOB”)

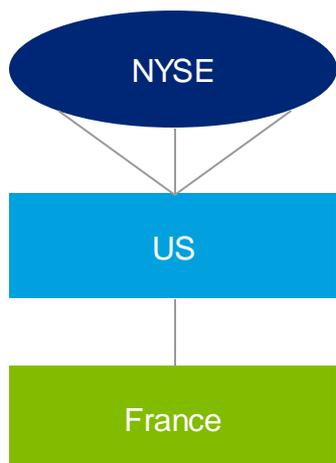
- Objective test
- See following slides

Anti conduit rule

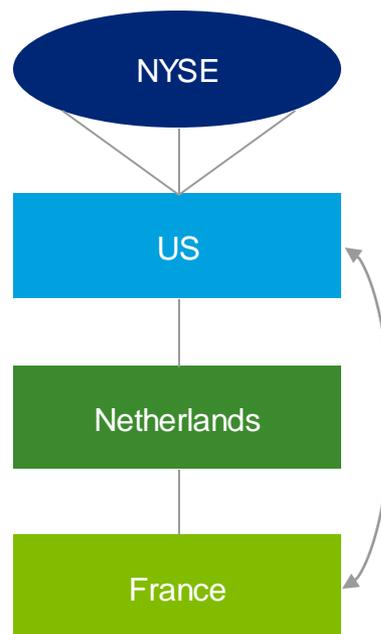
Impact op Nederlandse verdragen

BEPS action 6: Prevent treaty abuse

Limitation on benefits – equivalent beneficiary test



1. Article X.2.C.i – direct stock test



1. Article X.4 – equivalent beneficiary test

- Direct stock test would have been possible in direct relation between US-France

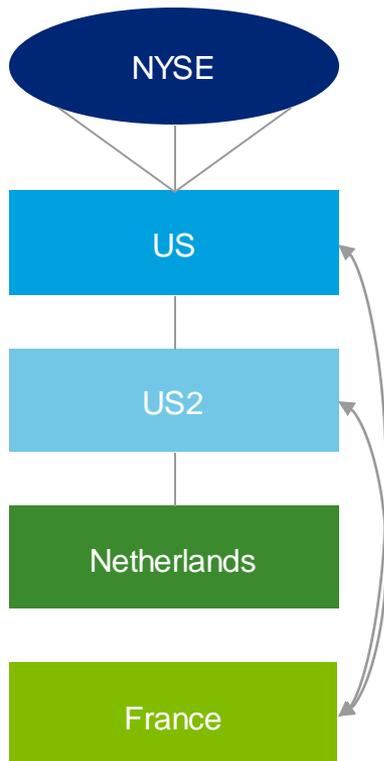


Impact op Nederlandse verdragen

BEPS action 6: Prevent treaty abuse



Limitation on benefits – equivalent beneficiary test



1. Article X.4 – equivalent beneficiary test not available. US2 tax no equivalent beneficiary
2. Article X.2.e – ownership test not available because US no NL tax resident
3. Without NL: in direct relation France-US direct stock test would have been available (art. X.c.i)
4. Without NL: in direct relation France-US2 indirect stock test would have been available (art. X.c.ii)

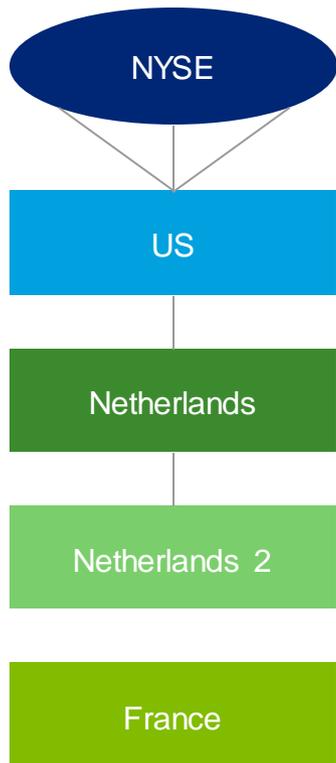


Impact op Nederlandse verdragen

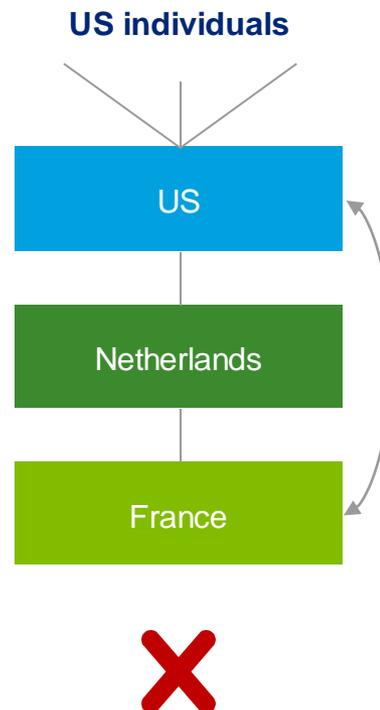
BEPS action 6: Prevent treaty abuse



Limitation on benefits – equivalent beneficiary test



1. Article X.4 – equivalent beneficiary test not available. NL no equivalent beneficiary
2. Article X.e – ownership test not available because US no NL tax resident
3. Without NL: in direct relation France-US direct stock test would be available (art. X.c.i)



1. Article X.4 – equivalent beneficiary test not applicable. US no equivalent beneficiary
2. Article X.2.e – ownership test not applicable because US no tax resident of NL for France-NL treaty application



DELOITTE GLOBAL BEPS SURVEY

What do you think will be the main hurdles, if any, to achieving cooperation between countries in implementing the OECD's BEPS recommendations?

➤ "No country wants to lose out, so agreement and consensus on actual policies will be difficult and therefore the risk of unilateral action increases."

➤ "One of the main hurdles will be consistency across the countries and how burdensome the 'reporting' element will become."

➤ "There are competing interests among the countries and BEPS, if adopted by all, will create winners and losers. Countries that stand to lose are likely to opt out. Unlikely that multilateral arrangement will be concluded by several key stakeholder countries."

➤ "USA will not do anything substantial in relation to the BEPS agenda and in the long run multilateral efforts will collapse into acrimony as a consequence."

SUMMARY

Implications and actions



Areas for change?

Hybrid instruments (and entities)
Conduit entities
Permanent establishments
Debt deductions
Domestic anti-avoidance
Transfer pricing
Compliance and data provision

Implications?

Loss of tax advantages associated with hybrids and conduit entities.
Creation of new permanent establishments.
Limitation of interest deductions.
Increased tax cost arising from new anti-avoidance rules.
Transfer pricing adjustments.
New tax compliance obligations.
Effect on cash flow, group ETR, EPS and Share Price.

Action

Assess impact of change on current model (in terms of likelihood and group financial & accounting impact)

Identify potential changes to prevent additional cost to the group. For example:

- Change from commissionaire to buy-sell structure
- Introduce revised financing arrangements
- Removal of hybrid instruments

Implementation of changes. This may include:

- Closure/establishment of legal entities
- Revising legal agreements
- Changes to IT systems
- Internal communications and policy updates
- Updating transfer pricing documentation
- Obtaining tax clearances

The timeframe for implementing change should not be underestimated, particularly as the first outputs to address BEPS are only 12 months away. Change can take time to implement – Deloitte 4R methodology is applicable to business change

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