

**BACKGROUND, SUMMARY, AND IMPLICATIONS
OF THE OECD/G20 BASE EROSION AND
PROFIT SHIFTING PROJECT**

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INTRODUCTION

The Subcommittee on Tax Policy of the House Ways and Means Committee has scheduled a public hearing for December 1, 2015, on the Base Erosion and Profit Shifting Project conducted by the Organization for Economic Cooperation and Development at the request of the Group of Twenty (“OECD/G20 BEPS Project”). The Senate Committee on Finance has scheduled a public hearing on December 1, 2015, titled “International Tax: OECD BEPS and EU State Aid.” This document,¹ prepared by the staff of the Joint Committee on Taxation, provides background on the OECD/G20 BEPS Project, an overview of its findings and recommendations, and a discussion of its potential implications for U.S. tax policy.

¹ This document may be cited as follows: Joint Committee on Taxation, *Background, Summary, and Implications of the OECD/G20 Base Erosion and Profit Shifting Project* (JCX-139-15), November 30, 2015. This document can also be found on the Joint Committee on Taxation website at www.jct.gov.

I. BACKGROUND AND SUMMARY OF THE OECD/G20 BEPS PROJECT

A. OECD/G20 Base Erosion and Profit Shifting Initiative

1. General Background of OECD

The OECD has its roots in the aftermath of World War II, as the successor to the Organization for European Economic Cooperation (“OEEC”), formed in 1948. European countries established the OEEC to design and implement the economic recovery of Europe, including allocation and distribution of aid pursuant to the Marshall Plan. Membership in the organization initially comprised 18 countries.² The OEEC was responsible for development and implementation of a joint program to promote all aspects of economic development in Europe and to remove trade impediments among the participants. To accomplish this, subordinate committees addressed the trade-related subject matters of various industries, balance of payments, labor issues, as well as the feasibility of a free trade zone. Work continued after the end of the Marshall Plan in 1952. Roughly contemporaneously with the formation of the OEEC, the Council of Europe, based in Strasbourg, France, was established in 1949 to promote democracy, the rule of law and protection of human rights in Europe, and the Treaty of Paris in 1951 led to the first European Commission, an antecedent to the European Union.³ The security alliance, the North-Atlantic Treaty Organization (NATO) was also formed at this time.⁴ OEEC worked with both groups to continue its work on the development of the European market and European security. NATO created a Financial and Economic Board that coordinated its work with the OEEC in order to take advantage of the expertise and personnel in OEEC.⁵ In 1958, OEEC formed the autonomous European Nuclear Energy Agency.

Formation of the OECD

The United States and Canada initiated discussions to form a global organization based on the OEEC with the members of the OEEC. In 1960, the 18 members joined with Canada and the United States in signing a multilateral treaty to form the OECD.⁶ In its preamble, the OECD

² The members of the OEEC were Austria, Belgium, Denmark, France, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey, United Kingdom, and Western Germany (originally represented by both the combined American and British occupation zone and the French occupation zone), and the Anglo-American zone of the Free Territory of Trieste (until its return to Italian sovereignty in 1954).

³ “Treaty establishing the European Coal and Steel Community,” signed April 18, 1951, (entered into force July 23, 1952, expired July 23, 2002), known as the Treaty of Paris, and together with the “Treaty establishing the European Economic Community,” signed March 25, 1957 (entered into force January 1, 1958), known as the Treaty of Rome, form the initial organizations collectively referred to as the European Commission.

⁴ North Atlantic Treaty, T.I.A.S. 1964, 34 U.N.T.S. 243 (April 4, 1949)

⁵ Descriptions of the successive economic groups within NATO working with OEEC are available in the NATO archives at <http://archives.nato.int/financial-and-economic-board-2:isaar>.

⁶ Convention on the Organization for Economic Cooperation and Development, signed December 14, 1960 at Paris, (entered into force on September 30, 1961) (“OECD Convention”).

Convention explains that the signatories to the treaty recognize the increasing interdependence of their economies, the need for cooperation, the necessity of economic strength and prosperity for preservation of individual liberty and improved general well-being, and the role that the members could play in contributing to the improvement of international economics, including the economies of nonmember countries.

Under the terms of the OECD Convention, the members⁷ agree in Article 1 to their shared goals of sustained growth and improved standards of living for members, sound economic expansion of member and nonmember countries, and expansion of world trade. Article 2 requires that the members pursue individual and joint efforts toward those goals, via measures to encourage science and technology research and advances at home and abroad. Article 3 requires that each member inform, consult and cooperate with other members. A member that wishes to terminate its membership in the OECD may do so after providing 12 months notice, under Article 17.

The OECD is organized into committees that work on specific issues, and a Secretary-General that provides analysis and presents final proposals to the Council of members which ultimately oversees and directs activity of the Secretariat and committees. The Council is composed of all members, who are represented by a Minister or permanent representative to the OECD, under Article 7. The Council may designate a chairman and vice chairman to preside at sessions at which the members are represented by Ministers, under Article 8. Otherwise, the Council sessions are chaired by the Secretary-General. The Council may establish such subsidiary bodies as are necessary, according to Article 9. The Secretary-General is an appointee who serves a five-year term, according to Article 10. Under Article 11, the Secretary-General is authorized to appoint staff for the OECD and its subordinate organizations.

The OECD is authorized in Article 5 to make decisions through the Council that are binding on all members, to make recommendations and to enter into bilateral agreements with members, nonmembers, and international organizations. To the extent that the OECD makes a decision rather than a recommendation of action, Article 6 provides that such decisions must be made by mutual agreement, unless the members have previously agreed unanimously to a different standard. According to Article 6.2, each member is permitted one vote in the organization on such decisions; abstention from a vote on an issue does not defeat the requirement of unanimity in decision-making, but it generally precludes applying such decision to the abstaining member.⁸

The OECD assumed the functions over the full range of topics that the OEEC formerly addressed, as well as all subordinate organizations therein, such as the European Nuclear Agency.⁹ These areas include agriculture, employment, energy, and social policy, taxation, trade

⁷ Article 4 adopts the nomenclature “member” to refer to a contracting party to the convention.

⁸ However, under the terms for admitting a new member in Article 16, if a member is permitted to abstain from voting on whether to permit a country to accede to the OECD Convention, the results of the ensuing vote will apply to all members.

⁹ Article 15, OECD Convention. The European Nuclear Energy Agency remained under the OECD, formally dropping “European” from its title in 1972.

and investment. In addition to working with individual jurisdictions, the OECD works with other international organizations, under the authority granted in Article 12.

Article 13 and the Supplementary Protocol No. 1 that accompanied the OECD Convention, provides that the European Commission may participate in the OECD to the extent permitted by the Treaties of Rome and Paris. As the successor to the original European Commissions organized under those treaties, the present-day European Commission participates in activities of the OECD but is not a member of the OECD.

Growth in membership¹⁰

Since its founding, the OECD has grown to include 34 members from around the world, and developed numerous programs to work closely with many non-members. One of the first non-European countries to accede to the OECD was Japan, in 1964. Chile, Estonia, Israel, and Slovenia became the most recent countries to accede to the OECD convention, in 2010. Accession talks are ongoing with Colombia and Latvia, and Lithuania and Costa Rica have been invited to open formal talks about potential accession. Table 1, below, lists all member countries and the date on which they deposited instruments of ratification of the OECD convention.

Table 1.–OECD Membership

Member Country	Date
Australia	June 7, 1971
Austria	September 29, 1961
Belgium	September 13, 1961
Canada	April 10, 1961
Chile	May 7, 2010
Czech Republic	December 21, 1995
Denmark	May 30, 1961
Estonia	December 9, 2010
Finland	January 28, 1969
France	August 7, 1961
Germany	September 27, 1961
Greece	September 27, 1961
Hungary	May 7, 1996

¹⁰ Information in this section is based on OECD website, at <http://www.oecd.org/about/membersandpartners>.

Member Country	Date
Iceland	June 5, 1961
Ireland	August 17, 1961
Israel	September 7, 2010
Italy	March 29, 1962
Japan	April 28, 1964
Korea	December 12, 1996
Luxembourg	December 7, 1961
Mexico	May 18, 1994
Netherlands	November 13, 1961
New Zealand	May 29, 1973
Norway	July 4, 1961
Poland	November 22, 1996
Portugal	August 4, 1961
Slovak Republic	December 14, 2000
Slovenia	July 21, 2010
Spain	August 3, 1961
Sweden	September 28, 1961
Switzerland	September 28, 1961
Turkey	August 2, 1961
United Kingdom	May 2, 1961
United States	April 12, 1961

Nonmembers may participate by invitation in certain meetings. Nonmembers invited with approval of the Council may participate in meetings with the same rights of a member. Five countries are accorded “key partner” status: Brazil, India, Indonesia, China, and South Africa. Work with these partners includes a range of OECD activities, adoption of and adherence to OECD principles, integration into the data collection and assessments of the OECD, and other activities as determined by the OECD and each partner. The OECD has also developed a number of regional programs throughout the world to begin work on exchange of good practices within the region.¹¹

¹¹ The regional programs focus on Africa; Central and Eastern Europe, the Caucasus and Central Asia; Latin America; Middle East and North Africa; Southeast Asia; and South East Europe.

United States status within the OECD

The United States is a member of the OECD and an observer at the Council of Europe. When the OECD Convention was pending with the United States Senate for advice and consent, concerns were raised about the extent to which membership in such an organization could limit legislative authority or expand or limit the executive branch powers. Based on assurances offered by both the Eisenhower and Kennedy Administrations, the resolution for ratification included a statement of the Senate understanding of the OECD Convention that "...nothing in the Convention, or the advice and consent of the Senate of the ratification thereof, confers any power on the Executive to bind the United States in substantive matters beyond what the Executive now has, or to bind the United States without compliance with applicable procedures imposed by domestic law, or confers any power on the Congress to take action in fields previously beyond the authority of Congress, or limits Congress in the exercise of any power it now has."¹²

2. OECD Role in Developing Tax Policy

As part of its work to promote trade and economic growth, the OECD and its predecessor have worked to develop normative tax principles that resolve conflicting claims of jurisdiction to tax cross-border income. International law recognizes the right of a sovereign nation to regulate conduct based on a nexus of the conduct to the territory of the nation or to a person (whether natural or juridical) whose status links the person to the nation, subject to limitations based on evaluating the reasonableness of the regulatory action.¹³ In turn, these two broad bases of jurisdiction, i.e., territoriality and nationality of the person whose conduct is regulated, have been refined and, in varying combinations, shape most systems of income taxation. As a result, there is a risk that conflicting standards for determining residency, sources of income or other basis of taxation can lead to double taxation, that is, the same income may be subject to taxation in two or more jurisdictions. To the extent that the rules of two or more countries overlap, rules to mitigate potential double taxation generally apply, either by operation of bilateral treaties to avoid double taxation or in the form of legislative relief, such as credits for taxes paid to another jurisdiction.

The principles developed by the OECD for relief of double taxation are generally reflected in the provisions of the Model Tax Convention on Income and on Capital of the Organization for Economic Cooperation and Development (the "OECD Model treaty"),¹⁴ a precursor of which was first developed by the OEEC in 1958, which in turn has antecedents from

¹² Cong. Record, Senate, March 16, 1961, 87 Congress Vol. 107, page 4154.

¹³ Restatement (Third) of Foreign Relations Law of the United States, secs. 402 and 403, (1987).

¹⁴ OECD (2014), Model Tax Convention on Income and on Capital: Condensed Version 2014, OECD Publishing. http://dx.doi.org/10.1787/mtc_cond-2014-en. The multinational organization was first established in 1961 by the United States, Canada and 18 European countries, dedicated to global development, and has since expanded to 34 members.

work by international organizations from the 1920's.¹⁵ As a consensus document, the OECD Model treaty is intended to serve as a model for countries to use in negotiating a bilateral treaty that would settle issues of double taxation as well as to avoid inappropriate double nontaxation. The provisions have developed over time as practice with actual bilateral treaties leads to unexpected results and new issues are raised by members that are parties to such treaties.

The policies reflected in the OECD Model treaty are developed on the basis of information about the tax regimes and business practices of members and nonmembers, including their experience with actual treaties. At present, the OECD work on taxation is conducted under its Centre for Tax Policy and Administration. Working parties for each article in the OECD Model treaty analyze how such articles are working in practice, and develop formal commentary on the articles. The OECD consults with stakeholders in the private sector, through the Business and Industry Advisory Committee, a group that attempts to build industry consensus and ensure that views of business are given appropriate weight in OECD deliberations.

Coordination of work with Group of Twenty

The OECD and the Group of Twenty (“G20”) Ministers of Finance work on a range of issues including agriculture, employment, energy, social policy, taxation, trade and investment. G20 is a forum for international economic cooperation among 19 member countries and the European Union.¹⁶ The G20 has met regularly since 1999 at the finance minister and central bank governor level. In November 2008, the G20 country leaders held the first G20 summit, in Washington, D.C., to address the global financial crisis. The following year, at its London Summit, the leaders declared that “the era of banking secrecy is over.”¹⁷ Later that year, the OECD Secretary-General attended the leaders’ meeting for the first time. The leaders designated the G20 to be the premier forum for international economic cooperation among the member countries.¹⁸ The leaders of the members meet annually, while finance and banking regulators meet more frequently throughout the year.

With respect to the enhancement of the ability of tax authorities to gain access to information, the OECD and G20 work on information exchange and transparency have been central to development of an international consensus on the need for improved transparency regarding financial accounts. Although exchange of information has been part of the OECD Model treaty since the beginning, its effectiveness was undermined by lack of commitment to

¹⁵ Lara Friedlander and Scott Wilkie, “Policy Forum: The History of Tax Treaty Provisions--And Why It Is Important to Know About It,” 54 *Canadian Tax Journal* No. 4 (2006).

¹⁶ The members of the G20 are Argentina, Australia, Brazil, Canada, China, France, the European Union, Germany, India, Indonesia, Italy, Japan, the Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, and the United States of America.

¹⁷ London Summit, Leaders Declaration, paragraph 15, April 2, 2009. Available at <http://www.oecd.org/g20/meetings/london/G20-Action-Plan-Recovery-Reform.pdf>.

¹⁸ Leaders’ Statement, The Pittsburgh Summit, September 24-25, 2009, paragraph 19, available at <http://www.oecd.org/g20/meetings/pittsburgh/G20-Pittsburgh-Leaders-Declaration.pdf>.

transparency on the part of some jurisdictions. Under the work of the OECD's Harmful Tax Practices Project, which is carried out through the Forum on Harmful Tax Practices ("FHTP"), more than 40 jurisdictions with harmful tax practices were identified. A Global Forum, an organization of both OECD members and nonmembers, was formed to address the issues of bank secrecy and effective exchange of information. In 2009, the OECD published standards under which adherents to the standards would respect requests to exchange information where it is "foreseeably relevant" to the administration and enforcement of the domestic laws of a requesting State and not permit restrictions on exchange due to bank secrecy or domestic tax interest requirements, while respecting both taxpayer rights and strict confidentiality of information exchanged.¹⁹ These standards have been endorsed by the G20 Ministers of Finance. At the urging of the G20, the OECD also reorganized and renamed the forum the Global Forum on Transparency and Exchange of Information (the "Global Forum").²⁰ As of 2015, all of the 40 jurisdictions identified as having harmful tax practices by the FHTP are members of the Global Forum and are committed to the aforesaid transparency standards.

3. Background of OECD/G20 BEPS Project

As G20 and various policymakers worked toward greater transparency in tax administration, concerns about the operation of and effects of tax on cross-border activities were voiced. These concerns related to the difficulty of taxing corporations engaged in cross-border activities, a perceived increase in base erosion and profit shifting, and a risk that double taxation may arise if governments acted unilaterally to protect their respective corporate tax revenue bases, and resulting uncertainty for taxpayers with cross-border operations. At the G20 Leaders Summit in June 2012, world leaders expressed the "need to prevent base erosion and profit shifting" and voiced support for the work being done in that area by the OECD.²¹

In response to concerns raised by the G20, and the desire to provide an internationally coordinated approach, the OECD released a report in early 2013,²² presenting an overview of data and global business models, and discussing some of the issues related to base erosion and profit shifting. The BEPS Report listed several key principles for the taxation of cross-border

¹⁹ Overview of the OECD's Work on International Tax Evasion (A note by the OECD Secretariat), p. 3 (March 23, 2009) ("2009 OECD Overview"). See, OECD, *Update to Article 26 of the OECD Model Tax Convention and Its Commentary*, (July 12, 2012), available at http://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20%282%29.pdf.

²⁰ OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes*, November 2013, available at http://www.oecd.org/tax/transparency/global_forum_background%20brief.pdf; St. Petersburg Declaration, paragraph 51, available at https://g20.org/wp-content/uploads/2014/12/Saint_Petersburg_Declaration_ENG_0.pdf.

²¹ G20 Leaders Declaration, Los Cabos, Mexico, June 19, 2012, at paragraph 48. Available at <http://www.treasury.gov/resource-center/international/g7-g20/Documents/Washington%20Nov%20Leaders%20Declaration.pdf>. See also the G20 Ministers Communique, Mexico City, Mexico, November 5, 2012.

²² OECD, *Addressing Base Erosion and Profit Shifting*, 2013, available at <http://dx.doi.org/10.1787/9789264192744-en> ("BEPS Report").

activities and the base erosion and profit shifting opportunities the principles may create. The BEPS Report concluded that it is often the interaction of various principles and the asymmetries among tax regimes of multiple jurisdictions with which a taxpayer has contact that allows base erosion and profit shifting to occur.

The OECD/G20 BEPS Action Plan (“BEPS Action Plan”)²³ was approved by the G20 leaders at the St. Petersburg summit in September 2013.²⁴ The BEPS Action Plan reiterated the need for new international standards and identifies 15 action items (“BEPS Actions”). The BEPS Action Plan set a goal of completion within two years. Initial proposals with respect to work on hybrid mismatch arrangements, treaty abuse, the transfer pricing aspects of intangibles, documentation requirements for transfer pricing purposes, and a report on issues raised by the digital economy and possible actions to address them, were due within 12 to 18 months. A longer timeline was proposed for work relating to CFC rules, interest deductibility, preventing artificial avoidance of permanent establishment status, transfer pricing aspects of intangibles, risks, capital and high-risk transactions, data collection, mandatory disclosure rules and dispute resolution. Finally, it was anticipated that work on transfer pricing of financial transactions and development of a multilateral treaty to implement proposals would extend beyond the contemplated two-year duration of the project.

The plan required that the OECD conduct its work not only with members of OECD and G20, but also with all interested nonmembers on an equal footing. For each action item, working groups were organized to begin the process of consultation with stakeholders, development of recommendations and reports. Prior to submission to the G20, the proposals were required to be the subject of public comment, necessitating release of discussion drafts, a period for public comment, publication of those comments, and in some instances public consultation meetings. Revised reports were then submitted through a review process within the OECD, ultimately requiring approval of the Council, before submission to the G20 Ministers, and if approved there, to the G20 leaders. The timeline included in the Appendix reflects the publication of drafts and final reports, the comment period, public consultation, and submissions to the G20, for each action item.

The final reports on each of the 15 action items identified in the BEPS Action Plan were delivered to the G20 leaders, who subsequently endorsed the reports at the Antalya Summit, stating, “To reach a globally fair and modern international tax system, we endorse the package of measures developed under the ambitious G20/OECD Base Erosion and Profit Shifting (BEPS) project. Widespread and consistent implementation will be critical in the effectiveness of the project, in particular as regards the exchange of information on cross-border tax rulings. We, therefore, strongly urge the timely implementation of the project and encourage all countries and

²³ OECD, *Action Plan on Base Erosion and Profit Shifting*, July 19, 2013, available at <http://www.oecd.org/tax/action-plan-on-base-erosion-and-profit-shifting-9789264202719-en.htm>

²⁴ The complete annex is available at <http://www.oecd.org/g20/meetings/saint-petersburg/Tax-Annex-St-Petersburg-G20-Leaders-Declaration.pdf>

jurisdictions, including developing ones, to participate.”²⁵ The G20 leaders asked the OECD to develop an inclusive framework by early 2016 to assist the implementation of the recommendations in interested non-G20 countries and jurisdictions, including developing economies. In expressing support for the implementation of the recommendations, the group reaffirmed its commitment to enhancing the transparency of tax administration and exchange of information, including both automatic exchange and exchanges in response to specific requests.

²⁵ See, G20 Leaders Communique, Antalya Summit, 15-16 November 2015, paragraph 15. Available at <http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/15-16/>.

B. Summary of OECD/G20 BEPS Actions

Introduction

The following sections provide a brief summary of each of the BEPS Actions. These summaries are not comprehensive, but provide an overview of the final reports for each of the BEPS actions, including a description of the main discussion points, any recommendations made by the OECD, and next steps anticipated by the OECD.

Countries around the world can be expected to make, and in many cases already have made, changes to their internal tax laws as a result of the BEPS Project. Individual country law changes are beyond the scope of this pamphlet. A number of organizations, however, are offering free and fee-based tracking of internal law changes stemming from the BEPS Project.²⁶

Action 1: Addressing the Tax Challenges of the Digital Economy

Discussion

In September 2013, the Task Force on the Digital Economy (“TFDE”) was established as a subsidiary body of the OECD Committee on Fiscal Affairs. The TFDE includes non-OECD G20 countries as associates on an equal footing with OECD countries. The TFDE was established to develop a report identifying tax issues raised by the digital economy and to provide detailed options to address them.

The TFDE identified the spread of the digital economy as a challenge for international taxation. The digital economy’s reliance on intangible property, the use and collection of data, and the difficulty of determining the jurisdiction in which the value is created raise fundamental questions as to how companies add value and make profit. The application of the concepts of source and residence or the characterization of income for tax purposes is more difficult in the context of the digital economy.

The TFDE determined that the digital economy is increasingly becoming the economy itself and that attempting to ring-fence the digital economy from the rest of the economy for tax purposes would not be practical. Instead, the TFDE identified some key features of the digital economy that exacerbate the BEPS risks, and work on other actions took these risks into consideration to ensure that the proposed solutions addressed the additional risks of BEPS in the digital economy.

In addition to analyzing the challenges posed by the digital economy in the taxation of income the TFDE also looked at the challenges posed for value added tax collection, particularly where goods, services, and intangibles are acquired by private consumers from suppliers abroad.

²⁶ See, for example, <http://www2.deloitte.com/global/en/pages/tax/articles/beps-country-scorecards.html>; <http://www.ey.com/GL/en/Services/Tax/OECD-base-erosion-and-profit-shifting-project> (link to “The Latest on BEPS” for bi-weekly reports of individual country developments); <https://www.ibfd.org/IBFD-Tax-Portal/News/NEW-Comtax-BEPS-Tracker>; and <https://home.kpmg.com/xx/en/home/insights/2015/03/beps-in-taxnewsflash.html>.

The TFDE analyzed various options including: introducing a new nexus standard based on a significant economic presence; proposing a withholding tax on certain types of digital transactions; and imposing an equalization levy. These actions were not recommended as the TFDE expects that other measures developed in the BEPS Project would have significant impact on BEPS issues identified in the work on the digital economy.

Recommendations

The TFDE considered options to modify the exceptions to permanent establishment status to ensure that the exceptions were only available for activities that are in fact preparatory or auxiliary in nature. This work is reflected in the work on Action 7.

With regards to indirect taxes, the TFDE recommends that countries apply the principles of the international value-added tax (“VAT”) and general goods and services tax (“GST”) guidelines for the collection of VAT on cross-border business-to-consumer supplies of services and intangibles and to consider introduction of the collection mechanisms included in the guidelines.

Countries may adopt the various options the TDFE identifies (the new nexus standard, withholding taxes on certain digital transactions, and imposition of an equalization levy), provided that countries respect existing treaty obligations and that they ensure consistency with existing international legal commitments.

Next steps

Future work will be detailed in a mandate to be developed during 2015 with a report reflecting the outcome of the continued work to be produced by 2020.

The OECD Committee on Fiscal Affairs will clarify the characterization of certain payments under new business models (especially cloud computing payments) under current tax treaty rules.

Implementation packages for the implementation of the international VAT/GST guidelines will be developed to ensure that countries can implement these guidelines in a coordinated manner.

Action 2: Neutralizing the Effects of Hybrid Mismatch Arrangements

Background

The tax laws of one country may treat a particular cross-border arrangement differently from the treatment of the arrangement under the tax laws of another country to which the arrangement has a connection. This varying tax treatment has been referred to colloquially as a hybrid arrangement. Taxpayers have used hybrid arrangements to achieve favorable tax outcomes (or “mismatches”) such as a deduction in one country with no corresponding income inclusion anywhere or a duplicate deduction in two countries.

Hybrid arrangements come in different forms. Hybrid instruments are financial instruments that are classified differently under the tax laws of two or more countries. For example, an instrument that is treated as indebtedness under the laws of one country may be treated as equity under the laws of another country. Hybrid entities and reverse hybrid entities are business entities that are classified differently under the tax laws of two or more countries. If the country of residence of an entity treats the entity as fiscally transparent and another country classifies the entity as a separately taxable corporation, the entity is a hybrid entity from the perspective of the residence country. By contrast, from the residence country's perspective a reverse hybrid entity is an entity that is a separately taxable corporation under the residence country's tax law and is fiscally transparent under the tax law of another country.

The BEPS Action Plan provides that the OECD would “develop model treaty provisions and recommendations regarding the design of domestic rules to neutralise the effect (e.g. double non-taxation, double deduction, long-term deferral) of hybrid instruments and entities.”²⁷ The OECD published an interim report in September 2014.²⁸ The final report (or “final Action 2 report”)²⁹ expands on the interim report in a number of respects but is largely consistent with the earlier report in its recommendations.

Recommendations

The final Action 2 report provides two categories of recommendations: internal law recommendations and an OECD Model treaty recommendation. The report recommends internal law rules to stop taxpayers from achieving favorable tax outcomes through hybrid mismatch arrangements. These internal law recommendations are categorized according to the particular outcome to which they are addressed: deduction / no inclusion (“D/NI”) mismatches and double deduction (“DD”) mismatches.

A D/NI mismatch might result from a payment under a hybrid financial instrument, from a disregarded hybrid payment, or from a reverse hybrid payment. A taxpayer in one country might make a payment on a financial instrument to a related taxpayer in another country in a situation in which the tax laws of one of the countries treat the instrument differently from the treatment of the instrument under the tax laws of the other country. The related taxpayers create a D/NI mismatch if the country of residence of the payor treats the instrument as indebtedness and allows an interest deduction for the payment while the related recipient's country of residence treats the instrument as equity and the payment as an exempt dividend.

²⁷ OECD, *Action Plan on Base Erosion and Profit Shifting*, 2013, p. 15.

²⁸ OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2: 2014 Deliverable*, 2014. The OECD also had done previous work related to hybrid arrangements. See, for example, Organization for Economic Cooperation and Development, *Addressing Tax Risks Involving Bank Losses*, 2010, and Organization for Economic Cooperation and Development, *Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues*, 2012.

²⁹ OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2: 2015 Final Report*, 2015.

Taxpayers also might produce a D/NI mismatch by setting up a disregarded hybrid payment. A taxpayer in one country might make a loan to a wholly-owned subsidiary in a second country in a situation in which (1) the first country disregards the wholly-owned subsidiary as separate from its parent company and, therefore, sees no loan and no payment on a loan for purposes of its tax law, but (2) the second country treats the wholly-owned subsidiary as separately taxable and, therefore, allows a deduction for a payment of interest on the loan.

Taxpayers might create a D/NI mismatch as well through a reverse hybrid payment under which a subsidiary company that is treated as fiscally transparent in its country of residence but as separately taxable in the country of residence of its parent company makes a loan to an accommodation party (a party that is aware of, and may benefit indirectly from, the structured nature of the arrangement), with the result that the accommodation party is allowed an interest deduction even though neither the parent company's nor the subsidiary company's country of residence taxes interest payments on the loan. The parent company's country of residence respects the recipient subsidiary as separately taxable on the interest but the subsidiary's country of residence treats the subsidiary as transparent. In these D/NI examples, the final Action 2 report recommends as a primary rule that the country of residence of the payor deny a deduction for the payment that yields the D/NI outcome. If the payor country does not deny a deduction in the hybrid financial instrument or disregarded payment example, the final report recommends that, as a defensive rule, the country of residence of the recipient of the payment require that the payee include the payment in income.

A DD mismatch might result from a payment made by a hybrid entity or from a payment made by a dual-resident entity. A parent company in one country might organize a wholly-owned entity in a second country, and the parent country might disregard the entity as separate from the parent while the subsidiary country might respect the entity as separately taxable. If the wholly-owned entity borrows funds, a DD mismatch results if interest payments on the borrowing are deductible against other income in both the parent country (which treats the loan as made by the parent company directly) and the subsidiary country (which treats the loan as made by the wholly-owned entity). In this situation, the final Action 2 report recommends, as a primary rule, that the country of residence of the parent company deny a deduction for the interest payments and, as a defensive rule, that the country of residence of the wholly-owned payor deny a deduction for the interest payments if the parent country does not adopt the primary rule. When a DD mismatch instead results from a situation in which two countries otherwise allow an deduction for the same payment by a dual-resident entity – that is, an entity that each country treats as its resident – the final Action 2 report recommends that both countries deny the deduction.

To address hybrid mismatches, the final Action 2 report also includes what it refers to as “improvements” to internal laws that, among other things, (1) deny a dividend exemption in respect of payments that are deductible in the country of residence of the payor, and (2) prevent taxpayers from using hybrid transfers to duplicate credits for source-country withholding tax.

The final Action 2 report's OECD Model treaty recommendation proposes to include in the OECD Model Tax Convention a new provision to ensure that an entity that is a hybrid entity under the tax laws of two treaty countries is eligible for treaty benefits in appropriate

circumstances but that treaty benefits are not allowed for income that neither treaty country treats as income of one of its residents.

Action 3: Designing Effective Controlled Foreign Company Rules

Discussion

Action 3 recognizes that entities may establish non-resident affiliates to which they shift income and these affiliates may be established wholly or partly for tax reasons. Controlled foreign company (“CFC”) and other anti-deferral rules combat BEPS by currently taxing certain income earned by foreign subsidiaries. Currently the United States and the 29 other countries participating in the BEPS Project have CFC rules, and many others have expressed interest in implementing CFC rules.

The BEPS Action Plan called for the development of recommendations regarding the design of CFC rules. The final report sets out recommendations in the form of building blocks. The recommendations are not minimum standards; rather they provide jurisdictions that choose to implement them with rules that effectively prevent taxpayers from shifting income into foreign subsidiaries.

Recommendations

The report sets out six building blocks for the design of effective CFC rules.

- Definition of a CFC. The report sets out recommendations on how to determine when shareholders have sufficient influence over a foreign company for that company to be considered a CFC.
- CFC exemptions and threshold requirements. The report recommends that CFC rules only apply to CFCs that are subject to effective tax rates that are meaningfully lower than the rates the parent jurisdiction applies.
- Definition of income. The report recommends that CFC rules include a definition of CFC income, and sets out a non-exhaustive list of approaches or combination of approaches that CFC rules could use for such a definition.
- Computation of income. The report recommends that CFC rules use the rules of the parent jurisdiction to compute the CFC income to be attributed to the shareholders. It also recommends that CFC losses should only be offset against the profits of the same CFC or other CFCs in the same jurisdiction.
- Attribution of income. The report recommends that, when possible, the attribution threshold should be tied to the control threshold and that the amount of income to be attributed should be calculated by reference to the proportionate ownership or influence.
- Prevention and elimination of double taxation. The report emphasizes the importance of both preventing and eliminating double taxation, and it recommends, for example, that jurisdictions with CFC rules allow a credit for foreign taxes actually paid, including any tax assessed on intermediate parent companies under a CFC regime. It

also recommends that countries consider relief from double taxation on dividends on, and gains arising from the disposal of, CFC shares where the income of the CFC has previously been subject to taxation under a CFC regime.

The recommendations provide flexibility to implement CFC rules and sets out design options that could be implemented to be compliant with European Union law.

Action 4: Limiting Base Erosion Involving Interest Deductions and Other Financial Payments

Discussion

The OECD has identified the use of debt and similar instruments to generate interest deductions in the cross-border context as profit shifting techniques that are very simple for companies to establish. The tax rules of most jurisdictions distinguish between debt and equity financing, whereby interest payments on debt are generally deductible while payments of dividends on equity are generally not deductible. The OECD notes in its report that a number of academic studies have established the influence of tax rules on the location of debt within multinational groups.

According to the OECD, the risks of BEPS in this area may arise as a result of groups placing higher levels of third party debt in high tax countries, using intragroup loans to generate interest deductions in excess of the group's actual third party interest expense, and using third party or intragroup financing to fund the generation of tax-exempt income.

Multinational groups can make use of the disparate international tax rules in different countries to introduce distortions with respect to the ownership of capital, by selectively using interest deductions to reduce the cost of capital, providing them an advantage over purely domestic firms in holding assets. In part, multinational groups achieve this result through borrowing by the parent company to make equity investments in their subsidiaries. While the interest on the third-party debt is deductible by the parent, the equity return on the subsidiary asset may be deferred or largely exempt from taxation.

While a number of countries already have so-called interest stripping or earnings stripping rules, the OECD is encouraging a more consistent approach across jurisdictions. In principle, the approach would associate an interest deduction with the overall external interest expense of the group, and further, to the income producing activities in the jurisdiction.

Recommendations

The final report on Action 4 recommends an approach based on a fixed ratio rule, which limits an entity's net deductions for interest (and payments economically equivalent to interest) to a percentage of its earnings before interest, taxes, depreciation and amortization ("EBITDA"), as measured under relevant tax principles. The recommended approach includes a "corridor" of possible ratios of between 10 and 30 percent for adoption by countries. Action 4 also includes factors that countries should take into account in setting their fixed ratio within the corridor. A worldwide group ratio rule that allows an entity to exceed this limit in certain circumstances may supplement this approach.

Recognizing that some groups are highly leveraged with third party debt for non-tax reasons, the recommended approach proposes a group ratio rule alongside the fixed ratio rule. This proposed approach would allow an entity with net interest expense above a country's fixed ratio to deduct interest up to the level of the net interest to EBITDA ratio of its worldwide group.

The OECD also suggests a voluntary rule that countries may apply an increase in limitation (or "uplift") of up to 10 percent over the worldwide group's net third party interest expense in order to prevent international double taxation. The earnings-based worldwide group ratio rule can also be replaced by different group ratio rules, such as the "equity escape" rule, which compares an entity's level of equity and assets to those held by its group, a variety of which some countries have already adopted into their domestic law.

If a country does not introduce a group ratio rule, it should apply the fixed ratio rule to entities in multinational and domestic groups without improper discrimination. The recommended approach also allows countries to supplement the fixed ratio rules with exceptions for situations that pose less risk of BEPS, including a *de minimis* threshold for low levels of group-wide net interest expense, and for certain loans that fund public-benefit projects.

To reduce the impact on earnings volatility with respect to the ability of an entity to deduct interest expense, the approach introduces optional rules for carryforward of disallowed interest expense and/or unused interest capacity.

The report also recommends that targeted anti-abuse rules support the approach.

Next steps

The report recognizes that the banking and insurance industries have specific features that must be taken into account and therefore there is a need to develop suitable and specific rules that address BEPS risks in these sectors.

The OECD recognizes that success of the Action 4 recommendations is entirely dependent upon a multitude of countries enacting new domestic rules and therefore recommends monitoring of the implementation, operation, and impact of the recommendations.

Action 5: Countering Harmful Tax Practices More Effectively, Taking Into Account Transparency and Substance

Overview

The final report to Action 5 of the BEPS Project is an outgrowth of work that the OECD has conducted on identifying and countering harmful tax practices as part of the FHTP. The goal of this work is to "secure the integrity of tax systems by addressing the issues raised by regimes

that apply to mobile activities and that unfairly erode the tax bases of other countries, potentially distorting the location of capital and services.”³⁰

In a 1998 report, the OECD established four key factors and eight other factors to be used to determine whether a preferential regime is harmful. The four key factors are: (1) the regime imposes no or low effective tax rates on income from geographically mobile financial and other service activities; (2) the regime is ring-fenced from the domestic economy; (3) the regime lacks transparency; and (4) there is no effective exchange of information with respect to the regime. The eight other factors are: (1) an artificial definition of the tax base; (2) failure to adhere to international transfer pricing principles; (3) exemption of foreign-source income from residence-country taxation; (4) negotiable tax rate or tax base; (5) existence of secrecy provisions; (6) access to a wide network of tax treaties; (7) the regime is promoted as a tax minimization vehicle; and (8) the regime encourages operations or arrangements that are purely tax-driven and involve no substantial activities (“substantial activity factor”).

The final report to Action 5 describes the substantial activity factor that is one of the eight other factors used to determine whether a preferential regime is harmful, with an emphasis on the substantial activity factor’s application to regimes that provide a tax preference on income relating to intellectual property (“IP”). In addition, the report includes recommendations for how to improve transparency in the exchange of information on tax rulings that may give rise to BEPS concerns and offers a review of preferential regimes.

Substantial activity requirement for preferential regimes

In the context of IP regimes, the substantial activity requirement reflects a “nexus approach,” meaning that countries are allowed to provide preferential tax treatment to IP-related income “so long as there is a direct nexus between the income receiving benefits and the expenditures contributing to that income.”³¹ Research and development (“R&D”) expenditures incurred by the taxpayer to develop IP are a proxy for substantial activities, but, in the final report’s view, it is the proportion of expenditures directly related to IP, as opposed to the amount, that measures how much substantial activity the taxpayer undertook. In particular, the proportion of income benefiting from an IP regime is the same proportion as that between research expenditures and overall expenditures incurred by the taxpayer to develop the IP. The final report introduces, and defines the necessary terms for, the following calculation to illustrate how the benefits of an IP regime can be computed in a manner consistent with the nexus approach:

³⁰ OECD, *Countering Harmful Tax Practices More Effectively, Taking Into Account Transparency and Substance*, September 16, 2014, p. 7.

³¹ *Ibid.*, p. 24. The report also describes, but in less detail, substantial activity requirements in the context of non-IP regimes, such as headquarters regimes, banking and insurance regimes, shipping regimes, and holding company regimes.

$$\frac{\text{Qualifying expenditures incurred to develop IP asset}}{\text{Overall expenditures incurred to develop IP asset}} \times \text{Overall income from IP asset} = \text{Income receiving tax benefits}$$

“Qualifying taxpayers” that may benefit from an IP regime include resident companies, domestic permanent establishments (“PEs”) of foreign companies, and foreign PEs of resident companies that are subject to tax in the country offering the regime. Under the nexus approach, IP assets that may qualify for the benefits of an IP regime (“qualifying IP assets”) are limited to patents and other IP assets that are functionally equivalent to patents if those IP assets are both legally protected and subject to similar approval and registration processes. IP assets that are functionally equivalent to patents are patents defined broadly, copyrighted software, and, under certain conditions, other IP assets that are non-obvious, useful, and novel.³² Functionally equivalent patents could include, for example, certain designs.

“Qualifying expenditures” must have been incurred by a qualifying taxpayer, and they must be directly connected to the IP asset. The final report allows countries to provide the actual definition of qualifying expenditures but notes that qualifying expenditures should be limited to research expenditures incurred to develop an IP asset. The report notes that these expenditures include the type of expenditures that would qualify for R&D credits under the tax laws of multiple jurisdictions (*e.g.*, salary and wages, direct costs, overhead costs directly associated with R&D facilities, and the cost of supplies, incurred from the performance of activities undertaken to advance the understanding of scientific relations or technologies, address known scientific or technological obstacles, or otherwise increase knowledge or develop new applications). Countries may permit taxpayers to increase expenditures that are included in qualifying expenditures by up to 30 percent to account for costs related to acquisition of the IP or the outsourcing of IP development, which are not incurred by the taxpayer and therefore would not be considered a “qualifying expenditure.”

“Overall expenditures” should be defined in such a way that if the qualifying taxpayer incurred all relevant expenditures itself, 100 percent of the income from the IP asset would benefit from the IP regime. In particular, overall expenditures should exclude interest payments, building costs, and other costs that do not represent actual R&D activities, but should include IP acquisition costs and expenditures for outsourcing that do not count as qualifying expenditures.

“Overall income” should only include income that is derived from the IP asset and, in general, should be calculated by subtracting IP expenditures allocable to IP income and incurred in a given year from gross IP income earned in that year.

The final report contains grandfathering provisions for existing IP regimes. No new entrants will be permitted in any existing IP regime not consistent with the nexus approach after June 30, 2016, and if a new regime consistent with the nexus approach takes effect before June 30, 2016, no new entrants will be permitted in the existing IP regime after the new IP regime has

³² *Ibid.*, pp. 26-27. The conditions are described in the final report to Action 5 and generally apply to taxpayers that earn gross revenues below a certain threshold from all their IP assets.

taken effect. “New entrants” include both new taxpayers not previously benefiting from the regime and new IP assets owned by taxpayers already benefiting from the regime. Jurisdictions are permitted to introduce grandfathering rules that will allow all taxpayers benefiting from an existing regime to keep such entitlement until a second specified date (“abolition date”). The period between the two dates should not exceed five years (so the latest possible abolition date is June 30, 2021). After that date, no more benefits stemming from the respective old regimes may be given to taxpayers.

Framework for improving transparency in relation to rulings

The final report to Action 5 also establishes a framework to improve transparency, including the compulsory spontaneous exchange of information on certain rulings.³³ The goal of the work is to cover all rulings that could give rise to BEPS concerns. Rulings are defined as “any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on which they are entitled to rely.” The rulings covered by the framework fall into six categories: (1) rulings related to preferential regimes, (2) cross-border unilateral advance pricing arrangements (“APAs”) or other unilateral transfer pricing rulings, (3) rulings giving a downward adjustment to profits, (4) PE rulings, (5) conduit rulings, and (6) any other type of ruling where the FHTP agrees in the future that the absence of exchange would give rise to BEPS concerns.

The rulings that are subject to spontaneous exchange include past and future rulings. It has been agreed that information on rulings that have been issued on or after January 1, 2010, and were still in effect as of January 1, 2014, must be exchanged. Future rulings subject to exchange will only be those issued on or after April 1, 2016. For future rulings, when a country has provided a ruling that is subject to the obligation to spontaneously exchange, it must exchange the relevant information on that ruling with any affected country as quickly as possible and no later than three months after the date on which the ruling becomes available to the competent authority of the country that granted the ruling. Both the country exchanging information and its taxpayers have a legal right to expect that the information exchanged pursuant to the framework remains confidential, and may be used only for tax purposes or other purposes permitted by the relevant information exchange instrument (such as through a treaty agreement).

³³ The European Commission (“EC”) has been conducting investigations to determine whether certain member states were offering illegal state aid to certain companies by providing them with competitive advantage in the context of issuing a tax ruling. On June 11, 2014, the European Commission opened formal state aid investigations on three cases: Apple in Ireland, Starbucks in the Netherlands, and Fiat Finance and Trade in Luxembourg. On October 7, 2014, the EC opened an investigation regarding Amazon’s operations in Luxembourg.

On October 21, 2015, the EC concluded that Luxembourg granted selective tax advantages to Fiat’s financing company, and the Netherlands to Starbucks’ coffee roasting company, through tax rulings (similar in concept to advance pricing agreements) that, in the EC’s view, artificially lowered the tax paid by each company based on the transfer pricing methodology used in certain related-party transactions. The EC has ordered that Luxembourg and the Netherlands recover “unpaid tax” from Fiat and Starbucks, respectively, of between 20 million to 30 million euros for each company (or between \$23 million and \$32 million, approximately). A press release explaining the EC’s findings is available at http://europa.eu/rapid/press-release_IP-15-5880_en.htm.

Review of preferential regimes

The FHTP reviewed 43 preferential regimes to identify whether they constituted harmful tax practices. Sixteen were IP regimes, and all were inconsistent with the nexus approach. It is expected that countries will bring their IP regimes into compliance with the nexus approach, and the FHTP will monitor that progress.

Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

Discussion

Action 6 identifies treaty abuse through treaty shopping as one of the most important sources of BEPS concerns. Treaty shopping involves strategies through which a person who is not a resident of a country that is party to a particular bilateral income tax treaty attempts to obtain benefits of that treaty that are available only for residents of the treaty countries.

Countries have agreed to include anti-abuse provisions in their tax treaties, including a minimum standard to counter treaty shopping. They also agree that some flexibility in the implementation of a minimum standard, described below, is necessary so that they may be adapted to the particular circumstances and negotiations of bilateral treaties.

Recommendations

The OECD report recommends a three-part approach to counter treaty abuse.

- Countries would include in treaties a clear statement that tax evasion, avoidance, or treaty shopping is not condoned by the treaty countries.
- A specific anti-abuse rule known as limitation-on-benefits (“LOB”), which limits the availability of treaty benefits to entities that meet certain objective tests, will be included in the OECD Model treaty. The LOB conditions, which are generally based upon the legal nature, ownership in, and activities of the entity, seek to ensure that there is a sufficient connection between the entity and the country of residence.
- In order to address situations not caught under the LOB rule, a more general anti-abuse rule based on the principal purposes of transactions or arrangements (the principal purposes test or “PPT”) will be included in the OECD Model treaty.

In recommending a three-part approach, the OECD acknowledges that each of the LOB and PPT rules has relative strengths and weaknesses and in combination may not be appropriate for all countries. Also, the domestic law of some countries may include provisions that make it unnecessary to combine these two rules to prevent treaty shopping.

Countries involved have committed to ensure a minimum level of protection against treaty shopping (“minimum standard”). That commitment requires countries to include in their tax treaties an express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. Countries will implement this common intention by including in their treaties: (i) both an LOB and a PPT rule; (ii) the PPT rule

alone; or (iii) the LOB rule accompanied by a mechanism to combat any remaining possibilities for conduit financing arrangements.

The report also suggests new rules for inclusion in tax treaties in order to address other forms of treaty abuse. The targeted rules address certain dividend transfer transactions, real property transactions, dual-resident companies, and structures intended to arbitrage varying definitions of what constitutes a permanent establishment.

The report describes changes to the OECD Model treaty aimed at ensuring that treaties do not inadvertently prevent the application of domestic anti-abuse rules as well as a clear statement that the countries intend to deny treaty benefits in circumstances involving abusive transactions.

The report also addresses two issues related to the interaction between treaties and domestic rules. The first issue codifies the principle that treaties do not restrict a country's right to tax its own residents. The second issue deals with exit taxes, under which liability for tax on some types of income that has accrued for the benefit of a resident is triggered in the event that the resident ceases to be a resident of that country.

The report sets forth factors to identify the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country or to continue with an existing treaty in the event of a change in relevant factors.

Next steps

The OECD notes that additional work will be required in order to fully consider the LOB proposals recently released by the United States in connection with updating its model treaty. Since the United States does not anticipate finalizing its new model tax treaty until the end of 2015, the relevant provisions included in this report will need to be reconsidered and will therefore not be finalized until early 2016.

In addition, the OECD will continue to evaluate issues related to entitlement to treaty benefits by certain types of investment funds, which it also intends to finalize by early 2016.

Action 7: Preventing the Artificial Avoidance of Permanent Establishment Status

Discussion

Tax treaties generally provide that a country may only tax the business profits of a foreign enterprise to the extent that the enterprise has a permanent establishment in the taxing country to which the profits are attributable. The BEPS Action Plan includes Action 7 to develop changes to the definition of permanent establishment to prevent the artificial avoidance of permanent establishment status.

Action 7 recognizes that commissionaire arrangements³⁴ may enable a foreign enterprise to sell its products in a country without technically having a permanent establishment, therefore without being taxable in that country on the profits derived from such sales. Other similar strategies involve situations where contracts which are substantially negotiated in a country are not formally concluded in the country, or where the person exercising the authority to conclude contracts is an independent agent even though it is closely related to the foreign enterprise on whose behalf it is acting.

Additionally, the changes in the way that business is conducted, including the growth of the digital economy as detailed in the report on Action 1, take advantage of the specific exceptions to the definition of permanent establishment such that activities that were generally considered to be of a preparatory or auxiliary nature may nowadays correspond to core business activities. Action 7 also addresses the ease with which multinational enterprises may alter their structures and avoid permanent establishment status by fragmenting a cohesive operating business into several small operations, arguing that each part is merely engaged in preparatory or auxiliary activities.

Recommendations

Action 7 recommends specific changes to the permanent establishment rules of Article 5 of the OECD Model treaty. The changes tighten the agency rules of paragraph 5 and 6 such that if the agent habitually concludes contracts or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise in the name of the enterprise or for the transfer of, or the granting of the right to use, property of the enterprise or for the provision of services by the enterprise, the enterprise will be deemed to have a permanent establishment. The independent agent rules are narrowed such that a person who acts exclusively or almost exclusively on behalf of one or more closely related enterprises is not considered an independent agent.

Additionally, paragraph 4 of Article 5 of the OECD Model treaty clarifies that the exceptions from creating a fixed place of business for specific activities (such as storage, display or delivery of goods) apply only if the overall activity of the fixed place or business is of a preparatory or auxiliary character. A new anti-fragmentation rule is added to prevent an enterprise from fragmenting its activities between closely related enterprises. The activities of the related enterprises will be viewed together in determining whether they are of a preparatory or auxiliary character.

Next steps

The changes to the definition of permanent establishment that are included in this report will be among the changes proposed for inclusion in the multilateral instrument that will implement the results of the work on treaty issues mandated by the BEPS Action Plan.

³⁴ A commissionaire arrangement is loosely defined as an arrangement through which a person sells products in a country in its own name but on behalf of a foreign enterprise that is the owner of the products.

Follow-up work on attribution of profits issues related to Action 7 will be carried on with a view to providing guidance before the end of 2016, which is the deadline for the negotiation of the multilateral instrument.

Actions 8-10: Aligning Transfer Pricing Outcomes with Value Creation

Discussion

Transfer pricing rules determine the allocation of profits for tax purposes in transactions between entities that are part of the same multinational group. The 2013 OECD BEPS Action plan found that the existing international standards for transfer pricing are insufficient in that allocation of profits under the current rules does not necessarily align with the economic activity producing the profits.

Current transfer pricing rules are based on the “arm’s length principle:” members of multinational groups must price transactions as if group members were independent, operating at arm’s length and engaging in comparable transactions under similar conditions and economic circumstances. This comparability analysis is key to applying the arm’s length principle. If the conditions of the intra-group transaction are different from those between third parties in comparable circumstances, there may be adjustments to profit allocations for tax purposes.

BEPS Actions 8-10 address transfer pricing challenges related to intangible assets, risk and capital allocation, and other transactions which would not, or would only very rarely, occur between third parties. The underlying question for all actions is whether the actual transaction has commercial rationality, as compared to arrangements between unrelated parties under comparable economic circumstances.

Recommendations

For countries that formally subscribe to the OECD Transfer Pricing Guidelines, the guidance in the report takes the form of an amendment to the Transfer Pricing Guidelines.

Transactions that involve the use or transfer of intangibles³⁵

Intangible assets present challenges to transfer pricing analyses for a number of reasons. For example, intangibles might have special characteristics that complicate the search for comparables in a transfer pricing analysis, thus making it difficult to determine an appropriate transfer price. To address situations in which misallocation of profits generated by valuable intangibles has contributed to base erosion and profit shifting, the 2015 report clarifies that legal ownership alone does not necessarily generate a right to all (or any) of the return that is generated by the exploitation of the intangible. The group companies performing important functions, controlling economically significant risks, and contributing assets for the

³⁵ In the OECD Guidelines, the term “intangible” refers to something which is not a physical asset or a financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances.

development, value enhancement, maintenance, protection, and exploitation of an intangible asset, as determined through the accurate delineation of the actual transaction, will be entitled to an appropriate return reflecting the value of their contribution.

Where reliable comparable uncontrolled transactions with respect to intangibles cannot be identified, the report provides guidance on the use of valuation techniques to estimate an arm's length price.

The report also provides guidance on the definition of an intangible asset with specific illustrations.

To address situations in which there are information asymmetries between taxpayers and tax administrators, the report provides specific guidance for hard-to-value intangibles:³⁶ tax administrators may consider post-contractual outcomes as presumptive evidence of the appropriateness of the contractual pricing arrangement.

Contractual allocation of risks

In the open market, greater returns typically compensate assumption of increased risk. Allocation of profits according to contractual allocation of risks, however, may lead to profit allocations that do not correspond with the activities multinational group entities actually carry out. The 2015 report provides a new analytical framework for analyzing risk and provides that a transaction is not simply delineated by what is set out in a contract. Where necessary, evidence of the parties' actual conduct should supplement the terms of any contract.

Under the new framework for analyzing risk, to assume a risk for transfer pricing purposes the associated enterprise must control the risk (have the capability to decide whether to take on the risk and how to respond to risk) and have the financial capacity to assume the risk (access to funding to take on the risk or to lay off the risk, to pay for the risk mitigation functions, and to bear the consequences of the risk if the risk materializes). For example, where an enterprise providing capital does not exercise control over the investment risks that may give rise to premium returns, that enterprise should not expect more than a risk-free return.

Low value-adding intra-group services

Low value-adding intra-group services are services that are of a supportive nature, not part of the core business of the multinational group, do not require the use of unique and valuable intangibles, do not lead to the creation of unique and valuable intangibles, and do not involve or give rise to the assumption of substantial risks. In response to concerns that excessive charges for intra-group services have the potential to erode the tax base, the 2015 report provides an elective, simplified approach for transfer pricing with low value-adding services.

³⁶ The term hard-to-value intangibles covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises, (i) no reliable comparables exist, and (ii) at the time the transaction was entered into, the projections of future cash flows, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.

The approach in the report specifies a wide category of common intra-group services which typically have very limited profit mark-ups on costs; applies a consistent basis for allocating profits for all recipients of those intra-group services; and provides greater transparency through specific reporting and documentation requirements. Countries considering implementing the new approach may do so in combination with the introduction of a threshold: if the payments required under the approach exceed a threshold, then the tax administrators may perform a full transfer pricing analysis that would include requiring evidence demonstrating the detailed benefits received. Determinations of the threshold and other implementation issues will be undertaken and finalized before the end of 2016.

According to the report, the significant majority of countries participating in the BEPS Project have indicated that they will enable the simplified approach as soon as it is feasible in their domestic situations. Other countries have indicated that they are considering the introduction of the approach, but that their final decisions depend on the outcomes of follow-up work regarding implementation.

Commodity transactions

The report clarifies the existing guidance on the application of transfer pricing methods to commodity transactions. In such transactions, comparability must be based on economically relevant characteristics such as physical features, quality, contractual terms, and foreign currency. The report provides that taxpayers should provide reliable evidence of their price-setting policies, and should be able to justify deviations from quoted index data. The report also provides guidance on deemed pricing dates in the absence of evidence of an actual pricing date agreed to by the parties to the transaction. There will be future work to provide guidance and best practices for commodity-rich countries.

Cost contribution arrangements (“CCAs”)

Cost contribution arrangements are contractual arrangements in which business enterprises share the contributions and risks involved in the joint development, production, or the obtaining of intangibles, tangible assets, or services with the understanding that such items are expected to create benefits for the individual businesses of each of the participants. The 2015 report specifies that a party is not a participant in a CCA if it does not exercise control over the specific risks it assumes under the CCA and does not have the financial capacity to assume these risks. If contributions to and benefits of the CCA are not valued appropriately, profits may be shifted away from the location where value is created.

The report provides general guidance for determining whether the conditions established by associated enterprises for transactions covered by a CCA are consistent with the arm’s length principle. Allocation of contributions should generally accord with contributors’ respective shares of expected benefits. Contributions should generally be measured based on value, not cost. Where the value of a participant’s share of overall contributions at the time the contributions are made is not consistent with that participant’s share of expected benefits, the arm’s length principle would generally require an adjustment; this may take the form of an adjustment to the contribution through making or imputing a balancing payment. The 2015

report also provides recommendations for structuring and documenting cost contribution arrangements.

Multinational group synergies

Multinational groups and the associated enterprises that comprise such groups may benefit from interactions or synergies amongst group members that would not generally be available to similarly situated independent enterprises. These synergies are distinct from intangible assets. The report provides guidance that where corporate synergies arise from deliberate concerted group action to provide material advantages not typical with comparable independent companies, the benefits from multinational group synergies should be allocated to the group members that have contributed to these synergies.

Transactional profit split method

The transactional profit split method is a transfer pricing approach that is useful for highly integrated operations where each party makes unique and valuable contributions, and thus there are limited comparables available. The 2015 report provides a scope for revised guidance that will form the basis for additional guidance to be developed in 2016 and expected to be finalized in the first half of 2017.

Action 11: Measuring and Monitoring BEPS

Overview

The final report to Action 11 of the BEPS Project addresses a number of topics related to the empirical analysis of BEPS, including the measurement of BEPS and the identification of the economic impact of BEPS, and presents findings related to the scale and scope of BEPS.³⁷ The report also includes suggestions on how to evaluate the effectiveness of the various BEPS “countermeasures” proposed as part of the BEPS Project and offers recommendations on collecting and disseminating data to facilitate analysis of BEPS.

Measurement of BEPS

The final report to Action 11 defines BEPS as relating to “arrangements that achieve no or low taxation by shifting profits away from the jurisdictions where the activities creating those profits take place or by exploiting gaps in the interaction of domestic tax rules where corporate income is not taxed at all.”³⁸ The report proposes six indicators to analyze the existence, scale, and economic impact of BEPS over time: (1) the concentration of foreign direct investment (“FDI”) relative to gross domestic product (“GDP”); (2) high profit rates of low-taxed affiliates of top global multinational enterprises (“MNEs”); (3) high profit rates of MNE affiliates in

³⁷ As may be the case elsewhere in this document, the term “BEPS” may be used as an abbreviation for “base erosion and profit shifting” without being a direct reference to the BEPS Project.

³⁸ OECD, *Measuring and Monitoring BEPS*, September 16, 2014, p. 42.

lower-tax locations; (4) effective tax rates of large MNE affiliates relative to non-MNE entities with similar characteristics; (5) concentration of royalty receipts relative to research and development spending; and (6) interest expense to income ratios of MNE affiliates in countries with above-average statutory tax rates. The final report identifies the strengths and limitations of each indicator, and emphasizes that analysis of BEPS should not rely on any one indicator. Instead, the indicators should be viewed collectively to determine the scale and scope of BEPS.

In the view of the final report, analysis of data confirms the existence of BEPS and points to its increase in scale in recent years. The OECD bases its conclusion on the following findings contained in the final report: the profit rates of MNE affiliates in lower-tax countries are higher than their group's average worldwide profit rate; the effective tax rates paid by large MNE entities are estimated to be four to 8.5 percentage points lower than similar enterprises with only domestic operations; FDI in countries with net FDI to GDP ratios of more than 200 percent increased from 38 times higher than all other countries in 2005 to 99 times higher in 2012; the separation of taxable profits from the location of value creating activity with respect to intangible assets has been clear and growing over time; and related- and third-party debt is more concentrated in MNE affiliates operating in countries with higher statutory tax rates.

Economic impact of BEPS

The final report to Action 11 includes a review of the literature on the economic impact of BEPS and discusses methodological approaches to estimating the fiscal impact of BEPS and the various ways in which MNEs may engage in BEPS. The report also includes suggestions on how to estimate the impact of the various proposals and recommendations contained in the final report for each action item.

The OECD's review of the economic literature suggests that BEPS results in excessive interest deductions and distorts the location of patents and real economic activity. The OECD estimates that worldwide corporate income tax revenue losses from BEPS, on net, range from 4 percent to 10 percent of corporate income tax revenues (or \$100 billion to \$240 billion annually at 2014 levels).³⁹

Recommendations for data collection and dissemination

The final report notes that limitations on existing data sources hinder the analysis of BEPS. As one example, the report notes that most BEPS analysis relies on non-tax return information, which offers insufficient coverage of companies that may or may not be engaging in BEPS, and may not allow analysts to separate the economic impact of BEPS from the economic impact of non-BEPS tax preferences. The report offers recommendations concerning data collection and dissemination to facilitate the analysis of BEPS, including the publication of a new OECD Corporate Tax Statistics publication, for participating countries, that compiles a range of data and statistical analyses relative to the economic analysis of BEPS in an

³⁹ The final report to Action 11 notes that the estimate is subject to uncertainty and should be interpreted with caution. The estimate

internationally consistent format, and the issuance of periodic reports by participating OECD countries on the estimated revenue impact of proposed and enacted BEPS countermeasures.

Action 12: Mandatory Disclosure Regime

The BEPS Project identified the need for mandatory disclosure of potential tax avoidance planning or aggressive planning, distinct from the broadly applicable information reporting used to measure compliance or the development of facts about planning trends through audits of taxpayers. A mandatory disclosure regime enables tax administrators to learn of novel or aggressive tax planning techniques early in the development of the plans and permits authorities to identify and evaluate the potential tax risk and to respond appropriately. The possible responses are not limited to a specific plan of a specific taxpayer, via examination of the taxpayer's use of the plan, but may address the systemic risk posed by aggressive planning. The final report on BEPS Action 12 provides an overview of mandatory disclosure regimes in use in OECD and G20 member states, together with recommendations for design and adoption of similar regimes in countries, including recommendations that international tax arrangements be given special focus.

The design elements generally require that both the taxpayer using the technique and the person advising or selling the technique disclose the transaction or arrangement. The requirement to disclose is triggered by presence of certain hallmarks or filters, or a combination of hallmarks or filters. The filters or hallmarks may be generic, such as confidentiality agreements beyond the usual professional privileges or contingent fee arrangements, or they may be specific to certain types of transactions, such as use of hybrid entities or instruments, excessive loss claims, etc. A system of penalties for the failure to comply with mandatory disclosure and tracking the disclosures is recommended, with a goal of promoting enhanced compliance and chilling interest in the most aggressive techniques. The information may be shared with other tax authorities under existing exchange of information provisions in treaties. The recommendations take into account the administrative costs for governments and businesses and draw on experiences from a number of countries that have such rules in place.

At present, seven countries among the OECD and G20 members⁴⁰ include regimes in their domestic laws that require taxpayers and advisers or promoters of transactions to disclose contemporaneously the use of aggressive tax planning with a potential for tax avoidance. Responses to the disclosures may include legislative action to address unintended loopholes in domestic legislation that enables the transaction, administrative measures to advise the public whether the authorities agree that the planning technique achieves the tax benefits promoted, and consultation with other jurisdictions to learn more about cross-border planning of the type disclosed.

⁴⁰ The countries with domestic legislation in the nature of a mandatory disclosure regime are Ireland, Israel, Korea, Portugal, South Africa, the United Kingdom, and the United States. In the United States, the mandatory disclosure regime is the reportable transaction disclosure regime under sections 6011, 6012, 6111 and 6112 of the Internal Revenue Code, and is a network of interlocking disclosure obligations and related penalties for parties with disparate interests, *i.e.*, the investors, promoters and their material advisers.

Action 13: Transfer Pricing Documentation and Country-by-Country Reporting

Discussion

Action 13 calls for the development of rules for transfer pricing documentation to enhance transparency for tax administration, including a requirement that multinational enterprises provide all relevant governments with needed information on their global allocation of the income, economic activity, and taxes paid among countries according to a common template.

Recommendations

Action 13 recommends a three-tiered standardized approach to transfer pricing documentation. The three recommended documents (master file, local file, and country-by-country report) require taxpayers to articulate consistent transfer pricing positions and are expected to provide tax administrations with useful information to assess transfer pricing risks.

Master file

The master file provides an overview of the multinational enterprise group business. In general it is intended to provide tax administrations with high-level information regarding the global business operations and transfer pricing policies of the multinational enterprise group's transfer pricing practices. The master file information provides a blueprint of the multinational group and contains relevant information in five categories: (1) organizational structure; (2) description of the business or businesses; (3) intangibles; (4) intercompany financial activities; and (5) financial and tax positions.

Local file

The local file provides detailed information relating to specific intercompany transactions. It will identify material related party transactions, the amounts involved in those transactions, and the company's analysis of the transfer pricing determinations made with regard to those transactions.

Country-by-country report

The country-by-country report requires aggregate tax jurisdiction-wide information relating to the global allocation of the income, the taxes paid, and certain indicators of the location of economic activity among tax jurisdictions in which the multinational enterprise group operates. The annual country-by-country report will provide, for each jurisdiction in which the multinational enterprise does business, the amount of revenue, profit before income tax, income tax paid and accrued, the number of employees, stated capital, retained earnings, and tangible assets. It also requires the large multinational enterprise to identify each entity within the group doing business in a particular tax jurisdiction and to provide an indication of the business activities each entity engaged in.

The country-by-country reporting requirements are to be implemented for fiscal years beginning on or after January 1, 2016, and apply to multinational enterprises with annual

consolidated group revenue equal to or exceeding 750 million euros (or approximately \$800 million).

Next steps

Countries participating in the BEPS Project are to review the implementation of the new standards and to reassess by the end of 2020 whether modifications to the content of the reports should be made to require reporting of additional or different data.

Action 14: Making Dispute Resolution Mechanisms More Effective

Discussion

Action 14 makes clear that the implementation of BEPS measures should not lead to double taxation or unnecessary uncertainty for taxpayers. Article 25 of the OECD Model treaty provides for a mutual agreement procedure through which competent authorities of the treaty countries may resolve differences regarding the interpretation of the tax treaty between the countries. Countries have agreed to strengthen the effectiveness and efficiency of the mutual agreement procedure process. Action 14 lays out a minimum standard with respect to the resolution of treaty-related disputes as well as an agreement to ensure effective implementation through the establishment of a peer-based monitoring mechanism that will report regularly through the OECD Committee on Fiscal Affairs.

In addition to the commitment to implement the minimum standard, several countries also declared a commitment to include mandatory binding arbitration in their bilateral tax treaties. The countries are Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and the United States. These countries represent more than 90 percent of the outstanding mutual agreement procedure cases as of the end of 2013.

Recommendations

The minimum standard sets out three general objectives:

- Countries should ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that mutual agreement procedure cases are resolved in a timely manner;
- Countries should ensure that administrative processes promote the prevention and timely resolution of treaty-related disputes; and
- Countries should ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 can access the mutual agreement procedure.

Each standard in the report recommends specific measures that each country should implement. The measures include changes to Article 25 of the OECD Model treaty and Commentary as well as measures for individual countries to adopt as best practices. Some countries were not willing to commit to the best practices at this stage and are therefore not part of the minimum standard.

Next steps

Future work on Action 14 includes developing the monitoring mechanisms that will be used by peers to evaluate implementation of the minimum standard.

Additionally, a mandatory binding arbitration provision will be developed as part of the negotiation of the multilateral instrument under Action 15.

Action 15: Developing a Multilateral Instrument to Modify Bilateral Tax Treaties

Discussion

Action 15 highlights that globalization has exacerbated the impact of disparities between different countries' tax systems, which results in base erosion. Beyond the challenges faced by the current tax treaty system as a result of these gaps, making updates to the more than 3,000 bilateral treaties currently in existence makes that process time-consuming and uncertain. As a result of the extensive efforts it takes to update bilateral tax treaties, the current network no longer conforms to the model tax conventions, which, with respect to many in-force treaties, was drafted later in time.

Formulation of a new model treaty alone may not solve the base erosion issue, since it cannot be swiftly implemented to replace the existing network of treaties. Because there is strong support to eliminate base erosion while retaining double-tax relief, governments have agreed to explore the feasibility of a multilateral instrument that would have the same effect as a simultaneous renegotiation of thousands of bilateral tax treaties. The OECD points out the advantages of taking this approach as allowing for highly targeted changes to the treaty network to be adapted in a synchronized manner without creating the potential for violation of existing treaties that may result from unilateral actions by countries.

Action 15 provides for an analysis of the tax and public international law issues related to the development of a multilateral instrument to enable interested countries to develop and design an innovative approach to international tax matters that is in close alignment with the realities of a rapidly and continuously evolving global economy.

A group authorized by the OECD Committee on Fiscal Affairs and endorsed by the G20 Finance Ministers and Central Bank Governors began its work on drafting a multilateral instrument in May 2015, with the aim to complete its work and present it for signature by the end of 2016. Participation in the development of the multilateral instrument is voluntary and does not require any commitment by a participating country to sign it.

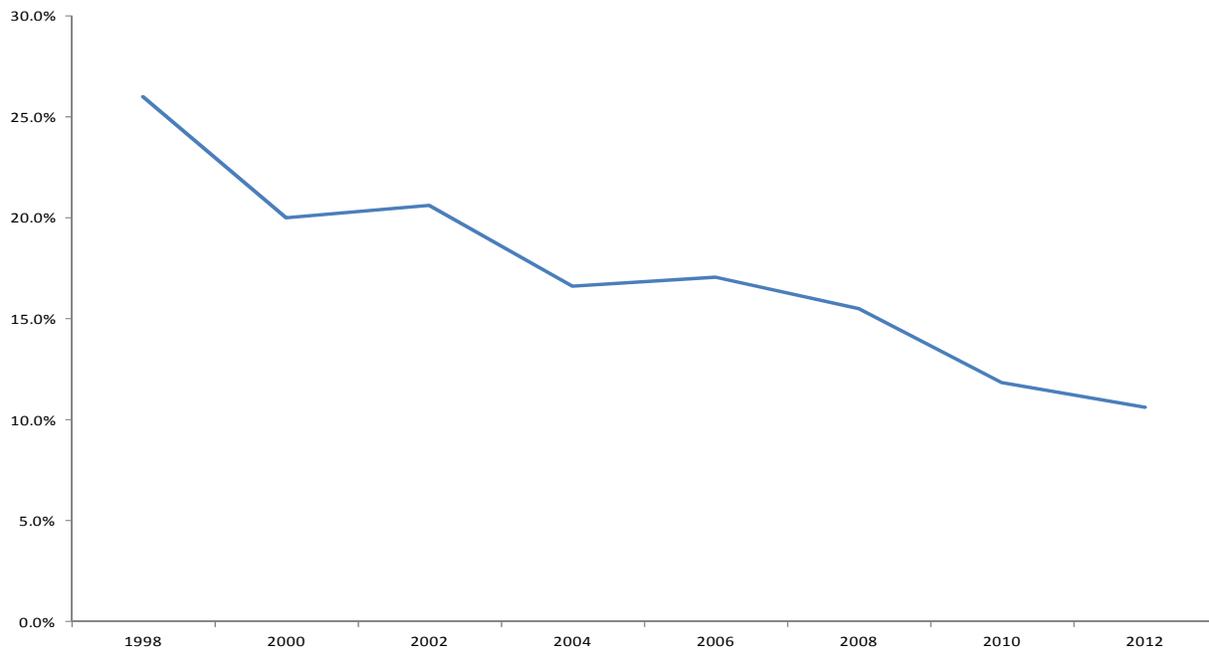
II. SELECTED DATA ON U.S. TAXATION OF CROSS-BORDER INCOME

As part of the OECD and the G20, the United States has engaged in the BEPS Project out of concern expressed by a number of U.S. policymakers that planning by some taxpayers has resulted in inappropriate erosion of the U.S. tax base as well as aggressive shifting of income to low-tax jurisdictions. In the context of corporate taxation, both U.S. and foreign MNEs are potentially implicated in engaging in behavior resulting in BEPS. Concern over BEPS may inform ongoing discussion on reform of the U.S. international tax system.

Average tax rates across U.S. CFCs

Figure 1, below, charts the decline in the average tax rate across U.S. CFCs from 1998 to 2012, biennially, based on data reported on Form 5471 (“Information Return of U.S. Persons With Respect to Certain Foreign Corporations”) by U.S. parent corporations with at least \$500 million in assets. The average tax rate is calculated as total cash taxes paid by the CFC to its country of incorporation divided by the sum of pre-tax earnings and profits and total cash taxes paid by the CFC to its country of incorporation. The average tax rate declined from 26.0 percent in 1998 to 10.6 percent in 2012. The chart reflects a number of phenomena that may or may not be related to BEPS: the general decline in statutory corporate tax rates around the world and a larger portion of earnings being reported in low-tax jurisdictions (which may be a consequence of foreign base erosion, more income being shifted outside the United States, or general growth in overseas markets).

**Figure 1.—Average Tax Rate of U.S. CFCs, 1998 - 2012
(Biennial)**



Source: Calculations by the staff of the Joint Committee on Taxation based on data from the Internal Revenue Service (Statistics of Income Division). Average tax rates for each CFC are calculated as total cash taxes paid by the CFC to its country of incorporation divided by the sum of its pre-tax earnings and profits and total cash taxes paid by the CFC to its country of incorporation.

Comparing average tax rates of foreign-controlled and U.S.-controlled domestic corporations

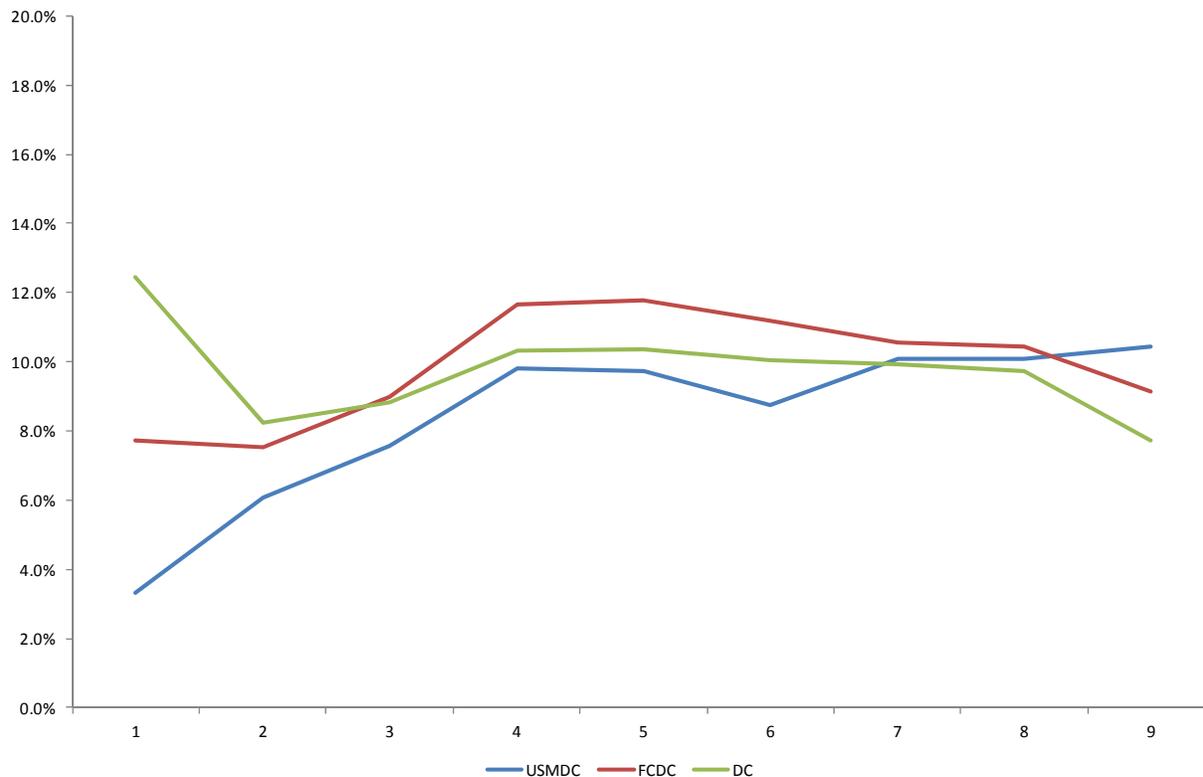
U.S. policymakers have been concerned that the ability of foreign-controlled U.S. corporations (“FCDCs”) to engage in earnings stripping may give them a competitive tax advantage over purely domestic corporations (“DCs”) or domestic corporations that are controlled by U.S. MNEs (“USMDCs”). The term “earnings stripping” typically refers to generating inappropriately large U.S. tax deductions from outbound deductible payments such as interest, rents, royalties, premiums, and management service fees made from FCDCs to their foreign parent or other foreign affiliates that are not subject to U.S. tax on the receipt of such payments. Determining whether FCDCs are engaged in earnings stripping is difficult because empirically identifying what is “inappropriately large” requires a baseline measure of what is “appropriate.” One empirical approach is to compare FCDCs with domestic corporations that are not foreign-controlled, and this was done in a 2007 study on earnings stripping prepared by the U.S. Treasury Department based on tax year 2004 data.⁴¹ The idea behind the study is that if FCDCs were engaged in earnings stripping by incurring excessive levels of related-party debt in the United States—which some consider the most prevalent method of earnings stripping—then one may expect that FCDCs would be less profitable (because of high levels of interest expense), or have higher ratios of interest expense in relation to cash flow, than domestic corporations that are not foreign-controlled. Based on this empirical approach, the Treasury Department found strong evidence that inverted corporations were engaging in earnings stripping, largely through interest payments but also through royalties, but did not find conclusive evidence that non-inverted FCDCs were engaging in such behavior. However, as the Treasury Department noted, a significant limitation of its report was that there may be systematic and unobserved differences in the characteristics of the FCDCs and domestic corporations under study that account for potential differences in profitability and borrowing, such as differences in management behavior and business opportunities. In addition, the comparison group of domestic corporations included both purely domestic corporations and domestic corporations controlled by U.S. MNEs, even though FCDCs may be more comparable to domestic corporations owned by U.S. MNEs.

Another approach, subject to some of the same limitations as the 2007 Treasury study, is to compare the average tax rates of FCDCs with USMDCs and DCs separately, while controlling for differences in earnings and the industries in which the corporations operate. Earnings stripping by foreign-controlled U.S. corporations can lower their average tax rate relative to their U.S.-controlled counterparts, so one may expect that FCDCs have lower tax rates than USMDCs and DCs if they are engaging in earnings stripping. Figure 2, below, compares the average tax rates of these corporations for 2012 within an earnings decile. For example, Figure 2 shows that among domestic corporations in the ninth earnings decile (in this case, earnings above \$1.0 billion), FCDCs had a higher average tax (9.2 percent) than DCs (7.7 percent) but had a lower average tax rate than USMDCs (10.4 percent). The earnings concept used is EBITDA, which is generally larger than net income and is computed as net income less interest income plus interest deductions, net depreciation, depletion deductions, the domestic production activities deduction,

⁴¹ U.S. Department of the Treasury, *Report to the Congress on Earnings Stripping, Transfer Pricing and U.S. Income Tax Treaties*, 2007.

and amortization deductions. The average tax rate is computed as total Federal taxes paid less credits, divided by EBITDA. Figure 2 excludes U.S. corporations in the financial and insurance industries, pass-through corporations (such as RICs and REITs), and corporations with less than \$25 million in assets.

Figure 2.—Average Tax Rates of Domestic Corporations by Ownership Status and Decile of Earnings in 2012



Source: Calculations by the staff of the Joint Committee on Taxation based on data from the Internal Revenue Service (Statistics of Income Division). Average tax rates are computed as net income less interest income, divided by EBITDA.

Figure 2, above, shows that FCDCs generally have higher average tax rates than DCs (except at the first and second earnings deciles) and USMDCs (except at the ninth earnings decile). Figure 2 does not offer conclusive evidence that FCDCs are, or are not, engaged in earnings stripping, and inferences from Figure 2 are subject to some of the same limitations as inferences from the 2007 Treasury study. In particular, there are a number of potential explanations for the result in Figure 2: FCDCs are not engaged in earnings stripping; only a subset of FCDCs are engaged in earnings stripping; FCDCs do reduce their average tax rate by engaging in earnings stripping, but still have higher average tax rates than their U.S. counterparts; or it may be the case that there are significant operational differences between foreign-controlled domestic corporations and their U.S.-controlled counterparts that are masked by aggregating corporations by their place in the earnings distribution, such as differences in industry concentration and the location of their business operations.

Table 2, below, presents a similar calculation as Figure 2 but breaks down the average tax rates for FCDCs, USMDCs and DCs by industry; unlike Figure 2, it does not control for a

corporation's location in the earnings distribution. Cells corresponding to the ownership category with the lowest average tax rate are shaded orange, while cells corresponding to the ownership category with the highest average tax rate are shaded tan. As in Figure 2, Table 2 shows that FCDCs do not have systematically higher, or lower, average tax rates than USMDCs or DCs.

Table 2.—Average Tax Rates for Domestic Corporations by Ownership Status and Industry in 2012

Industry	Foreign-Controlled	U.S. MNE-Controlled	Purely Domestic
All Industries	9.5 percent	10.4 percent	8.6 percent
Manufacturing	9.3 percent	9.2 percent	17.1 percent
Wholesale and Retail	11.1 percent	18.7 percent	16.5 percent
Research and Scientific	8.0 percent	12.9 percent	10.2 percent
Pharmaceutical	15.5 percent	7.4 percent	20.9 percent
Information	6.7 percent	10.0 percent	4.1 percent
Transportation	9.1 percent	13.4 percent	8.2 percent
Construction	8.8 percent	13.5 percent	11.9 percent
Agriculture	2.7 percent	12.7 percent	16.4 percent
Education and Health Services	14.1 percent	15.5 percent	9.8 percent
Mining	6.9 percent	4.4 percent	2.4 percent
Management	19.8 percent	8.0 percent	17.6 percent
Oil	4.5 percent	4.1 percent	10.4 percent
Utilities	1.9 percent	0.6 percent	0.7 percent

Source: Calculations by the staff of the Joint Committee on Taxation based on data from the Internal Revenue Service (Statistics of Income Division). Average tax rates are computed as net income less interest income divided by EBITDA.

Cross-border acquisitions

U.S. policymakers may be concerned that BEPS is placing U.S. companies at a competitive disadvantage in the context of mergers and acquisitions and is making U.S.

companies more valuable under foreign ownership than U.S. ownership. For example, U.S. corporations, once acquired by foreign corporations, may be able to engage in earnings stripping to reduce the taxes they pay on their U.S.-source earnings, as the 2007 Treasury study shows. Moreover, foreign acquisition of a U.S. corporation may cause the U.S. corporation's headquarters to move out of the United States, potentially leading to a loss in headquarters jobs and whatever local economic benefits may be associated with having headquarters in the United States.

Cross-border acquisitions involving the United States and another OECD country

The Zephyr database, maintained by the Bureau Van Dijk, includes mergers and acquisitions data for a wide range of companies worldwide. Tables 3 and 4, below, provide information on cross-border acquisitions in OECD countries from 2006 to 2014, where a U.S. company was either the target or acquirer of a company based in another OECD country. The data reported below only includes transactions in which final acquisition values and ownership stakes are known. As a result, the data is not comprehensive and all figures should be interpreted in light of these sampling restrictions. Assignment of a company to a country is based on the company's country of incorporation rather than country of tax residence, although the two may coincide.

Table 3, below, shows the number of acquisitions that occurred during each year of the sample period. For the sample in 2014, 252 companies from an OECD country (besides the United States) were acquired by U.S. companies, while 238 companies in the United States were acquired by a company based in another OECD country. For the sample from 2006 to 2014, there is no clear trend in the number of acquisitions involving companies based in the United States and another OECD country. However, in six of the nine years in the sample, there were more acquisitions involving a U.S. acquirer than a U.S. target.

**Table 3.—Number of Cross-Border Acquisitions Involving
U.S. and Another OECD Country, 2006-2014**

Year	U.S. Acquirer	U.S. Target
2006	331	316
2007	306	341
2008	250	295
2009	131	132
2010	225	175
2011	252	230
2012	186	180
2013	204	145
2014	252	238

Source: Zephyr Database, Bureau Van Dijk, and calculations by the staff of the Joint Committee on Taxation. Database accessed on November 18, 2015.

Table 4, below, shows the value of the acquisitions reported in Table 3. In 2014, the value of acquisitions made by a U.S. company of a company based in another OECD country totaled \$99.8 billion (in nominal U.S. dollars). The value of acquisitions of a U.S. company by a company based in another OECD country totaled \$159.1 billion (in nominal U.S. dollars). As in Table 3, there is no discernible directional trend in the data in Table 4, but the value of acquisitions involving a U.S. target was higher than the value of acquisitions involving a U.S. acquirer in eight out of the nine years in the sample.

**Table 4.—Value of Cross-Border Acquisitions Involving
U.S. and Another OECD Country, 2006-2014
(nominal dollars, in billions)**

Year	U.S. Acquirer	U.S. Target
2006	\$85.4	\$119.3
2007	\$89.1	\$183.3
2008	\$54.2	\$171.2
2009	\$24.4	\$80.4
2010	\$67.1	\$61.1
2011	\$109.0	\$110.6
2012	\$56.0	\$64.5
2013	\$54.3	\$75.3
2014	\$99.8	\$159.1

Source: Zephyr Database, Bureau Van Dijk, and calculations by the staff of the Joint Committee on Taxation. Database accessed on November 18, 2015.

III. RELATIONSHIP OF OECD/G20 BEPS PROJECT TO U.S. CROSS-BORDER TAX POLICY

The OECD/G20 BEPS Project and its aftermath have uncertain implications for U.S. multinational companies and for U.S. cross-border taxation. This section provides a brief glimpse into possible implications of the project for the United States and describes recent U.S. cross-border tax proposals related to the subjects addressed by the BEPS Project.

Possible implications

The explanatory statement accompanying the BEPS Project's final reports includes the following statement:

With the adoption of the BEPS package, OECD and G20 countries, as well as all developing countries that have participated in its development, will lay the foundations of a modern international tax framework under which profits are taxed where economic activity and value creation occurs.⁴²

If in the coming years the location of cross-border taxation increasingly aligns with the location of real economic activity, this increased alignment could take different forms in relation to the activities and taxation of U.S. multinational companies. In one possible scenario, U.S. multinational companies might face increased foreign taxation of their non-U.S. operations because, among other reasons, governments will introduce domestic rules and treaty provisions that restrict opportunities for shifting profits to low-tax or zero-tax countries. Governments of countries in which U.S. multinational companies operate might reform transfer pricing, controlled foreign corporation, interest deductibility, and other rules in ways intended to ensure that those governments collect more tax at the prevailing statutory rates on income attributable to activities in those countries than they do under present law. In another possible scenario, U.S. multinational companies might face decreased taxation of their non-U.S. operations as governments of various countries use tax incentives such as preferential tax rates for some intellectual property income to encourage multinational firms to move existing operations to, or locate new operations in, those countries. It is possible that for some operations of some U.S. multinational companies, foreign taxation will increase, while for other operations of the same or other U.S. multinational companies, foreign taxation will decrease.

Foreign taxation of U.S. multinational companies is part of a broader scheme of corporate taxation across countries around the world. Statutory corporate tax rates generally have declined in OECD member countries over the last several decades. A chief goal of the BEPS Project has been to decrease opportunities for eroding the corporate tax bases of countries around the world. On the other hand, the BEPS Project documents explicitly avoid suggesting any desired level of statutory corporate tax rates and explicitly contemplate that countries around the world may compete for economic activity by lowering statutory tax rates and by creating special tax

⁴² OECD, *Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project*, 2015, p. 9.

preferences for targeted activities such as expenditures on research.⁴³ Particularly given this larger context, it is hazardous to predict the net effects of possible foreign law changes on the overall levels of taxation of foreign operations of U.S. multinational companies.

Even if trends in the foreign taxation of U.S. multinational companies could be reliably predicted, the implications of these trends for U.S. cross-border tax policy would depend on the goals of that policy. One possible goal is to use the U.S. tax rules to attract mobile activity, irrespective of revenue consequences. This goal would suggest lowering U.S. tax rates applicable to the desired activity, perhaps irrespective of the nature of foreign tax law changes. Another possible goal is to protect the U.S. base for taxing U.S. and foreign multinational companies. This goal might suggest various reforms. Rules to limit base erosion and profit shifting by U.S. and foreign companies seem to be the most direct way to advance this policy, but if base-protecting rules were enacted without any other countervailing reforms such as exemption from U.S. tax for foreign business income, a question might be the extent to which, in the long run, tax revenues associated with new business operations would increasingly shift to countries with less burdensome business taxation as the operations themselves moved to those countries. An entirely different way of advancing a fisc-protecting policy is to enact preferential tax rules intended to encourage U.S. and foreign multinational companies to locate profits in the United States rather than in foreign countries. A question related to this approach would be the outcome for the U.S. fisc if other countries attempted to tax the same income for which the United States made available preferential rates. The U.S. fisc would generally be protected only to the extent the United States prevailed in asserting its primary right to tax the income rather than having to cede primary right to tax by means of a foreign tax credit or exemption. In practice, U.S. cross-border tax policy has not had a single aim but instead has balanced multiple goals including protecting the base and encouraging economic activity in the United States.

U.S. proposals related to the BEPS Project

The U.S. Treasury Department, former House Ways and Means Committee chairman Dave Camp, former Senate Finance Committee chairman Max Baucus, and other members of Congress have made legislative proposals related to the topics addressed by the BEPS Project. The Treasury Department's revenue proposals for fiscal years 2015 and 2016 have included a number of proposals consistent with the recommendations of the various BEPS Project actions. These proposals address hybrid arrangements, the digital economy, manufacturing services arrangements, excessive U.S. interest deductions, and corporate inversions.⁴⁴ In its fiscal year

⁴³ See, for example, OECD, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5: 2015 Final Report*, 2015, p. 11 ("The work on harmful tax practices is not intended to promote the harmonization of income taxes or tax structures generally within or outside the OECD, nor is it about dictating to any country what should be the appropriate level of tax rates. Rather, the work is about reducing the distortionary influence of taxation on the location of mobile financial and service activities, thereby encouraging an environment in which free and fair tax competition can take place.").

⁴⁴ Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2015 Revenue Proposals*, March 2014, pp. 58-65. For an analysis of these proposals, see Joint Committee on Taxation, *Description of Certain Revenue Provisions Contained in the President's Fiscal Year 2015 Budget Proposal* (JCS-2-14), December 2014, pp. 25-80. Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals*, February 2015, pp. 10-12, 32-38. For an analysis of these proposals, see Joint

2016 budget, the Treasury Department described a more thorough international tax reform that included a minimum tax on foreign income.⁴⁵ This more thorough reform was intended, among other things, to address profit shifting.

Members of Congress have introduced comprehensive international tax reform proposals and more targeted legislation. As part of an overall reform of the Internal Revenue Code, former House Ways and Means Committee chairman Camp proposed a new international tax system that, among other things, allows a 95-percent exemption for repatriated earnings of foreign subsidiaries of U.S. parent companies; imposes current U.S. taxation of intangible income of CFCs, with a preferential tax rate for intangible income from serving foreign markets; allows a preferential tax rate for foreign intangible income of domestic corporations; and restricts interest deductions of U.S. members of worldwide, U.S.-parented groups.⁴⁶ Former Senate Finance Committee chairman Baucus released international tax reform staff discussion drafts that, among other things, provide alternative options for imposing current U.S. taxation (including at rates below the general U.S. statutory corporate tax rate) on low-tax foreign income of U.S. companies.⁴⁷ More recently, Representatives Charles Boustany and Richard Neal released a discussion draft of a proposal that allows (by means of a 71.4 percent deduction) a 10-percent U.S. tax rate for certain intellectual property income that has a U.S. nexus.⁴⁸

Committee on Taxation, *Description of Certain Revenue Provisions Contained in the President's Fiscal Year 2016 Budget Proposal* (JCS-2-15), September 2015, pp. 3, 67-73.

⁴⁵ Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals*, February 2015, pp. 10-23. For an analysis of these proposals, see Joint Committee on Taxation, *Description of Certain Revenue Provisions Contained in the President's Fiscal Year 2016 Budget Proposal* (JCS-2-15), September 2015, pp. 3-65.

⁴⁶ H.R. 1, Tax Reform Act of 2014, 113th Cong., 2nd Sess. (2014).

⁴⁷ For the legislative text and explanations of these discussion drafts, see documents available at <http://www.finance.senate.gov/newsroom/chairman/release/?id=f946a9f3-d296-42ad-bae4-bcf451b34b14>.

⁴⁸ For a press release and a link to legislative text of the proposal, see <http://waysandmeans.house.gov/ryan-welcomes-boustany-neal-innovation-box-discussion-draft/>.

APPENDIX

List of OECD Publications on OECD/G20 BEPS Project

Initial reports, discussion drafts and 2014 deliverables

1. OECD, *Addressing Base Erosion and Profit Shifting*, February 12, 2013, available at <http://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm>.
2. OECD, *Action Plan on Base Erosion and Profit Shifting*, July 19, 2013, available at <http://www.oecd.org/tax/action-plan-on-base-erosion-and-profit-shifting-9789264202719-en.htm>.
3. OECD, Public Consultation, *Revised Discussion Draft on Transfer Pricing Aspect of Intangibles*, July 30, 2013, available at <http://www.oecd.org/ctp/transfer-pricing/revised-discussion-draft-intangibles.pdf>.
4. OECD, Public Consultation, *White Paper on Transfer Pricing Documentation*, July 30, 2013, available at <http://www.oecd.org/ctp/transfer-pricing/white-paper-transfer-pricing-documentation.pdf>.
5. OECD, *Memorandum on Transfer Pricing Documentation and Country by Country Reporting*, October 3, 2013, available at <http://www.oecd.org/ctp/transfer-pricing/memorandum-transfer-pricing-documentation-and-country-by-country-reporting.pdf>.
6. OECD, Public Consultation Discussion Draft on Transfer Pricing Documentation and CbC Reporting, January 30, 2014, available at <http://www.oecd.org/ctp/transfer-pricing/discussion-draft-transfer-pricing-documentation.pdf>.
7. OECD, Public Discussion Draft BEPS Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, March 14, 2014, available at <http://www.oecd.org/ctp/treaties/treaty-abuse-discussion-draft-march-2014.pdf>.
8. OECD, Public Discussion Draft BEPS Action 2: Neutralise the Effects of Hybrid Mismatch Arrangements (Recommendations for Domestic Laws), March 19, 2014, available at <http://www.oecd.org/ctp/aggressive/hybrid-mismatch-arrangements-discussion-draft-domestic-laws-recommendations-march-2014.pdf>.
9. OECD, Public Discussion Draft BEPS Action 2: Neutralise the Effects of Hybrid Mismatch Arrangements (Treaty Issues), March 19, 2014, available at <http://www.oecd.org/ctp/treaties/hybrid-mismatch-arrangements-discussion-draft-treaty-issues-march-2014.pdf>.
10. OECD, Public Discussion Draft BEPS Action 1: Address the Tax Challenges of the Digital Economy, March 24, 2014, available at <http://www.oecd.org/ctp/tax-challenges-digital-economy-discussion-draft-march-2014.pdf>.

11. OECD, *Addressing the Tax Challenges of the Digital Economy*, September 16, 2014, available at <http://www.oecd-ilibrary.org/docserver/download/2314251e.pdf?expires=1447780423&id=id&accname=guest&checksum=E675C1B9D5D4813766803B6E983CBA34>.
12. OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements*, September 16, 2014, available at <http://www.oecd-ilibrary.org/docserver/download/2314261e.pdf?expires=1447797017&id=id&accname=guest&checksum=90894A3D6127D7A8C1D8FBC46FF00F6F>.
13. OECD, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance*, September 16, 2014, available at http://www.oecd-ilibrary.org/taxation/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance_9789264218970-en.
14. OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, September 16, 2014, available at http://www.oecd-ilibrary.org/taxation/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances_9789264219120-en.
15. OECD, *Guidance on Transfer Pricing of Intangibles*, September 16, 2014, available at http://www.oecd-ilibrary.org/taxation/guidance-on-transfer-pricing-aspects-of-intangibles_9789264219212-en.
16. OECD, *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting*, September 16, 2014, available at http://www.oecd-ilibrary.org/taxation/guidance-on-transfer-pricing-documentation-and-country-by-country-reporting_9789264219236-en;jsessionid=glo96tqc591ge.x-oecd-live-02.
17. OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties*, September 16, 2014, available at <http://www.oecd.org/ctp/developing-a-multilateral-instrument-to-modify-bilateral-tax-treaties-9789264219250-en.htm>
18. OECD, *Public Discussion Draft BEPS Action 7: Preventing the Artificial Avoidance of PE Status*, October 31, 2014, available at <http://www.oecd.org/ctp/treaties/action-7-pe-status-public-discussion-draft.pdf>.
19. OECD, *Public Discussion Draft BEPS Action 10: Proposed Modifications to Chapter VII of the Transfer Pricing Guidelines Relating to Low Value-Adding Intra-Group Services*, November 3, 2014, available at <http://www.oecd.org/ctp/transfer-pricing/discussion-draft-action-10-low-value-adding-intra-group-services.pdf>.
20. OECD, *Public Discussion Draft Follow Up Work on BEPS Action 6: Preventing Treaty Abuse*, November 21, 2014, available at <http://www.oecd.org/ctp/treaties/discussion-draft-action-6-follow-up-prevent-treaty-abuse.pdf>.
21. OECD, *Public Discussion Draft BEPS Actions 8, 9, and 10: Discussion Draft on Revisions to Chapter I of the Transfer Pricing Guidelines (Including Risk*,

- Recharacterisation, and Special Measures*), December 1, 2014, available at <http://www.oecd.org/ctp/transfer-pricing/discussion-draft-actions-8-9-10-chapter-1-TP-Guidelines-risk-recharacterisation-special-measures.pdf>.
22. OECD, *BEPS Action 10: Discussion Draft on the Use of Profit Splits in the Context of Global Value Chains*, December 16, 2014, available at <http://www.oecd.org/ctp/transfer-pricing/discussion-draft-action-10-profit-splits-global-value-chains.pdf>.
 23. OECD, *BEPS Action 10: Discussion Draft on the Transfer Pricing Aspects of Cross-Border Commodity Transactions*, December 16, 2014, available at <http://www.oecd.org/ctp/transfer-pricing/discussion-draft-action-10-commodity-transactions.pdf>.
 24. OECD, *Public Discussion Draft BEPS Action 4: Interest Deductions and Other Financial Payments*, December 18, 2014, available at <http://www.oecd.org/ctp/aggressive/discussion-draft-action-4-interest-deductions.pdf>.
 25. OECD, *Public Discussion Draft BEPS Action 3: Strengthening CFC Rules*, May 12, 2015, available at <http://www.oecd.org/ctp/aggressive/discussion-draft-beps-action-3-strengthening-CFC-rules.pdf>.
 26. OECD, *Public Discussion Draft BEPS Action 11: Improving the Analysis of BEPS*, April 16, 2015, available at <http://www.oecd.org/ctp/tax-policy/discussion-draft-action-11-data-analysis.pdf>.
 27. OECD, *Public Discussion Draft BEPS Action 8: Revisions to Chapter VIII of the Transfer Pricing Guidelines on Cost Contribution Arrangements (CCAs)*, April 29, 2015, available at <http://www.oecd.org/tax/transfer-pricing/discussion-draft-beps-action-8-cost-contribution-arrangements.pdf>.
 28. OECD, *Public Discussion Draft BEPS Action 12: Mandatory Disclosure Rules*, May 11, 2015, available at <http://www.oecd.org/tax/aggressive/discussion-draft-action-12-mandatory-disclosure-rules.pdf>.
 29. OECD, *Revised Discussion Draft BEPS Action 7: Preventing the Avoidance of PE Status*, May 15, 2015, available at <http://www.oecd.org/tax/treaties/revised-discussion-draft-beps-action-7-pe-status.pdf>.
 30. OECD, *Revised Discussion Draft BEPS Action 6: Prevent Treaty Abuse*, May 22, 2015, available at <http://www.oecd.org/tax/treaties/revised-discussion-draft-beps-action-6-prevent-treaty-abuse.pdf>.
 31. OECD, *Public Discussion Draft BEPS Action 8: Hard-to-Value Intangibles*, June 4, 2015, available at <http://www.oecd.org/ctp/transfer-pricing/discussion-draft-beps-action-8-hard-to-value-intangibles.pdf>.

Final Reports

1. OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, October 5, 2015, available at http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report_9789264241046-en.
2. OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 - 2015 Final Report*, October 5, 2015, available at <http://www.oecd.org/tax/neutralising-the-effects-of-hybrid-mismatch-arrangements-action-2-2015-final-report-9789264241138-en.htm>.
3. OECD, *Designing Effective Controlled Foreign Company Rules, Action 3 - 2015 Final Report*, October 5, 2015, available at <http://www.oecd.org/tax/designing-effective-controlled-foreign-company-rules-action-3-2015-final-report-9789264241152-en.htm>.
4. OECD, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2015 Final Report*, October 5, 2015, available at <http://www.oecd.org/tax/limiting-base-erosion-involving-interest-deductions-and-other-financial-payments-action-4-2015-final-report-9789264241176-en.htm>.
5. OECD, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report*, October 5, 2015, available at <http://www.oecd.org/tax/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5-2015-final-report-9789264241190-en.htm>.
6. OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report*, October 5, 2015, available at <http://www.oecd.org/tax/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report-9789264241695-en.htm>.
7. OECD, *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report*, October 5, 2015, available at <http://www.oecd.org/tax/preventing-the-artificial-avoidance-of-permanent-establishment-status-action-7-2015-final-report-9789264241220-en.htm>.
8. OECD, *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10: 2015 Final Reports*, October 5, 2015, available at <http://www.oecd.org/tax/aligning-transfer-pricing-outcomes-with-value-creation-actions-8-10-2015-final-reports-9789264241244-en.htm>.
9. OECD, *Measuring and Monitoring BEPS Action 11: 2015 Final Report*, October 5, 2014, available at <http://www.oecd.org/tax/measuring-and-monitoring-beps-action-11-2015-final-report-9789264241343-en.htm>.

10. OECD, *Mandatory Disclosure Rules Action 12 - 2015 Final Report*, October 5, 2014, available at <http://www.oecd.org/tax/mandatory-disclosure-rules-action-12-2015-final-report-9789264241442-en.htm>.
11. OECD, *Explanatory Statement -- 2015 Final Reports*, October 5, 2014, available at <http://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf>.

OECD/G20 BEPS Action Plan Timeline

Date	Activity
June 18-19, 2012	G20 leaders declare need to prevent base erosion and profit shifting (Los Cabos, Mexico Summit)
February 12, 2013	Report: Addressing Base Erosion and Profit Shifting
July 19, 2013	Report: BEPS Action Plan G20 finance ministers communiqué in support of BEPS (Moscow, Russia Meeting)
July 30, 2013	Revised discussion draft: Transfer pricing aspects of intangibles Comments due by October 1, 2013 White paper: Transfer pricing documentation Comments due by October 1, 2013
September 5-6, 2013	G20 leaders declaration in support of BEPS Action Plan (St. Petersburg, Russia Summit)
September 2013	The Task Force on the Digital Economy (“TFDE”) established
October 3, 2013	Memorandum: Transfer pricing documentation and country-by-country reporting
October 22, 2013	Request for input: Avoidance of permanent establishment status Comments due by November 15, 2013
November 12-13, 2013	Public consultation: Transfer pricing documentation; transfer pricing aspects of intangibles
November 22, 2013	Request for input: Tax challenges of the digital economy Comments due by December 22, 2013
January 30, 2014	Discussion draft: Transfer pricing documentation and country-by-country reporting Comments due by February 23, 2014
March 14, 2014	Discussion draft: Treaty abuse Comments due by April 9, 2014
March 19, 2014	Discussion draft: Hybrid mismatch arrangements (recommendations for domestic laws and treaty issues) Comments due by May 2, 2014
March 24, 2014	Discussion draft: Tax challenges of the digital economy Comments due by April 16, 2014
April 23, 2014	Public consultation: Tax challenges of the digital economy
May 19, 2014	Public consultation: Country-by-country reporting

Date	Activity
July 2014	Report to G20 on impact of BEPS to low income countries
August 4, 2014	Request for input: Methodologies to collect and analyze data and actions to address BEPS Comments due by September 19, 2014
September 16, 2014	BEPS 2014 Deliverables – Interim recommendation reports presented to G20 finance ministers: Tax challenges of the digital economy Hybrid mismatch arrangements Countering harmful tax practices Treaty abuse Transfer pricing of intangibles Transfer pricing documentation and country-by-country reporting Developing a multilateral instrument to modify bilateral tax treaties
September 20-21, 2014	G20 finance ministers and central bank governors communiqué in support of BEPS (Cairns, Australia Meeting)
October 31, 2014	Discussion draft: Avoidance of permanent establishment status Comments due by January 9, 2015
November 3, 2014	Discussion draft: Transfer pricing and low value-adding services Comments due by January 14, 2015
November 21, 2014	Discussion draft: Follow-up work on treaty abuse Comments due by January 9, 2015
November 15-16, 2014	G20 leaders communiqué in support of BEPS (Brisbane, Australia Summit)
December 16, 2014	Discussion Draft: Transfer pricing and profit splits in the context of global value chains Comments due by February 6, 2015 Discussion draft: Transfer pricing aspects of commodity transactions Comments due by February 6, 2015
December 18, 2014	Discussion draft: VAT/GST guidelines Comments due by February 20, 2015 Discussion draft: Interest deductions Comments due by February 6, 2015

Date	Activity
December 18, 2014	Discussion draft: Dispute resolution mechanisms Comments due by January 16, 2015
December 19, 2014	Discussion draft: Transfer pricing (risk, recharacterization, and special measures) Comments due by February 6, 2015
January 21, 2015	Public consultation: Avoidance of permanent establishment status
January 22, 2015	Public consultation: Treaty abuse
January 23, 2015	Public consultation: Dispute resolution mechanisms
February 17, 2015	Public consultation: Interest deductions
March 19-20, 2015	Public consultation: Transfer pricing
March 31, 2015	Discussion draft: Mandatory disclosure rules Comments due by April 30, 2015
April 3, 2015	Discussion draft: CFC rules Comments due by May 1, 2015
April 16, 2015	Discussion draft: Improving the analysis of BEPS Comments due by May 8, 2015
April 29, 2015	Discussion draft: Transfer pricing guidelines on cost contribution arrangements Comments due by May 29, 2015
May 11, 2015	Public consultation: Mandatory disclosure rules
May 12, 2015	Public consultation: CFC rules
May 15, 2015	Revised discussion draft: Avoidance of permanent establishment status Comments due by June 12, 2015
May 18, 2015	Public consultation: Methodologies to collect and analyze data and actions to address BEPS
May 22, 2015	Revised discussion draft: Treaty abuse Comments due by June 17, 2015
June 2015	Implementation package: Country-by-country reporting
June 4, 2015	Discussion draft: Transfer pricing with hard-to-value intangibles Comments due by June 18, 2015
July 6-7, 2015	Public consultation: Transfer pricing

Date	Activity
October 5, 2015	BEPS project final reports presented for discussion at G20 finance ministers meeting
October 8, 2015	G20 finance ministers endorse final BEPS measures (Lima, Peru Meeting)
November 15-16, 2015	G20 leaders communiqué in support of final BEPS measures
Early 2016	OECD to propose framework for implementation, including developing economies
2017-2018	Finalize work on automatic exchange and exchange-on-request standardization