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WTS News Release
September 2014

Conclusions on the first OECD deliverables regarding BEPS

Dear reader,

On 16 September 2014, the OECD launched its BEPS 2014 deliverables with a webcast. The comments, progress and current level of agreement across OECD countries, the G20 and developing world highlights the continuing political will to implement new rules worldwide. However, it is also evident that differences remain and a range of difficult issues still need to be addressed.

The envisaged implementation speed is striking. A multilateral instrument is now regarded as both feasible and desirable for implementation. Moreover, the new rules on transfer pricing are clarifications of existing legislation, and so should be valid upon adoption, subject to transition rules. The goal of the rules is clear – to create a level playing field between taxpayers regarding the (dis)ability to reduce taxes where double (non) taxation must be avoided.

The first set of seven BEPS deliverables are (the hyperlinks below are to each of the seven reports as posted separately on the OECD website):

1. Hybrid mismatch arrangements (Action 2) to neutralise the effect of hybrid instruments and entities and thereby provide for coherence of corporate income taxation at the international level. This is to be achieved through new domestic rules to neutralise hybrid mismatch arrangements and new model tax treaty provisions to deal with transparent entities and address the interaction with the new domestic rules.

2. Prevent the abuse of tax treaties (Action 6) to restore the intended benefits of international standards and to prevent the abuse of tax treaties. Recommendations include that a clear statement of intention should be included in treaties; a minimum standard of anti-abuse provisions be included in treaties; and policy considerations should be reviewed prior to entering into treaties.

3. Transfer pricing issues in the key area of intangibles (Action 8) to support transfer pricing outcomes in line with value creation. There is further work to do in certain areas, but some new final guidance has been published.

   "It is good news that for IP it is recognised that the starting point for taxation is legal ownership. Again the interim guidance does not deal with the more complex issues although there is some indication that a form of profit sharing may be appropriate in hard to value intangible transfers. One could argue that this is a restatement of the current status with CCA's and buy in payments where declining royalties is an estab-

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   lished 'best' method," said Marvin Rust, a member of the WTS global transfer pricing team.

4. Transfer pricing documentation and a template for country-by-country reporting (Action 13) to improve transparency for tax administrations and aid risk assessment. There is now greater clarity on what will be required through the amendment to the Transfer Pricing Guidelines. The implementation process remains to be addressed.

   "The argument for country by country reporting appears to be going the way of certain governments. The main concern here for companies is around the cost of compliance and the 'fishing trips' that fiscal authorities and other organisations may seek to pursue with greater information that may not be necessarily better information." said Maik Heggmair, Head of Transfer Pricing for WTS Germany.

5. Challenges of the digital economy (Action 1). It was stated that the digital economy cannot be "ring-fenced" for tax purposes. However, there are features of the digital economy that exacerbate BEPS risks. Therefore, these risks should be addressed within other elements of the BEPS action plan, including specifically the CFC work, PE issues and transfer pricing.

   "It comes as no surprise that after 12 months of committee deliberations that the conclusion on the digital economy is that the taxation of it is a difficult topic. Work will not be completed on the complex issue before December 2015." said Jan Boekel, a Dutch member of the WTS global transfer pricing team.

6. Feasibility of developing a multilateral instrument (Action 15) for swift implementation of BEPS actions, to have the same effects as simultaneous renegotiation of bilateral tax treaties. This is now considered both feasible and desirable. A draft mandate for the negotiation of a multilateral instrument is being taken forward.

7. Harmful tax practices (Action 5) to revamp the work on harmful tax practices.. There is particular focus on substantial activity requirements and consideration of intangibles regimes.

We consider that the OECD has made very good progress in developing rules to reduce the opportunities to artificially reduce taxes. However, still is unclear how and when the (local) legislation embedding those rules will be implemented, given that various plans require a domestic change of laws, e.g. the rules to address hybrid mismatch arrangements.

   "Finally, not within the scope here, is the US reaction and buy in to this proposed set of rules. With a government that is unable to agree to new tax laws and the current treatment by many international companies of all entities outside the US as one (through check the box elections) many of the questions and issues around substance and transparency look very different. A coherent set of tax principles needs the world's leading economies to be fully aligned." said Victoria Garton in London.

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Upon implementation of the plans, the international tax planning landscape will change. For example, appropriate transfer pricing in line with the value creation and substance will be the norm and the subject of greater focus. Immediate consideration of the implications of the new legislation is strongly recommended. The new legislation is not expected before the end of 2015, however some countries have already acted with legislation against the hybrid instruments (e.g. France).

Kind regards,

Maik Heggmair   Jan Boekel   Marvin Rust

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