



TAXREP 62/15 (ICAEW REPRESENTATION 173/15)

AN EXAMINATION OF THE OECD BEPS' RECOMMENDATIONS TO THE G20

ICAEW welcomes the opportunity to comment on the consultation [An examination of the OECD BEPS' recommendations to the G20](#) published by the All-Party Parliamentary Group on 23 November 2015 for comment by 21 December 2015.

This response of 18 December 2015 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, the Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

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MAJOR POINTS

General comments

1. We have reproduced in Annex 2 the text of an article on BEPS published in the December 2015 edition of TAXline, the ICAEW Tax Faculty monthly magazine for its members.
2. This sets out in broad outline the nature of the BEPS Action Plan, what has been achieved to date and what would appear to be some of the potential difficulties from a UK perspective plus some of the outstanding issues that are going to be addressed in 2016 and subsequently.
3. As is stated in the article the BEPS Action Plan was decided upon by politicians and project managed by OECD which did a really excellent job in carrying out their work to time and to the satisfaction of the commissioning politicians.
4. We also believe that OECD did an excellent job in bringing in additional countries to the debate and the BEPS process, in particular from the developing world, so that the present “conclusions” from the Action Plan reflect not just the views of the more developed economies of the world.
5. The ultimate success, or otherwise, of the Action Plan will depend on the countries involved making the necessary changes to their domestic tax regimes and for there to be a successful multilateral arrangement, to be worked on in 2016, to be able to effect the necessary changes to existing double tax conventions between contracting states without each one having to be separately renegotiated.
6. The success of tax systems, domestically and internationally, is dependent not only on the actions of governments but also on the actions of taxpayers and their advisers. The necessity of, and the benefits from, this cooperative approach is set out in the earlier OECD work on Tax Intermediaries, see the Cape Town Communiqué of January 2008 <http://www.oecd.org/ctp/administration/39886621.pdf> and the Tax Intermediaries final report <http://www.oecd.org/ctp/administration/39882938.pdf>. In its subsequent work OECD has re-categorised enhanced cooperation, the term it used in 2008, as cooperative compliance http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/co-operative-compliance-a-framework_9789264200852-en%20#page14. We believe there has been a subsequent change in approach by both tax advisers and their clients so that a more cooperative approach is emerging from all the relevant participants in tax systems and one of the consequences of this change in approach is that tax systems are more likely to perform as it is intended they should.
7. It is too early at the present time to seek to establish whether the BEPS Action Plan has been a success or not: it is work in progress and more time needs to be allowed before one can attempt to answer such a question.

RESPONSES TO SPECIFIC QUESTIONS

Q1 The effectiveness of the OECD's current BEPS proposals in responding to the globalisation of businesses, the growth of the digital economy and other challenges.

8. The OECD has laid out an exhaustive programme comprising domestic and international legal changes to address what it considers to be the Base Erosion Profit Shifting problems facing the global economy and individual countries.
9. As we note in our general comments above it is, in our view, too early at the moment to determine whether it has been a success or not.

Q2 The impact of these proposals on the UK, the EU and other developed economies and developing countries. This includes how developing countries raise revenues and fight poverty [change recommended by Jon Date, Action Aid].

10. It is too early to tell.

Q3 The UK government's role in contributing to, supporting and implementing the OECD's BEPS proposals.

11. The UK was a prime mover in the OECD BEPS work as set out in the attached article.

Q4 The role of other stakeholders in contributing to, supporting and implementing the OECD's BEPS proposals.

12. The countries involved in preparing the Action Plan contributed to it and supported it. Implementation is just about to begin.

Q5 The scale and distributional impact of BEPS, and the ability of the OECD or others effectively to track progress over time [addition from Alex Cobham, Tax Justice Network].

13. OECD is going to develop a framework in the first quarter of 2016 to cover the next steps. See the end section of the attached article.

Q6 An assessment of the existing and proposed tax changes in the UK which might impact on the effectiveness of the OECD's proposals.

14. The government is introducing some proposals immediately, for instance Country by Country Reporting, and consulting on other measures such as interest deductibility (Action 4) and Patent Box (Intellectual Property) regimes. It is too early to assess what impacts these changes will have.

Q7 The role of non-OECD and non-G20 governments and other international institutions in the agreement of global tax rules[change recommended by Jon Date, Action Aid and Caroline Macfarland, CoVi].

15. The OECD has run a series of regional meetings in different parts of the world over the past two years and increased the number of countries involved in BEPS from 44 in 2014, which were in the main G20 and OECD countries, to 62 in the current year, including a considerable number of developing countries. The full list of participating countries is set out in Annex 3.

Q8 The longer term challenges which cannot be addressed by the current proposals. Including the actions the UK government could take in its tax policies, including tax treaties, to ensure that UK companies do not make use of tax havens for tax minimising purposes [addition from Jon Date, Action Aid].

16. There are other initiatives to ensure that tax havens cannot harbour, for instance financial resources, without making appropriate reports to the countries of the persons depositing the funds in those jurisdictions. The Common Reporting Standard will be introduced from 2017 – 2018 onwards. See <http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/> for details that are available on the OECD website.

Q9 Principles which could be considered over time as effective mechanisms for dealing with the changing global economy, including the fair and effective taxation of multinational companies [change recommended by Jon Date, Action Aid].

17. We believe that the approach taken by the countries involved in the G20 OECD BEPS Action Plan provides an appropriate response to the challenges faced by the international tax system.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see via <http://www.icaew.com/en/about-icaew/what-we-do/technical-releases/tax>).

APPENDIX 2

Article published in the December edition of the ICAEW Tax Faculty monthly magazine TAXline

Towards a better international tax system

Ian Young brings us up to date on the BEPS project – and why it matters

For more than two years OECD has been working on behalf of the G20 and other countries to establish the parameters for a better international tax system and, in particular, one in which international business pays tax in countries where it carries out the substance of its economic activities and makes its profits.

The outcome of more than two years' intensive work on the Base Erosion and Profit Shifting (BEPS) project was published in October 2015. In this briefing I will look at the background to the OECD work, the latest developments, and what we can expect to happen next.

The genesis of the OECD project

The UK played a key role in putting these issues at the top of the international political agenda when it chaired the G8 in 2013 and made tax a fundamental issue at the Lough Erne summit in July 2013: the three key themes at that summit were “trade, tax and transparency”.

Of the 10 items in the Lough Erne Declaration the first four were concerned with taxation:

1. Tax authorities across the world should automatically share information to fight the scourge of tax evasion.
2. Countries should change rules that let companies shift their profits across borders to avoid taxes, and multinationals should report to tax authorities what tax they pay where.
3. Companies should know who really owns them and tax collectors and law enforcers should be able to obtain this information easily.
4. Developing countries should have the information and capacity to collect the taxes owed them – and other countries have a duty to help them.

The next step was the adoption of an action plan at the G20 Summit in St Petersburg in September 2013, to combat base erosion and profit shifting – the BEPS project as it has been known ever since.

The action plan would never have been established with such significant (political) momentum had it not been for the very profound underlying problems which it was expected to help combat. These included very considerable public dissatisfaction with the existing tax arrangements (mainly those at international but also at national level); the concern that business could take advantage of the existing tax regime(s) to pay less tax than was considered to be appropriate; and the continuing problems for the public finances in the aftermath of the financial recession of 2008..

In broad terms there were three fundamental pillars to BEPS which concerned coherence, substance and transparency. These have recently been summarised by Pascal Saint-Amans, head of tax at OECD, as:

- introducing **coherence** in the domestic tax rules that affect cross border activities;

- reinforcing **substance** requirements in the existing international standards; and
- improving **transparency** as well as certainty for businesses that do not take aggressive tax positions.

In practice, 15 separate BEPS actions were identified which were mainly grouped under the three key criteria set out above but, in addition, there were two overarching concerns which were included as Actions 1 and 15.

Action 1 was to determine whether the increasing digitalisation of the world's economies necessitated a different fiscal approach to those digital businesses, separate from, and in addition to, the normal tax system: the answer to that question was an emphatic No. It was, however, agreed that digitalisation does exacerbate the problems that BEPS was seeking to combat.

Action 15 was to determine whether it would be possible to develop a multilateral instrument which would enable changes to the 3,000-plus existing bilateral treaties to be effected more or less immediately.

Both these two questions were actually "answered" in September 2014 when OECD published its first set of seven "deliverables" or reports. In addition to the answer that digitalisation makes it tougher for domestic tax systems but does not need a separate system, the answer to the second question was that a multilateral instrument was feasible. Work on this multilateral instrument begins now and OECD has said that it will come up with the required instrument before the end of 2016.

Does all this matter?

Corporate tax is a reducing part of the tax systems of developed countries but it remains very important for the tax systems of developing countries. Perhaps even more importantly, tax systems depend on a general acceptance that they deliver a reasonably fair result. That has been challenged by the public questioning of some multinational companies. Google, Amazon and Starbucks have been subjected to vigorous attack, not least by the UK's Public Accounts Committee, and there has also been concern expressed about Apple in US Senate hearings and from the European Commission's Competition Directorate in its work on State Aid.

The OECD has also evaluated the impact of BEPS and its paper published on 5 October 2015 suggests that global corporate income tax (CIT) losses could be between 4% and 10% of global CIT revenues or \$100–240bn each year. OECD states that such losses have a variety of different causes including aggressive tax planning by some multinational enterprises, the interaction of domestic tax rules, the lack of transparency and coordination between tax administrations, limited country enforcement resources and harmful tax practices of countries themselves.

What has just been decided?

In addition to seven reports last year in September 2014, OECD published a further 13 BEPS papers on 5 October 2015. These papers covered the conclusions and recommendations on its 15 actions which, in a few instances, repeat what was in the 2014 papers. There was a single paper to cover the three transfer pricing actions, hence only 13 papers in all to cover the 15 actions. See <http://www.oecd.org/tax/beps-2015-final-reports.htm>

It seems that there is a clearer way forward on the transparency part of the action plan, and one that is more likely to achieve the intended results, than on some of the other areas of work.

I cover below some of the achievements and also some of the challenges.

Some of the OECD achievements

A major achievement is to have kept the BEPS action plan on target and on time, and to have kept the politicians who signed up at the outset right behind it.

But let's look at some of the detail.

Country-by-country reporting is going to be required for groups of companies whose group turnover is more than €750m but the information will only have to be sent to tax administrations and will not be made public. This is likely to be helpful to tax administrations and to address what can be quite a serious asymmetry in knowledge and understanding in the current regime.

The transfer pricing recommendations, which come under the substance part of the action plan, are probably acceptable but are likely to be very complicated in practice, and some of the trickier issues have been carried forward to be sorted out in 2016. So we will have to wait and see on that one.

Challenges ahead

A potential problem for the UK could be Action 4 which was designed to "limit base erosion via interest deductions and other financial payments". The UK has a relaxed regime as far as interest deductions are concerned, which the government has consistently stated makes it an attractive location for existing, and potentially new, investment. The final report recommends a limitation of the interest deduction to a fixed percentage, between 10 and 30%, of an entity's EBITDA (earnings before interest, taxes, depreciation and amortisation). Countries can decide whether to combine this with a group ratio rule under which interest is deductible up to the level of the net third party interest/EBITDA of the group. How the UK handles the OECD recommendations could have a profound impact on the future attractiveness of the UK as an investment destination, so I anticipate there will be lots of consultation and no early decision from the UK government on this one.

There is a proposed new definition of what will constitute a permanent establishment and hence a taxable presence in a country where the international business has some activities. The idea is that companies should not be taxable unless they have sufficient presence in a country in which, for instance, they make sales. The existing rules had exceptions if a business just had a distribution centre or did not conclude contracts in the particular country. There are now rules to prevent groups circumventing those old rules, but some of the new definitions are vague and may prove a temptation to countries that want to tax more of the activities going on in their countries than they have been able to do in the past.

If countries are themselves in dispute as to which of them is able to tax the activities of a particular group then they can use an international dispute resolution mechanism known as the Mutual Agreement Procedure (MAP). OECD has tracked the number of cases that have gone into MAP over the past 10 years and the number has more than doubled. The uncertainties created by BEPS are going to exacerbate the amount of dispute. While there is a specific action point (number 14) to reduce the number of disputes, which sets out a minimum standard to which all countries say they will adhere, a best practice to which they might aspire, and a monitoring system to ensure there is information about what is happening in practice, the possibility of more disputes in the future remains a cause for serious concern.

Continuing concerns

The report on the digitalisation of the world economy seems to be offering individual countries the opportunity to go it alone and decide that activities in their country are sufficient to give them taxing rights that they did not previously enjoy. The danger is that international groups will find themselves taxed in more than one country under the new international tax rules when the original rules, set up nearly 100 years ago, were designed to achieve exactly the opposite effect.

What is next on the BEPS agenda?

In addition to the reports on individual actions published on 5 October, OECD also published an explanatory statement which summarises what it has done and achieved and looks forward to future challenges:

“It is now time to focus on the upcoming challenges, which include supporting the implementation of the recommended changes in a consistent and coherent manner, monitoring the impact on double non-taxation and on double taxation, and designing a more inclusive framework to support implementation and carry out monitoring.”

OECD/G20 BEPS Project – Explanatory Statement (paragraph 22)

<http://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf>

A key next step for OECD is to come up with, by early 2016, an inclusive framework to involve, on an equal footing, all those countries that want to stay part of the continuing BEPS work. This will bring in some countries that are not currently involved and also international and regional tax organisations.

When the BEPS action plan started out in 2013 there were 44 countries involved: the members of OECD (numbering 32) plus the OECD candidate countries and those G20 member countries that are not members of OECD (which include, rather importantly, Brazil, China, India and Russia).

At the beginning of 2015 the participating countries were expanded to 62 to include, among others, a group of 10 countries representing the developing world.

There are currently more than 90 countries that are going to be participating in the multilateral instrument work which began in early November and is to be completed during 2016. The final result should be a multilateral instrument which will sit “above” the bilateral treaties and amend many of the provisions in those treaties.

Ian Young is the Tax Faculty’s international tax manager and has been closely involved in the BEPS work

APPENDIX 3

The sixty-two countries involved in year 2, 2015, of the BEPS Action Plan

Albania, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, People's Republic of China, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Peru, Philippines, Poland, Portugal, Russian Federation, Saudi Arabia, Senegal, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, United States and Vietnam.