BIAC THE VOICE OF BUSINESS AT THE OECD

AN UPDATE ON THE OECD BEPS PROJECT JULY 2016

BIAC'S ENGAGEMENT

Throughout the OECD's BEPS process, BIAC submitted comments on 24 discussion drafts and vigorously participated in the 12 public consultations organised by the OECD, consistently advocating and explaining business concerns.

BIAC endorses coherent and consistent application of the consensus reached at the OECD. As the project enters the pivotal phase of implementation, BIAC will work with the OECD to support implementation of the measures and help its member organisations in working with their governments to ensure consistency. Further, BIAC hopes to assist the OECD in its ongoing monitoring efforts by gathering evidence from businesses about their experience of implementation as taxpayers.

INTERNATIONAL TAXATION AND BEPS

Globalisation, the digitalisation of trade, and multinational enterprises (MNEs) whose operations span national borders have contributed positively to economic growth. However, the question of how to achieve a fair and efficient allocation of taxing rights in respect of the profits of MNEs whose operations are integrated across multiple jurisdictions is of concern to governments and the G20.

Inconsistencies between different tax systems can have negative effects on both business and governments. Double taxation, whereby the same income is taxed by more than one jurisdiction, hinders cross-border trade and negatively impacts growth. Base Erosion and Profit Shifting (BEPS) refers to the converse situation where mismatches in taxation systems are used to generate double non-taxation of income and/or the artificial shifting of profit to low or no-tax jurisdictions.

THE BEPS ACTION PLAN

Following a G20 mandate, in 2012 the OECD embarked on an ambitious project to reform the global tax system for the 21st century and to prevent the perceived BEPS problem. The project's goal is to realign taxation with economic substance and value creation, while preventing double taxation. BIAC fully supports this initiative and recognises the need for a coherent set of rules to govern an increasingly international economy.

"The aim of the [BEPS] measures is to realign taxation with economic substance and value creation, while preventing double taxation" – OECD, 2015

Over the last two and a half years the OECD has worked on 15 pre-defined actions to tackle BEPS, releasing final reports on each action in October 2015. The OECD's BEPS work is continuing in specific areas where the final 15 reports identified need for further action (in some cases, where countries were unable to reach agreement within the initial two year timeframe). However, BEPS can now broadly be said to be entering an implementation phase whereby governments are applying new guidance and translating the OECD's recommendations into domestic legislation.

The Business and Industry Advisory Committee to the OECD
Comité consultatif économique et industriel auprès de l'OCDE

13/15 Chaussée de la Muette, 75016 Paris, France
Tel. +33 (0)1 42 30 09 60 | Fax +33 (0)1 42 88 78 38
email: biac@biac.org | www.biac.org

The Director of the OECD's Centre for Tax Policy and Administration, Pascal Saint-Amans, discussing the BEPS proposals

BIAC Tax Committee Chair

William Morris, **Chair,** BIAC Committee on Taxation and Fiscal Policy
Director – Global Tax Policy
GE International Inc.
United Kingdom

BIAC Contacts

Nicole Primmer, Senior Policy Director
13-15 Chausee de la Muette
75016 Paris, France
primmer@biac.org

Frances Stewart, Tax Policy Consultant
13-15 Chausee de la Muette
75016 Paris, France
stewart@biac.org

Changes in the way tax is levied creates uncertainty for investors, and BIAC advocates for the consensus reached at the OECD to be implemented consistently across jurisdictions. Divergence from the OECD's recommendations undermines the purpose of the project to create a fair, transparent and coherent international tax system. Divergence also creates challenges for taxpayers, who are already navigating a transformation in the global tax environment.

INCLUSIVE FRAMEWORK: AN OPPORTUNITY FOR EVEN GREATER CONSISTENCY AND COHERENCE

The *Inclusive Framework* was announced in February 2016. All jurisdictions will now be able to participate in the BEPS project on an equal footing to the OECD/G20 countries if they wish. In practice, this means they will implement the BEPS minimum standards and engage in the ongoing monitoring of BEPS. BIAC is very supportive of this initiative, which we hope can bring greater coherence to the international system and enhance cross-border trade and investment. This is particularly important for developing countries where lack of familiarity with regulatory and tax guidance can stretch tax policy and tax administration resources.

THE OECD'S RECOMMENDATIONS

We have summarised, below, the substance of the recommendations and what they will mean in practice for business. In addition to the measures listed there are two actions for the OECD to implement themselves. Action 11 on BEPS data collection aims to establish methodologies to meaningfully monitor BEPS on an ongoing basis. Action 15 relates to the development of a multilateral instrument (MLI) to enable jurisdictions to implement measures developed in the course of the work on BEPS and to amend bilateral tax treaties. Work on the MLI is ongoing and may not be finalised until at least the end of 2016.

The final recommendations can be grouped into:

i. agreed ***minimum standards***, which, although not legally binding, it is anticipated all OECD, G20 and BEPS Associate countries will implement;
ii. ***revision of existing OECD standards,*** specifically the transfer pricing guidelines and model tax treaty, which reflect internationally accepted principles of cross border taxation;
iii. agreed ***common approaches***, which it is hoped most countries will choose to adopt in some form to facilitate the convergence of national practices; and
iv. guidance based on ***best practices***, which are optional to implement but can support countries intending to act in certain areas.

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SUMMARY OF OECD BEPS PROPOSALS AND IMPACT ON BUSINESS

Minimum standards	
Harmful Tax Practices (Action 5)	The proposals target preferential tax regimes (e.g. patent boxes) which may facilitate base erosion. As a result, some regimes that tax certain profits at a reduced rate will be affected. Further, to enhance transparency, there will be compulsory and automatic exchange of certain types of taxpayer specific rulings between tax authorities. Implementation requires changes to local rules and will vary across jurisdictions.
Prevent Treaty Abuse (Action 6)	This action calls for the refinement of bilateral treaties to prevent the granting of treaty benefits in inappropriate circumstances by use of a GAAR (Principal Purpose Test) or a LoB. There is a concern that the PPT could adversely affect some taxpayers with legitimate business structures. We await further developments and guidance.
Transfer Pricing Documentation (Action 13)	Action 13 concerns consistent tax and transfer pricing record-keeping and transparent disclosure of information to tax authorities. Proposals will be implemented via local rules in conjunction with OECD guidelines. Local implementation has begun and there is a concern that it is not being undertaken consistently and could create a challenging compliance burden for business to manage.
Dispute resolution (excluding arbitration) (Action 14)	The OECD's provisions aim to enhance the dispute resolution mechanisms between tax authorities as to who has taxing rights over particular income. This action is vital for the success of the entire BEPS project and of great importance for mitigating tax uncertainty and preventing double taxation, which undermines cross-border trade and investment.
Revision of OECD Standards	
Permanent Establishment (Action 7)	A Permanent Establishment (PE) is a fixed place of business which gives rise to an income and/or sales tax liability in the territory in which it is situated. The BEPS work has redefined the threshold for creating a PE to ensure that operations where economic value is created are more appropriately taxed. There is significant follow-up work ongoing in this area.
Transfer pricing of intangibles (Action 8) **Transfer pricing – risk and capital (Action 9)** **Transfer pricing of high-risk transactions (Action 10)**	Transfer Pricing (TP) is the pricing of transactions between related parties. Inappropriate TP is a BEPS risk as profit can be transferred from a high tax jurisdiction to a low tax one. OECD guidelines on TP have been updated throughout the BEPS project. There is still work to be completed on these actions and further amendments to the guidelines are expected. Not all countries have endorsed the updated guidelines and so uncertainty remains in this area regarding how they will be applied. Coherence in transfer pricing rules is necessary to mitigate uncertainty and foster cross-border trade and so the inconsistent application of the new guidelines is of concern for business. Actions 8-10 amend the TP rules: i. to address BEPS where intangibles are owned by, used by, contributed or moved among group members; ii. to address BEPS through the transfer of risks among, or allocating excessive capital to, group members; and iii. in respect of transactions which would not, or would only very rarely, occur between third parties.
Common approaches	
Digital Economy - VAT/GST (Action 1)	The OECD concluded, and BIAC agrees, that the digital economy is not distinct from the rest of the economy and should not be subject to a different tax regime. The challenges of sales tax collection on digital cross-border transactions can be addressed by aligning rules with the principles of the International VAT/GST Guidelines and countries should also consider the introduction of the collection mechanisms included therein.
Hybrids (Action 2)	Hybrid mismatch arrangements exploit a difference in the characterisation of an entity or arrangement under the laws of two or more tax jurisdictions to produce a mismatch in tax outcomes. The OECD's recommendations set out to counter hybrid mismatch arrangements and will be effected by changes to local rules and tax treaties. The OECD's recommendations could create double taxation in some cases which is of significant concern to business.
Interest deductions (Action 4)	Suggested rules to be implemented through domestic legislation, which will limit the deduction available for interest and other financial payments and apply to both related and third party debt. Some non-aggressive taxpayers in highly leveraged sectors (infrastructure, long-term investment, project finance) will be disproportionately affected by the measures.
Best practices	
Controlled Foreign Companies (Action 3)	Controlled foreign company (CFC) rules can safeguard against the shifting of income into foreign subsidiaries. There was not common agreement as part of the BEPS process on what CFC rules ought to target exactly and the resultant outputs on best practices are not coherent. Given this, there is a risk of unilateral action which will undermine the creation of a consistent tax environment.
Disclosure of aggressive tax planning (Action 12)	Rules which require taxpayers to disclose tax planning arrangements defined as aggressive or abusive will be implemented locally. The scope for different disclosure rules in different countries may lead to an increased compliance burden for business.