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OECD Action Plan on Base Erosion and Profit Shifting Published

On July, 19, the Secretary General of the OECD published it long expected action plan on Base Erosion and Profit Shifting (BEPS).

This action plan might influence current and future tax schemes of multi-national enterprises (MNEs).
In this alert we will summarize the action plan and lighten the key points.

I Summary
The OECD plans to develop a new set of international rules against shifting of profits to low or non taxed environments . The new set of rules is meant to prevent working with "loopholes", "gaps" and "mismatches". The OECD concludes that BEPS schemes are more and more common, i.e. due to the development of the digital economy.
Today this is not or insufficiently possible due to the lack of international interaction and the fact that current treaties do not address these issues sufficiently.
In general therefore, the OECD advices to determine rules regarding substance to prevent the use of empty shells (also called conduits). Also, the transfer pricing rules should be redeveloped, without adopting global apportionment methods.

II New International Standards
Actions planned
Action 1 Address the lack of nexus between digital environment and legal tax environment;
Action 2 Develop new set of tax treaty rules to put an end to mismatches;
Action 3 Develop new tax treaty rules covering the subject of controlled foreign company (CFC) legislation. Probably, this will especially raise the question whether participation exemption should be granted;
Action 4 Develop tax treaty rules regarding non deductibility of interest, preventing companies to deduct interest against a high tax rate, while the interest is taxed against a low tax rate;
Action 5 Counter harmful tax practices.
This action plan counters lack of transparency in connection with lack of substance. It focuses on anti-conduit rules, aligning income with economic activity, anti-treaty shopping and restore source taxation.

Action 6 Anti-treaty abuse
Update of the permanent establishment (PE) definition in the tax treaties, with special attention towards agent PE's;
Action 7 Preventing artificial PE's
The OECD will especially draw attention on transfer pricing allocation toward tax havens, i.e. transfer of Intangible Property (IP). TP rules should become more clear;
Action 8 Rules against shifting of IP towards tax havens;
Action 9 Re-definition of TP Risk and Capital allocation as well as remuneration;
Action 10 Rules against low risk transactions, which rarely take place between third parties. I.e. through reclassification of the low risk transactions.

III Ensure transparency/promote certainty
Action 11 Data are crucial;
Action 12 Enforce disclosement of tax planning arrangements;
Action 13 Reexamine TP documentation to enable tax authorities to get the big value chain picture;
Action 14 Solve mutual agreement procedure (MAP) problems more efficiently;
Action 15 Develop multilateral Instruments.

The timing of implementing the plan will be as follows:

Anti abuse measures will be implemented within 12-18 months
CFC rules measures will be implemented within 24 months
TP rules implementation will last longer than 24 months

Implementation methodology

Non-OECD member Countries will be invited to join the discussions, the commission of Fiscal affairs will seek for consensus with member Countries and finally MNEs will be involved through consulting them.

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