OECD BEPS project – CIOT responds to recent consultations

International Tax Technical

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The CIOT has responded to two recent discussion documents published by the OECD on BEPS actions. These were on BEPS Action 3: Strengthening CFC rules; and BEPS Action 12: Mandatory disclosure rules.

Action 3: strengthening CFC rules

The OECD discussion document began with a useful summary of the main policy considerations which lead to CFC rules being implemented. The document notes that CFC rules can either be specifically targeted at profit shifting, or they can be a tool of a worldwide tax system aimed at ensuring the inclusion of worldwide income in a company's tax return. It is the view of the CIOT that the OECD BEPS project should focus on how CFC rules can prevent profit shifting.

Also, recommendations in regard to CFC rules should take account of actions arising from other BEPS reports and actions, and should resist trying to solve too much of the BEPS agenda under this action. Not every BEPS problem can or should be solved by each BEPS action. In particular, BEPS actions around transfer pricing impact on some of the areas discussed in the CFC discussion document. The CIOT anticipates that transfer pricing rules – in particular, the rules relating to intangibles – will be strengthened so as to address the concerns identified in relation to CFCs.

A further general point made is that if recommendations by the OECD regarding CFC rules are too ambitious, it would reduce the likelihood of widespread adoption of them. It would be counterproductive for there to be very strict CFC rules in some countries and none in others, as this could lead to distorted tax competition.

The full text of our response can be found here.

Action 12: mandatory disclosure rules

The UK Disclosure of Tax Avoidance Schemes (DOTAS) regime has been successful as one element in a strategy to reduce abusive tax avoidance schemes from the UK. These rules were considered throughout the OECD discussion document, alongside similar rules in other jurisdictions.

The CIOT commented that the UK regime works best in identifying mass marketed pre-packaged schemes. However, we also noted that the rules impose a compliance burden for promoters and for companies with in-house tax departments, which have commercial affairs that happen to need tax advice. Significant work may be needed by in-house teams to confirm whether a disclosure has to be made. The OECD discussion draft is, therefore, right to identify as a design principle the aim of balancing the additional compliance cost with the benefits obtained by the tax administration.

In this regard, we suggested that the additional information which will be available to tax administrations, as a result of other BEPS actions (eg country by country reporting) and generally as transparency with regard to tax increases globally (eg Tax Information Exchange Agreements), should be considered when considering what other information would be useful to tax administrations to respond to tax risks posed by tax planning schemes.

Our response cautioned that international mandatory disclosure rules should be aimed at artificial and abusive schemes, categorised by hallmarks similar to those in the UK DOTAS regime. This means that the rules would not capture the types of international tax planning tools that have been identified as issues which are being looked at by other BEPS actions; for example, hybrid mismatch arrangements. However, since these types of planning are being addressed by other parts of the BEPS project, it is not necessary for them to also be addressed by mandatory disclosure rules.

We said that clarity will be particularly important in relation to determining what is required to be disclosed. Any generic or specific hallmarks must be very clearly described. Tax administrations should also ensure that they provide meaningful examples of the types of transactions that fall within each hallmark. In addition, countries should be encouraged to engage in consultation with taxpayers and tax advisers, prior to introducing any mandatory disclosure rules. Such consultation is

important to ensure that final legislation is appropriate for the jurisdiction and for promoters and taxpayers to be in a position to comply with the rules from the outset.

The discussion document acknowledges that there are differences between domestic and international schemes and that this makes international schemes more difficult to tackle. However, we suggested that the OECD does not adequately recognise the very real difficulties which will arise in practice, both in defining reportable schemes and identifying who should report it. For example, the expectation that promoters will be aware of the full consequences of tax planning within multinational groups
is misplaced.

It is very unlikely to be the case in the common and mainstream situations of international tax advice, where several advisers have been involved in bespoke tax planning for a group on its commercial affairs. Frequently, there will be a mixture of firms of accountants, lawyers and other intermediaries involved, each responsible for only part of the transaction; there will even be separate firms within the same network of firms. We pointed out that there may also be issues arising from international tax schemes, in that even two countries with identical mandatory disclosure rules may well interpret them differently.

Our full response can be viewed here.