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Documentation

OECD BEPS project final reports

Introduction

The BEPS (base erosion and profit shifting) is a joint project between the OECD and the G20 which takes action against erosion of the tax base and profit shifting in jurisdictions with low or no taxation. In particular, the interactions between national tax legislations should not allow taxpayers to benefit from inadvertent double non-taxation.

On 19 July 2013, the OECD published the BEPS Action Plan which comprises 15 actions to address the problem in a holistic manner. The technical work started in September 2013. Switzerland was actively involved in all of the OECD working parties devoted to the BEPS project. The work covered the following:

- Action 1 – Address the tax challenges of the digital economy
- Action 2 – Neutralise the effects of hybrid mismatch arrangements
- Action 3 – Strengthen controlled foreign company (CFC) rules
- Action 4 – Limit base erosion via interest deductions and other financial payments
- Action 5 – Counter harmful tax practices more effectively, taking into account transparency and substance
- Action 6 – Prevent treaty abuse
- Action 7 – Prevent the artificial avoidance of permanent establishment (PE) status
- Actions 8, 9, 10 – Assure that transfer pricing outcomes are in line with value creation
- Action 11 – Establish methodologies to collect and analyse data on BEPS and the actions to address it
- Action 12 – Require taxpayers to disclose their aggressive tax planning arrangements
- Action 13 – Re-examine transfer pricing documentation
- Action 14 – Make dispute resolution mechanisms more effective
- Action 15 – Develop a multilateral instrument

What is the status of the work in the OECD?

The OECD Committee on Fiscal Affairs (CFA) approved the final reports on 21 and 22 September 2015. They have been submitted to the OECD Council on 1 October and were published by the OECD on 5 October. They are due to be presented at the G20 Finance Ministers and Central Bank Governors Meeting in Lima on 8 October 2015. Finally, the OECD will also present the outcomes at the G20 Summit in Antalya on 15 and 16 November.

These outcomes complete the interim reports published in September 2014 and officially mark the end of the project. However, "post-BEPS" work will follow, among other things to establish systems that will make it possible to monitor jurisdictions' implementation of the project outcomes.

What is the content of the project outcomes?

The final results will be in the form of 13 reports covering the project's 15 actions and the recommendations. From a Swiss perspective, the focus is on the following recommendations:

- **Patent/IP boxes:** A new standard has been drawn up for the preferential taxation of intangible property, i.e. the nexus approach, according to which the income from eligible intangible property must be in proportion to the research and development carried out in the place of taxation in order for it to benefit from preferential taxation. Countries that already have patent boxes at present have to adapt these regimes to the new criteria by 30 June 2021 at the latest and take steps to prevent new entrants to existing IP regimes after 30 June 2016. At the moment, none of the 16 patent boxes examined by the OECD meets the new criteria.
- **Spontaneous exchange of information on advance tax rulings and similar instruments:** A framework governing the spontaneous exchange of information on advance tax rulings and similar instruments has been set up. It covers rulings to be issued in the future and rulings that will still be applicable when the rules come into force. Countries which unlike Switzerland already have the required legal basis for the spontaneous exchange of information should also exchange information on rulings issued after 1 January 2010 that were still effective in 2014. The spontaneous exchange of information is mandatory only for certain categories of rulings that carry a significant risk of base erosion and profit shifting.
- **Preferential regimes:** The OECD assessed 39 preferential regimes of its member states and of other jurisdictions participating in the BEPS project, including five Swiss regimes. As Switzerland has already launched the third series of corporate tax reforms, which makes provision for the abolition of tax regimes that are no longer accepted internationally, the international community is no longer focusing on Swiss regimes at present. Aside from Swiss regimes, the regimes of other states will be adapted by the states concerned.
- **Dispute resolution mechanisms:** As a minimum, the states undertake to grant access to the mutual agreement procedure when the application of a double taxation agreement could lead to double taxation. In addition to this commitment, a group of countries, including Switzerland, has decided to go beyond the minimum standard, declaring their willingness to provide for arbitration proceedings within the framework of double taxation agreements.
- **Anti-abuse provision in double taxation agreements:** New anti-abuse provisions will make it possible to prevent the benefits of double taxation treaties from being granted to persons who are not resident in one of the contracting states and who are thus not entitled to access the treaty benefits.

- **Transfer pricing documentation:** The primary outcome of this action is the creation of a system for the exchange of country-by-country reports. Country-by-country reporting aims to provide a complete overview of multinationals' global allocation of income and taxes paid, together with certain indicators of the location of economic activity within the group. Countries are to create a legal basis to enable the automatic exchange of country-by-country reports with the tax authorities of each state where a constituent entity is located.

What are the implications of the BEPS project for Switzerland?

The principal aim of the BEPS project is to ensure that profits are taxed in the jurisdiction where the economic activity that gave rise to the profit took place. All participating states will have to amend their laws and practices accordingly. The participation of all important business locations should lead to a more level playing field in terms of global tax competition.

- Switzerland has already taken account of some BEPS project outcomes or is in the process of doing so within the framework of ongoing reforms. This is the case particularly with the third series of corporate tax reforms (abolition of certain preferential tax regimes, introduction of a patent box in line with the OECD standard).
- Some results of the BEPS project do not require Switzerland to take any specific action because it already meets the criteria defined by the OECD. In the area of dispute resolution, for instance, Switzerland meets the requirements of the standard, as its double taxation treaties already provide access to the mutual agreement procedure and contain a dispute resolution clause. It has additionally concluded a large number of double taxation treaties that contain arbitration clauses and is a pioneer in this field, together with other states.
- Some outcomes are in the form of minimum standards with which Switzerland (just like the other states) now has to comply. In particular, these include the exchange of information on tax rulings and the exchange of country-by-country reports. Switzerland will create the necessary legal basis with the approval of the OECD/Council of Europe multilateral administrative assistance convention. The automatic exchange of country-by-country reports additionally requires the creation of a specific contractual and statutory basis. In this way, Swiss multinationals can benefit from the additional protection provided by international treaties especially in terms of speciality and confidentiality of the exchanged information.
- Finally, some of the project's outcomes are optional. Such recommendations could also influence the appeal of Switzerland as a business location if they are implemented by a large number of countries. The Federal Council is having analyses and possible courses of action prepared for such recommendations made by the OECD.