CURRENT TP LANDSCAPE AND DEVELOPMENTS IN TRANSFER PRICING

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BEPS FOLLOW UP WORK
Overview

• **BEPS Follow up work**
  – BEPS Action 7 – Additional Guidance on Attribution of Profits to PEs
  – BEPS Actions 8-10 Update
    • Revised Guidance on Profit Splits
    • Hard-to-value intangibles – Application guidance
    • Guidance on Financial Transactions

• **Scoping of future work**
  – Chapter IV – Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes
  – Chapter VII – Special Considerations for Intragroup Services

• **Other Projects**
  – Dialogue with jurisdictions (Brazil)
  – Tax Certainty work-stream

• **ICAP**
Attribution of Profits to PEs

• This guidance was published on 22 March 2018 as a supplementary report to the BEPS Action 7 Report

• In sum, the agreed guidance:
  – Clarifies that BEPS Action 8-10 changes do not change the PE profit attribution analysis, which continues to depend on Article 7 of the applicable treaty
  – Preserves existing treaty-based methods of attributing profits to PEs
  – Prevents double taxation of profits in the source country under Articles 7 and 9
  – Allows for administrative measures to reduce compliance/administrative burdens
Revised Guidance on Profit Splits

• Goals, per Actions 8-10 Final Report:
  – Clarify when profit split is the most appropriate method
  – Describe approaches to splitting profits reliably

• The final guidance was agreed by IF on 4 June 2018:
  – Profit Split is appropriate method if:
    • Unique and valuable contributions are made by both parties; highly integrated transactions; shared assumption of risk

  – Where Profit Split is the most appropriate method:
    • Split actual profits where risk assumption is shared (otherwise, split anticipated profits)

  – Revised guidance on profit-splitting factors (proxies for value creation) with examples
Hard-to-value intangibles (HTVI) application guidance

- HTVI approach was adopted as part of the 2015 BEPS Report on Actions 8-10 and incorporated into the revised Chapter VI TPG
  - Recognizes that after-the-fact results may be relevant in pricing an HTVI transfer
    - If actual financial results differ from the ex ante pricing
- New guidance for tax administrations on application of approach to HTVI was approved by IF on 4 June 2018.
    - Guidance to become Annex to Chapter VI of the TPG.
- Further work:
  - monitoring the application of the approach to transfers of HTVI, for purposes of 2020 review
Financial Transactions (1)

- Work mandated under BEPS Action 4 and to be carried out in close coordination with Action 9
  - Scoping paper agreed May 2016
- Based on this scoping, a draft guidance was discussed, amended, and discussed again by WP6 in June 2017 and November 2017
- Substantially re-drafted reflecting WP6 feedback but some significant differences between countries’ positions remained
- Progress made but difficult to reach consensus on some key issues (e.g., debt versus equity)
Financial Transactions (2)

• Countries still have some differing positions on financial transactions

• Further efforts to advance the work:
  – Focus group activated to advance specific issues
  – Road-plan agreed at WP6 meeting in April 2018
    • Plan to issue “non-consensus” public discussion draft – Summer 2018
    • Continued discussion in November 2018 meeting with an aim to agree “consensus” discussion draft – early 2019
    • Aim to agree on the final guidance in 2019
Financial transactions (3)

- Discussion draft published in July 2018 (open for comments until 7\textsuperscript{th} September 2018)
  - \url{http://www.oecd.org/tax/oecd-releases-beps-discussion-draft-on-the-transfer-pricing-aspects-of-financial-transactions.htm}
- Non-consensus document
- Issues where lack of consensus exists, framed as questions to commentators
  - Almost 1,000 pages of comments received
- Content
  - Delineation of financial transactions, including guidance on capital structure
  - Pricing of specific issues: loans, cash pools, hedging, guarantees and captives.
- Inputs from the public are useful to advance the discussions on certain controversial issues during WP6 in November
SCOPING OF FUTURE WORK
Planned update of guidance on Administrative Measures to prevent and resolve double taxation (Chapter IV TPG)

• WP6 is in the process of scoping the future revision of Chapter IV

• Initial draft on the scope → discussed at WP6 meeting in April 2018

• Main areas/issues that may be addressed:
  – Aspects or mechanisms to minimise the risk of transfer pricing disputes (e.g. co-operative compliance, risk assessment tax examination practices);
  – Corresponding and secondary adjustments and the risk of double taxation;
  – Advance pricing agreements;

• Invitation for public comments (deadline: 20 June 2018);
  – More than 130 pages of comments received

• Scoping to be finalized in 2018; project to continue in 2019.
Planned update of guidance on Services (Chapter VII TPG)

• Scoping work underway
  – Discussed at WP6 November 2017 and April 2018 meetings

• Suggested direction
  – Revise and modernise the language and the structure of the chapter;
  – To clarify some areas that could lead to misapplication; and
  – To ensure consistency with changes to other chapters of the TPG

• Invitation for public comments (deadline: 20 June 2018);
  – More than 270 pages of comments received

• Scoping to be finalized in 2018; project to continue in 2019
OTHER PROJECTS
Tax Certainty Work-stream

• Identifying the key areas of tax uncertainty in the area of Transfer Pricing
  – e.g. divergent interpretation or application of TPG
  – Different approaches to attribution of profits to PEs
• Identifying other opportunities for increasing tax certainty
  – e.g. simplification measures
• Identifying possible improvements and include into existing work-streams or start separate projects
Transfer Pricing Work Program with Brazil

**Objective**
- Dialogue between RFB and OECD
  - Identifying strengths and weaknesses of Brazilian TP regime and options for convergence

**Outline**
- Launch Event (28 February – 1 March 2018)
- Assessment of effectiveness of the Brazilian TP rules (including gap effectiveness)
  - April – December 2018
    - Inputs from MNEs via BIAC/CNI
- Identifying options for Convergence
  - Jan- March 2019
CbCR 2020 review

• Joint session between WP6 and WP10 on the review of the BEPS Action 13 minimum standard
• Current environment of CbC Reporting
• A number of issues previously identified by participants at OECD events, meetings and workshops will be discussed by the joint Group. Under this process, inputs from stakeholders will be invited:
  – Scope
  – Content
  – Surrogate parent entity filing and local filing
  – Exchange of CbCR
  – Other
Q&A