

The Impacts of BEPS Actions Regarding Transfer Pricing on the Regulations and Treaty Practice in Belgium

Thierry Vanwelkenhuyzen

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Agenda

1. Roots of the BEPS report
2. Objective of the BEPS report
3. Analysis of some actions of the report and their application in Belgium

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Roots of the BEPS Report

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Roots of the BEPS Report

- ▶ G20 London Summit in 2009
- ▶ Political approach of the fight against tax heavens:
 - political endorsement of OECD actions
 - intervention of the European Commission
- ▶ Appearance of ethics in the tax area

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Objective of the BEPS Report

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Objective of the BEPS Report

Addressing tax avoidance strategies that exploit gaps and mismatches in tax rules of different countries to artificially shift profits to low jurisdictions where there is no economic substance and to achieve a low or nil tax charge.

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Action Plan on BEPS

COHERENCE OF CORPORATION TAX	ALIGNMENT ON THE ECONOMIC SUBSTANCE	INCREASE TRANSPARENCY TOWARD TAX AUTHORITIES AND CERTAINTY FOR BUSINESSES
Neutralizing the effects of hybrid mismatch arrangements	Preventing an inappropriate use of tax treaty benefits	Measuring and monitoring BEPS (data collection and analysis)
Limiting interest deductions and other financial payments	Preventing the artificial avoidance of permanent establishment status	Mandatory disclosure rules (of aggressive tax planning)
Designing effective CFC rules	Aligning transfer pricing outcomes with value creation (3 actions)	Transfer pricing documentation
Countering harmful tax practices more effectively		Making dispute resolution mechanisms more effective
Addressing the tax challenges of the digital economy		
Developing a multilateral instrument to modify bilateral tax treaties		

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Objective of the BEPS Report

Four factors which modified the tax environment:

- The digitalization of the economy
- The increasing importance of emerging countries which challenge the arm's length principle and are in favor of the formulary apportionment of the group consolidated profit
- The interference of political leaders in the transfer pricing debate
- The appearance of ethics in the tax arena

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Objective of the BEPS Report

- Position of the OECD until 2012: priority is given to **the legal approach**: agreements concluded between parties are key in the transfer pricing analysis.
- Position of the OECD from 2013: priority is given to **the economic approach**: the profit is allocated in proportion to the value creation of each group entity.
- The action plan on BEPS identified **15 actions** in July 2013
 - 14 actions are described in final reports issued and approved on 5 October 2015
 - 1 action (developing a multilateral instrument) should be achieved by the end of December 2016

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Analysis of some actions of the report and their application in Belgium

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Analysis of some BEPS Actions

1. Current Transfer Pricing Regulation and Practice in Belgium

- 1.1. Statutory rules:** articles 185 §2 and 26 ITC
- 1.2. Administrative Regulations:** those of 28 June 1999, 14 November 2006 and2016 (profits attributable to PEs)
- 1.3. Case Law:** no case on real TP issues with benchmark studies

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Analysis of some BEPS Actions

2. The Impact of the BEPS Project on Transfer Pricing

2.1. Introduction

- The OECD TP guidelines are immediately enforceable in Belgium, according to the Tax Authorities
- Legislative changes: TP documentation, patent Box, extended definition of PE, etc.
- The « substance over form » approach

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Analysis of some BEPS Actions

2. The Impact of the BEPS Project on Transfer Pricing

2.2. Challenges of Transactions with Intangibles

- Definition of intangibles
- Economic ownership of intangibles
- « Substance over form » approach toward intangibles: the DEMPE functions and the position of Ruling Commission
- Comparability and group synergies: guarantee fees and volume discounts

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Analysis of some BEPS Actions

2. The Impact of the BEPS Project on Transfer Pricing

2.3. Risk and Capital: the current position of the Ruling Commission is more or less compliant

2.4. High-Risk Transactions

2.4.1. Intra-group services

- a) When the Belgian company is the provider
 - (service) PE
 - Method TNMM (with cost + as PLI)
 - Disbursements

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Analysis of some BEPS Actions

2.4. High-Risk Transactions (cont'd)

2.4.1. Intra-group services (cont'd)

- b) When the Belgian entity is the beneficiary
 - Benefits from services
 - Type of costs crosscharged and mark up
 - Anti-abuse provisions
- c) Rulings
- d) OECD « safe harbor » regime for low value-adding services: cost + 5%

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Analysis of some BEPS Actions

2.4. High-Risk Transactions (cont'd)

2.4.2. Profit Splits in the Context of Value Chains

- CUP method when comparables are available
- Profit split when two or more companies own high value intangibles: interesting rulings
- Public comments to discussion draft on « the revised guidance on profit splits »

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Analysis of some BEPS Actions

2.5. Transfer Pricing Documentation (Program Law of 1 July 2016)

2.5.1. Country-by-Country Reporting: 11 items to report, a.o.

- Worldwide allocation of profits
- Accrued and paid taxes
- Location of activities
- Number of personnel

Aim: to help the T.A. to detect profit shifting to companies without economic substance

- Threshold of min. EUR 750 million consolidated turnover: +/- 60 companies in Belgium
- Filing with the Belgian Tax Authorities
- Confidentiality issue: action from the European Commission

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Analysis of some BEPS Actions

2.5. Transfer Pricing Documentation (Program Law of 1 July 2016)

2.5.2. Master file: overview of the group

- List of intangibles
- TP policies for R&D and intangibles
- Financial transactions
- Financial and tax statements
- Overall TP policies
- Global allocation of income and economic activity

2.5.3. Local file: departs from the OECD requirements

- First form: information on local entity
- Second form: detailed information on TP applied between Belgian entity and foreign group entities (by exploitation unit – threshold: EUR 1 million)

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Analysis of some BEPS Actions

2.5. Transfer Pricing Documentation (Program Law of 1 July 2016)

2.5.3. Local file: departs from the OECD requirements (cont'd)

- Second form includes (intra-group transactions except first 2 – materiality level: EUR 25,000) :
 - Nature of the activities
 - Aggregated data on the transactions made by the business unit with (un)related parties over three financial periods
 - Sales to and purchases from non-residents for inventory, intangible fixed assets, tangible fixed assets, financial fixed assets and commissions for services
 - Transfer pricing method used for each flow
 - Details on financial transactions: interest, cash pooling interest, commercial debt interest, guarantee fees, (re)insurance premiums, derivatives
 - Details on ANY other cross-border transactions
 - Profit allocation with permanent establishments
 - List of CCAs, rulings and internal reinsurance contracts (copy may be annexed in pdf)

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Analysis of some BEPS Actions

2.5. Transfer Pricing Documentation (Program Law of 1 July 2016)

2.5.4. Filing obligations for the Master file and the Local file

- If one of the following thresholds is exceeded (based on preceding accounting year) :
 - Operational and financial revenue of EUR 50 million (excluding non recurring revenue)
 - Balance sheet total of EUR 1 billion
 - 100 full-time equivalent employees (on an average annual basis)

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