

Dealing with BEPS

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- BEPS measures entering into effect
- EU and individual countries are following up with measures
- A lot has been documented, discussed from theoretical, academic and policy perspective

...but how does it affect day-to-day tax advisory?

Often-heard perceptions

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“BEPS measures are still far from implementation”

“BEPS measures are still unclear”

“BEPS is only politics”



Reality

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BEPS measures are already entering into effect

Biggest shockwave (MLI) is near

Tax advisory requires BEPS sensitivity



Summary of BEPS (and similar) measures

- OECD/G20 BEPS measures. Most importantly
 - Tax treaty measures (MLI)
 - Transfer pricing
- EU Anti-Tax Avoidance Directives (ATAD 1 & 2)
 - deductibility of interest;
 - exit taxation;
 - general anti-abuse rule (GAAR);
 - controlled foreign company (CFC) rules; and
 - hybrid mismatches
- EU state-aid investigations
 - Apple
 - Starbucks
 - McDonalds, etc.

Also..

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- Enhanced exchange of information
- Altered attitude of tax inspectors (and even judges) -> taking into account public opinion on (alleged) tax avoidance
- US position in BEPS
- US tax reforms?



100% of international tax advisory will be affected
by BEPS(-like) measures

- BEPS actions 6 and 15
- OECD minimum standard against treaty abuse:
 - Principal purpose test (PPT), or
 - Limitation on benefits test (LOB) + anti-conduit rule
- Expectation: large majority of countries will opt for PPT
- Multilateral instrument: will implement tax treaty measures (including PPT) in worldwide tax treaty network
- Timing: signing ceremony June 2017
- Entry into effect: depending on domestic ratification processes (could be as early as 2019)

- PPT will end up in most tax treaties, denying *all* treaty benefits in case:
“having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit”



How to deal with the PPT?

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- In the first place legal context:
 - Scarce guidance
 - Important: BEPS 6 report -> legally binding means of interpretation under Vienna Convention on Law of Treaties, as *travaux préparatoires*
- Not yet entered into effect, but already relevant:
 - Necessity to assess existing structures/ previous advisory
 - Anticipation on PPT -> using favorable current treaty language for exit strategy
 - Assessing PPT compatibility of new advisory

International tax advisory is dead?

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Certainly not!

A lot of exciting possibilities for tax lawyers

- Reviewing previous advisory
- Anticipation on BEPS measures
- Creating functional substance
- Taking into account non-tax considerations:
 - Especially in the Netherlands, asset protection through Bilateral Investment Treaties



But a paradigm shift is required:

- Strategic thinking
- 0% structures are not always feasible anymore (accepting higher tax burden)

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