The Organisation for Economic Co-operation and Development (OECD) has issued final reports on all 15 focus areas in its two-year long project addressing base erosion and profit shifting (BEPS). These reports detail the recommendations developed by OECD and G20 countries for significant changes in key elements of international tax systems, including transfer pricing rules, the deductibility of interest expense, hybrids, the permanent establishment concept, and limitations on tax treaty benefits. Also included are a new country-by-country reporting requirement and a new two-tier approach to transfer pricing documentation. The project broadly looks to ensure that profits are taxed where the economic activities generating the profits are performed and where value is created through amendments to double tax treaties, the Commentary on the OECD Model Tax Convention, transfer pricing guidelines and domestic law.

At the same time, the OECD announced plans for the OECD and G20 countries to work on monitoring the implementation of the BEPS recommendations and to develop a framework for including additional countries in these efforts. Work on some topics such as the multilateral instrument and financial payments will carry on into 2016 and 2017.
The banking sector faces a unique challenge in coming to terms with BEPS developments, coming at the same time as unprecedented requirements for regulatory-driven structural reform. This alert briefly identifies some of the key issues arising from the reports that are most relevant for banks in Asia-Pacific in this context.

Of particular interest to banks, the deductibility and taxation of interest and other payments economically equivalent to interest is identified as a key area of focus for tackling BEPS. Action 4 focuses specifically on the ability of companies to deduct such interest. However, this is just one tool in the package of measures which seeks to counter BEPS associated with financing. In particular, hybrid mismatch rules (Action 2), controlled foreign company rules (Action 3), treaty abuse (Action 6) and transfer pricing (Actions 8-10) all impact bank financing structures (however, the remit of each of these is wider than simply financing).

While many Asia-Pacific jurisdictions are not formal OECD members and, hence, may not implement the complete package, many of these jurisdictions have been engaged in the BEPS project and the BEPS impact will be felt in Asia-Pacific. Even where Asia-Pacific non-OECD members choose not to implement parts of the BEPS proposals, the financing and group structures of Asia-Pacific banking sub-groups of Australian, US or European banks will undoubtedly be affected by the more likely BEPS related domestic law changes in those parts of the World.

Consideration has been given to how the different Actions might interact should a country decide to implement one or more of the Actions. In particular, it has now been confirmed that hybrid mismatch rules (Action 2) should be applied before the fixed ratio rule restricting interest deductions (Action 4). Furthermore, where a country applies CFC rules alongside interest limitation rules, CFC income which is subject to tax on the parent company may be included in the calculation of the parent’s EBITDA when the applying the fixed ratio rule and group ratio rule under the interest deductions rules in Action 4. It is anticipated that Action 4 will encourage groups to reduce the level of intra-group interest payments. It is therefore expected that this will in turn reduce the pressure on a country’s CFC rules. The hybrid mismatch and interest deductions reports issued on 5 October confirmed that notional interest deductions are not the target of either report.

The wide potential for domestic and treaty law change across jurisdictions, coupled with the complexity of the recommendations, makes it important for banking groups to review the potential longevity of their financing arrangements, capitalization and group structures over both the near and longer term.

**Action 1: Addressing the Tax Challenges of the Digital Economy**

The Action 1 report focuses on the BEPS risks and general challenges of attributing global taxable profit raised by the digital economy. While the final report refers to online payment processes and high speed trading it makes no specific recommendations in respect of financial services. However, the OECD and G20 countries shall continue to give further consideration to this Action in 2016.

**Action 2: Neutralizing Effects of Hybrid Mismatch Arrangements**

The majority of the recommendations under Action 2 have been known since the initial report was published by the OECD in September 2014. As noted above, the latest report confirms the recommendation that territories should implement a primary rule to deny a deduction for payments which are not taxed in the hands of the recipient, and a secondary rule to tax income from territories which have not implemented the primary rule.

Therefore it will be particularly important to identify reliance on hybrids in Asia-Pacific banking groups (such as “tower structures” or intra-group convertibles). This is because even if the country where the deduction is sought does not disallow it (say an Asia-Pacific jurisdiction that does not implement Action 2), under the secondary rule the income can be included in the counterparty (which may be in a BEPS-adopting jurisdiction), thereby neutralizing the effect of the hybrid financing of the Asia-Pacific based bank.

The recommendations also cover structures that provide double deductions and imported hybrid mismatches.

The ASEAN financial services hub Singapore (in 2014) recently introduced tax authority guidance on the classification of hybrid instruments, and further changes to domestic law and such guidance may conceivably arise out of the Action 2 recommendations (including a broader consideration of hybrid entities such as partnerships). Hong Kong is currently reviewing the tax deductibility of coupons on Basel III regulatory capital instruments and we expect consultation in the coming months – the final recommendations could form part of the debate.

It is worth noting that Action 2 is only concerned with tax mismatches caused by the hybridity of the instrument or entity, and not by differences in tax codes where the income is classified in the same way in both jurisdictions. Accordingly, it would appear that Action 2 recommendations should not, for example, extend as far as mismatches arising from Singapore’s various financial sector tax incentives (that impose a lower rate of tax or an exemption on qualifying financial income) or Hong Kong’s categorization of non-source income that is not subject to tax in Hong Kong (although see comments on Action 5 below).

The final report includes more detailed rules than previously, in particular on stock loans and repos, as well as noting that where income is picked up by a CFC inclusion this should not lead to a mismatch.
The report also confirms that territories will be free to deal with the tax treatment pertaining to intra-group hybrid regulatory capital as they see fit, a welcome acknowledgment that the banking sector is different in this regard. Where one country chooses not to apply the rules to neutralize a hybrid mismatch in respect of a particular hybrid regulatory capital instrument, this does not affect another country’s policy choice of whether to apply the rules in respect of the particular instrument.

This, therefore, leaves considerable room for variation between territories. For example, Singapore as a policy matter has introduced domestic law providing for the distributions on Additional Tier 1 (AT1) capital instruments to be treated as interest for tax purposes and therefore prima facie deductible (while other jurisdictions like Hong Kong and Australia in contrast have not) - it is possible that a domestic law for AT1 deductibility could be amended in light of Action 2 thereby potentially reintroducing an element of tax uncertainty or complexity to capital raising.

The report also confirms that a number of treaty provisions resulting from the work on treaty abuse in Action 6 are likely to play an important role in reducing the role of hybrids. Draft wording is included for Article 1 of the Model Convention, the purpose of which is to ensure that the benefits of treaties are not available where the income of an entity is not included, under domestic law, as the income of either contracting state. This essentially mirrors the existing wording in Article 1(8) of the US – UK treaty and is particularly relevant to partnerships. The report finally concludes that as long as domestic rules are drafted as proposed, there should be no conflict with non-discrimination provisions within treaties.

**Action 3: Designing Effective Controlled Foreign Company Rules**

The report sets out building blocks for the design of effective CFC rules in order to prevent the diversion of profits of a high-taxed parent to a controlled lower-taxed subsidiary (including the definition of a CFC; exemptions and threshold requirements; the definition, computation and attribution of income; and rules for the prevention and elimination of double taxation) while not always making specific recommendations. It is, therefore, up to individual territories to decide whether to adopt any design elements they do not already have.

The recommendations are largely consistent with the Australian and New Zealand CFC rules (which those countries already consider robust) and we understand that there are no plans to make further changes. It remains to be seen whether there will be changes to CFC codes in other Asia-Pacific countries (such as Japan and South Korea). Asia-Pacific jurisdictions such as India, Singapore, Hong Kong, Malaysia, Thailand, Vietnam and the Philippines do not have CFC rules and the report – which encourages the strengthening of CFC codes – does not explicitly ask jurisdictions without CFC rules to introduce them.

At present, CFC rules have recently been introduced in Mainland China and have been proposed as a legislative bill in Taiwan but we understand there are no plans for CFC rules to be introduced in the other aforementioned Asian jurisdictions.

What is perhaps more likely is that changes may be introduced to existing CFC rules in OECD member states elsewhere in the World that affect potential CFC taxable profits located in lower-taxed Asia-Pacific based subsidiaries (such as in Singapore and Hong Kong).

**Action 4: Limiting Base Erosion Involving Interest Deductions and Other Financial Payments**

Action 4 makes recommendations regarding best practices in the design of rules to prevent base erosion through the use of interest expense, fleshing out a lot of the detail in the earlier discussion draft. The report acknowledges that a number of particular features of groups in the banking sector need to be taken into account but does not propose an industry exclusion. Further work will therefore be conducted in 2016, to identify best practice rules to deal with the potential BEPS risks posed by banks, taking into account the particular features of the sector, although we note the report does not expand on describing these risks. However, the report does highlight that it is crucial that any recommended interest limitation rules do not conflict with, or reduce the effectiveness of, capital regulation intended to reduce the risk of a future financial crisis.

The rules provide plenty of flexibility which may be intended to allow countries that already restrict interest deductions on the basis of ratios not to make significant changes.

It is worth noting in this regard that Singapore and Hong Kong already restrict interest deductibility using an interest allocation rule, i.e. interest is not deductible if it is not used in the production of taxable income such as where it funds exempt dividends on equities. Jurisdictions in the region also take a different approach from a transfer pricing perspective; Australia and other jurisdictions in the region currently restrict interest deductions with reference to a statutory general arm’s length test (with supporting guidelines published by the tax authorities), while Australia also supplements the arm’s length rule with a statutory ratio test (which for banks reflects the risk-weighted asset capital calculation). In the case of Hong Kong there is no statutory rule, merely IRD ‘arm’s length’ guidelines.

The report specifically allows countries to keep the arm’s length test and only to apply ratio tests as a ceiling for interest deductions. It is quite possible that Asia-Pacific jurisdictions will keep their arm’s length tests unchanged; the key question is whether countries will expand their existing provisions or guidance to introduce some of the key OECD recommendations below:
Net interest should be restricted to a fixed ratio of EBITDA in a corridor of 10%-30%. In exceptional circumstances, countries can use a ratio based on EBIT or assets instead. EBITDA should exclude exempt income such as exempt dividends and foreign branch profits.

Countries may also, but do not have to, have a worldwide group ratio rule that allows companies to deduct interest up to a ratio calculated from their group’s net interest to its EBITDA. In calculating the group ratio, countries may allow an uplift in net interest of up to 10% Questions on how to calculate the group ratio for groups that are loss making or contain loss making entities have been deferred to 2016. Where there is no group ratio there should not be improper discrimination between multinational and domestic groups.

Countries may supplement the fixed ratio rule and group ratio rule with the following:
- A de minimis test for entities with low net interest;
- A public benefit exclusion which applies to third party non-recourse loans with a duration of at least 10 years financing assets with a public benefit, among other restrictions. If this exclusion applies, the ratio calculations for the rest of the group should be adjusted to take out the excluded interest and related earnings; and
- A rule allowing for the carry forward of disallowed interest; the carry forward of disallowed interest and unused interest capacity; or the carry forward and carry back of disallowed interest.

Targeted anti-avoidance may be required to prevent structures that circumvent the rules and to deal with additional risks.

Grandfathering of existing debt is permitted as well as transitional provisions to delay implementation to allow groups to restructure.

It is recommended that country-specific interest limitation rules (e.g. an arm’s length provision or thin cap rule) should apply before the fixed ratio. However, it is ultimately a decision for the country concerned, taking into account the design of its rules and risks they seek to address.

Limit interest payable to group companies lacking appropriate substance to no more than a risk free rate of return on the funding provided (in conjunction with Actions 8-10 discussed below).

Withholding tax is still due on disallowed interest.

The rules will be reviewed not later than 2020.

**Action 5 - Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance**

Action 5 requires substantial activity for any preferential tax regime and calls for the development of a framework for compulsory spontaneous exchange of information between tax authorities on rulings with respect to preferential regimes that meet specified criteria. For this latter purpose the OECD has been working on defining categories of rulings as well as a process that will assist in determining which countries should receive the ruling.

The framework covers six categories of rulings: (i) rulings related to preferential regimes, (ii) cross border unilateral advance pricing arrangements (APAs) or other unilateral transfer pricing rulings, (iii) rulings giving a downward adjustment to profits, (iv) permanent establishment (PE) rulings, (v) conduit rulings and (vi) any other type of ruling where there is a view that the absence of exchange would give rise to BEPS. These developments mean that banking groups should generally consider their approach to seeking rulings going forward.

Further, in the Asia-Pacific region this Action is particularly relevant for incentive-based tax regimes such as the Financial-Sector Incentives (“FSIs”) available in Singapore that enable regional banking hubs to avail of lower corporate tax rates on certain income.

In this regard, the OECD is not objecting to the use of tax incentive as a tool to attract investments. Under the substantial activity requirement (discussed in the context of IP regimes), the key is the nexus rule which links preferential tax treatment to actual economic activities. The OECD is focused on ensuring there is a nexus between the income receiving the tax incentive and the core activities contributing to that income. One suggested approach is to use the level of expenditure to gauge substance and activities necessary to earn the income.

So far as Singapore FSIs are concerned, the Government had traditionally already applied a substance based approach (minimum headcount requirements, business projections, business spending, etc.), such that the FSIs are in-principle aligned with the proposals by the OECD. Some refinements may be needed but the recommendations are unlikely to negatively impact Singapore’s FSI regime.

A broad BEPS point is it is more important than ever that taxpayers wanting to seek an FSI or other tax incentive in Singapore will have to ensure that their operations in Singapore are business-driven and they are able to meet the stringent conditions required as part of the incentives – the tax authorities are similarly likely to be more watchful than ever about the range of qualitative criteria required to obtain an incentive. This will likely also be the case in other ASEAN jurisdictions that have also recently introduced certain tax incentives.
Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

Consistent with the earlier proposals, the OECD has confirmed that treaties should include a clear statement that the States that enter into a tax treaty intend to avoid creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements and one of the following:

- A general treaty anti-abuse rule in the form of the principle purpose test (PPT) and a limitations-on-benefits (LOB) rule;
- A PPT only; or
- An LOB rule supplemented by anti-conduit rules (as can be found in some current US treaties).

It is expected that most major territories to continue to favor a PPT but there are some notable exceptions such as the US and Japan that favor an LOB rule. Additional work will be required to consider proposals recently released by the US concerning the LOB rule and this will therefore not be finalized until the first part of 2016. A review of the issues related to the treaty entitlement of certain types of funds will also continue with a similar deadline for its conclusion.

The Singapore Ministry of Finance, for example, has welcomed the Action 6 recommendations and considers their treaty network to be largely BEPS compliant insofar as most existing treaties contain PPTs or an LOB. Singapore companies within banking groups (particularly any SPVs or intermediate holding companies) should be increasingly mindful of their substance in terms of demonstrating beneficial ownership in light of the final recommendations, perhaps even more so when entering into deals with a counterparty in an attractive treaty country (e.g. as India).

Asia-Pacific banks should review their multi-tiered financing structures and funds flows, as now is the opportunity to restructure where necessary in advance of the introduction of new tax treaties or a multilateral instrument.

Action 7 - Preventing the Artificial Avoidance of Permanent Establishments Status

The final report includes changes to the definition of permanent establishment ("PE") in the OECD Model Tax Convention. The new definition seeks to combat commissionaire and similar arrangements to avoid PE status by amending the circumstances in which a person acting on behalf of an enterprise can give rise to a PE of that enterprise. The PE definition has been widened beyond the traditional authority to "conclude contracts" to include situations under the new drafting where a person "habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification".

Banks with cross border business models will need to review the extent to which a person exercises the authority to conclude contracts or plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the relevant enterprise, for example standardized contracts. Banks should also analyze whether 'rep offices' are now capable of becoming taxable PEs, as well as the activities of onshore sales teams and travelling bankers.

Furthermore, in deciding whether a person is an independent agent, this will not be the case where a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related. Whether enterprise are closely related will depend on whether, based on all the relevant facts, one has control of the other or both are under the control of the same persons or enterprises. This is a less precise test than the former connected test.

The guidance also notes that an independent agent cannot be said to act in the ordinary course of its business as such when it performs activities that are unrelated to the business of an agent. Specific consideration should be given to banks with global booking models to determine whether such models give rise to incremental dependent agency PE risks.

The report notes that follow-up work will be needed to provide guidance on attribution of profits to the PEs that will result from the changes proposed and this is likely to build on the 2010 Report on the Attribution of Profits to Permanent Establishments. This work is intended to conclude before the end of 2016.

Finally, these proposals only deal with the treaty definition of PEs and so consideration will need to be given to whether the domestic legislation is similarly wide and whether territories will expand their domestic definition. We note that quasi-territorial tax regimes such as Singapore and Hong Kong which are effectively based on the source of income do not incorporate a central domestic law PE concept for taxing income; however the definition of PE remains important in these jurisdictions for the purposes of allocating taxing rights with other jurisdictions pursuant to treaties.

Actions 8 to 10 - Aligning Transfer Pricing Outcomes with Value Creation

The outcome of the OECD work under Actions 8-10 will be changes to the OECD Transfer Pricing Guidelines, which may in turn be taken on board in domestic TP guidelines in parts of Asia-Pacific. The OECD has increased its focus on economic substance, moving from a balanced assessment of functions, assets and risks towards an increased focus on (people) functions on the basis that assets and risks follow functionality. Furthermore, there is an increased emphasis on the importance of economic substance in order to justify transfer pricing returns.
The report indicates an intention that the role of capital-rich, low-functioning entities in “BEPS planning” will become less relevant. Despite representations from the industry, the report does not refer to the specific role and importance of capital in a banking context in determining the appropriate location of profits. However, some comfort may be taken from the acknowledgement that further work will be undertaken on profit splits and financial transactions.

The Action 4 report acknowledges that interest and payments economically equivalent to interest are also affected by transfer pricing rules. The Actions 8 -10 final recommendations, concerning aligning transfer pricing outcomes with value creation, propose limiting the amount of interest payable to group companies lacking appropriate substance to no more than a risk-free return on the funding. It also requires group synergies to be taken into account. Notably, however, it is acknowledged that further work on the transfer pricing aspects of financial transactions needs to be undertaken. This will be undertaken during 2016 and 2017.

Key issues arising from Actions 8 – 10 for the BCM sector include:

- **Funds Transfer Pricing and Liquidity Transfer Pricing** models should be re-assessed in light of the work that will continue to be undertaken on financial transactions. Key to the review of these policies is the ability to understand and differentiate internal treasury models with tax transfer pricing concepts of arm’s length funding accounting for differences in approaches to branch and separate legal entity funding.

- **Subsidiary transfer pricing arrangements** should be reviewed as KERT type branch concepts are now being applied to dealings between separate legal entities. The new guidance focusses on analyzing the contractual relations between the parties with the conduct of the parties leading to the allocation of profits to the enterprise that conduct the corresponding business activities.

- **Management and group service fees** (including technology) should be reviewed and documentation improved. This is to help guard against developing countries (including some in Asia-Pacific) claiming that these are a mechanism for “BEPs planning” as they have been specifically identified in the revised guidance.

- **The necessity to explicitly consider and document transfer pricing policies around intangible assets.** The Broad definition of intangibles requires reassessment of intellectual property in the group; and which entity has legal and/or economic ownership. Traditionally BCM taxpayers have not had explicit intangibles policies. There is now a requirement to articulate the approach to intangibles in the master file to be prepared under Action 13.

- **Pricing of other financial transactions such as total return swaps, credit default swaps and interest rate swaps should be reviewed.** Particularly those which might appear to move income from higher tax to lower tax jurisdictions to ensure pricing and substance in lower tax jurisdictions can be defended as arm’s length and commercial.

**Action 11 – Measuring and Monitoring BEPS**

This Action does not have any banking specific implications – rather it focuses on measuring the general impact of BEPS and the challenges which countries face in terms of analyzing the economic impact of BEPS. It stresses the importance of collection, compilation and analysis of data. Whilst it is largely focused on the tax administration, it does allude to the importance of reporting under Action 13 which would inform the analysis of tax authorities.

**Action 12 – Mandatory Disclosure Rules**

This Action is aimed at providing a framework that enables countries without mandatory disclosure rules to introduce rules to gather early information on potentially aggressive or abusive tax planning schemes and their users.

Where these rules have been implemented in domestic law in other countries (e.g. in the UK), they have had a broad impact on the early disclosure of tax efficient structured finance transactions. Given that the recommendations in this Action do not provide a minimum standard, countries in the region may or may not introduce such disclosure regimes. The Action sets out recommendations for rules targeting international tax schemes, development and implementation of information exchange and co-operation between tax administrations. It will be interesting to see how countries in the Asia-Pacific region respond to this Action in due course.

**Action 13 – Transfer Pricing Documentation and Country by Country Reporting**

This Action provides revised standards for transfer pricing documentation and a template for Country-by-Country Report (CbC Report) requiring multinational enterprises (MNEs) to provide tax authorities with information regarding their entire global footprint. CbC Reports would be required to be filed by MNEs with financial statement revenue of €750m or greater and are to be implemented for fiscal years beginning on or after 1 January 2016. The revenue threshold shall be revisited as part of the 2020 review.
It depends on domestic legislation if taxpayers in a particular jurisdiction will be required to submit the master file. However, the first year’s documentation produced will be of paramount importance as it will be the base information that will be available to all tax authorities for subsequent years. The master file, together with the CbC Report data, will highlight any issues in the group’s transfer pricing policy, the potential for new PEs and questions around the location of intangibles as well as any associated functions.

Mainland China and Australia have introduced CbC Report regulations in Asia-Pacific and have drafted their rules in a way which allows them to obtain the CBC Report from the local entity, if they are unable to do so via their tax treaty or other tax information sharing agreements. Hong Kong has currently not introduced legislation or consulted in this regard. Singapore, which has a similar local/master file in its transfer pricing guidelines, is currently consulting on introducing CbC Reporting provisions.

**Action 14 – Making Dispute Resolution Mechanisms More Effective**

The measures developed under Action 14 aim to strengthen the effectiveness and efficiency of the Mutual Agreement Procedure (‘MAP’) process as outlined in the Article 25 of the OECD Model Tax Convention 2014. Action 14 develops a minimum standard aimed at ensuring that treaty obligations related to MAP are implemented and cases resolved, administrative processes related to resolution of treaty disputes are implemented and taxpayers can access the MAP when eligible.

Further work is being undertaken to develop an assessment methodology to monitor the implementation of this minimum standard.

It is worth noting that Australia, New Zealand and Japan are the only Asia-Pacific countries which have declared their commitment to provide for mandatory binding MAP arbitration in their bilateral treaties.

**Action 15 – Developing a Multilateral instrument to Modify Bilateral Tax Treaties**

This Action provides for an analysis of the tax and public international law issues related to the development of a multilateral instrument to enable countries that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties. An ad-hoc group has been formed to develop a multilateral instrument and the negotiations will continue until 31 December 2016. The initial conference to negotiate the convention starts on 5 November 2015, under the chairmanship of the UK, supported by vice-chairs from China and the Philippines. Over 90 countries and jurisdictions have indicated they will participate in the negotiations. The participating countries have been offered a level of flexibility as regards the terms of their participation in the multilateral instruments development and implementation.

Most major Asia-Pacific economies including China, Japan, India, Australia and Singapore have been involved in the initial discussion on development of the BEPS multilateral instrument and, hence, developments on this Action are quite relevant for Asia-Pacific.

**Summary**

The banking industry has and continues to go through significant commercial and regulatory transformation and over the last two years the industry has made considerable effort to share information with the relevant OECD working parties about banking business models. The final reports released earlier this week reflect that effort, but the work of the banking industry is far from finished. As we move into the next phase of the BEPS project, and as governments begin to implement the OECD’s recommendations, banks will need to review their financing, capital and group structures carefully and continue their work to ensure that decision makers are well-informed before taking policy choices that may impact the industry.
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