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Centre for Tax Policy and Administration
Organisation for Economic Co-Operation
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Via Email: CTP.TPS@oecd.org

RE: Request for input on BEPS Action 11: *Establish methodologies to collect and analyse data on BEPS and the actions to address it*

Dear Sir or Madam:

On 19 July 2013, the OECD published an *Action Plan on Base Erosion and Profit Shifting* (hereinafter the Action Plan) setting forth 15 actions the OECD will undertake to address a series of issues that contribute to the perception that individual countries' tax bases are being eroded. Pursuant to the Action Plan, on 4 August 2014 the OECD issued a request to stakeholders under Action 11 to "Establish methodologies to collect and analyse data on BEPS and the actions to address it." (Hereinafter the Request.) The Request seeks comments about ways to measure both the extent of base erosion and profit shifting (BEPS) actions undertaken by multi-national enterprises (MNEs) and the effectiveness of the actions taken pursuant to the Action Plan. On behalf of Tax Executives Institute, Inc. (TEI), I am pleased to respond to the OECD's request for input on BEPS Action 11.

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organisation has 55 chapters in Europe, North America, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 7,000 members represent over 3,000 of the largest companies with operations around the world.

TEI Comments

Definitional Issues

TEI applauds the OECD's efforts to develop measures of the scale and economic impact of BEPS and the effectiveness of potential changes to the international tax system that may ensue from the Action Plan. Without key performance indicators and absent a starting point or benchmark against which to measure progress, the success or failure of the Action Plan taken as a whole and the success or failure of individual actions can never be properly assessed. A clear understanding of the current state of affairs, a clear destination for the project as a whole (and the outcome for each component of the Plan), and a measure of progress toward the ultimate goal (and its various objectives) are all necessary to ensure the OECD proceeds in a considered manner and does not simply create more complicated rules with different problems.

TEI is concerned, however, that the OECD and the G-20 countries that initiated the BEPS project have evinced such differing views about the scope and objectives of the Action Plan (and its component actions) that multiple (and possibly conflicting) measures may be devised to satisfy different governmental constituencies. Each such measure in turn poses a risk of creating information reporting burdens on MNEs, who at best can only provide data relevant at the microeconomic level. As TEI has noted in comments on specific Action Plan discussion drafts, the ultimate prescriptive actions must be clear, limited, administrable, and based on a consensus view of the objective remedial actions to be undertaken by all participating governments. So too, the measures under Action 11 must be clear, limited, administrable, and reflect a consensus view among the participating countries. The BEPS measures should not simply be an aggregation of every measure suggested by every country participating in the BEPS project.

The OECD's February 2013 document *Addressing Base Erosion and Profit Shifting* (hereinafter the BEPS Report) was forthright about the current lack of quantitative evidence of base erosion and profit shifting activity. The BEPS Report states that "it is difficult to reach solid conclusions about how much BEPS actually occurs" and "[m]ost of the writing on the topic is inconclusive . . ."¹ Comprehensive and accurate data is indispensable for ensuring the effectiveness of the actions taken pursuant to the Action Plan and minimising unintended consequences, such as double taxation and the corresponding adverse effects on foreign direct investment and economic development.

Regrettably, it seems that any attempt to measure BEPS and BEPS behaviours and assess the effectiveness of the Action Plan suffers from three key deficiencies. The first is a lack of an understanding of the current state of affairs. As noted, the data is inconclusive. Thus, TEI recommends that the OECD establish a clear baseline of the current amount and nature of BEPS

¹ BEPS Report, page 15.

and BEPS behaviours, which can then be used to measure the progress of the steps taken pursuant to the Action Plan to reduce or eliminate these activities. The second deficiency is a lack of a defined goal or description of a successful conclusion to the OECD's BEPS project. Is success defined as an aggregate increase in income and withholding tax revenues from international business? That would be a rather blunt and imprecise measure – one heavily influenced by economic and business trends. Perhaps the success of the project could be defined as significantly less BEPS and fewer BEPS behaviours and a closer alignment of taxes and activity. Such a measure would suffer from the third deficiency: the lack of a definition of BEPS and BEPS behaviours. The Request states that a BEPS behaviour is a case of “no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it.”² More broadly, the Action Plan states

BEPS relates chiefly to instances where the interaction of different tax rules leads to double non-taxation or less than single taxation. It also relates to arrangements that achieve no or low taxation by shifting profits away from the jurisdictions where the activities creating those profits take place. No or low taxation is not *per se* a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it.³

While this statement is clear about the consequences of BEPS behaviour – low or no taxation and a disconnect between profit location and the location of activities or value creation – it affords precious little guidance on the macro or microeconomic data evidencing BEPS behaviours. Lacking a direct connection between the description of BEPS and the available econometric data, it may be tempting to decide that *any* data that shows low or no taxation or a “disconnect” between profits and activity/value creation is evidence of BEPS. In other words, taxing authorities may use a subjective “we know it when we see it” approach rather than objective, evidenced-based measures. A disconnect between where value is *perceived* to be created and where profits are subject to tax would automatically become subjective proof of BEPS behaviours rather than an objective test of where profits should be subject to tax. We believe that is a prescription for endless controversies because there are already misperceptions about where “true” value is created and misunderstandings about where value arises in a particular business or industry. The OECD should be wary of concluding that BEPS behaviours are widespread on the basis of evidence based solely on taxes paid without carefully ruling out other considerations.

² Request, page 4.

³ Action Plan, page 8.

The focus on a disconnect of taxable income from activity and value creation also raises concerns that tax authorities may use the measures developed under BEPS Action 11 to advance formulary apportionment approaches to transfer pricing. Tangible assets, employees, payroll, and sales are generally easily measurable and hence are common inputs for formulary apportionment methods. Intangible assets, on the other hand, are difficult to value and thus are often excluded from formulary apportionment, which tends to discount their contribution to an MNE's taxable profits, value creation, and activity, or the intangible may be assigned an arbitrary value (*e.g.*, capitalising leases as fixed assets by multiplying rental amounts by a fixed numerical factor). Due to the varying difficulty in measuring the contributions of different types of assets to value creation, TEI is concerned that the methodologies developed under Action 11 will, at the end of the day, show a clear picture of the location of the typical formulary apportionment factors and profits of an MNE. This would potentially entice tax authorities to propose adjustments to profits based on those factors because that is the disconnect the data shows.

For these reasons, TEI urges the adoption of a clear definition of BEPS and BEPS behaviours before attempting to develop mechanisms to differentiate inappropriate (if legal) tax results from "regular" corporate tax planning that may take advantage of government enacted tax incentives. In addition, the OECD should develop its measures in such a manner so they are not easily converted to use for formulary apportionment purposes and state explicitly that they should not be so used by tax authorities.

Balanced Measures

The Request speaks of the need to not only measure the current scope of BEPS and BEPS behaviours, but also to assess the effectiveness of the Action Plan in addressing BEPS and more closely aligning taxable income with value creation. In addition to collecting this information, TEI recommends that the OECD develop measures to ensure the actions to address BEPS are appropriate and do not move too far in the other direction. That is, measures to assess whether anti-BEPS actions have resulted in double taxation, including double taxation that arises because of withholding taxes, should be developed to ensure the appropriate balance between double taxation and double non-taxation has been set. Appropriate measurements of BEPS and BEPS behaviours may show the effectiveness of anti-BEPS actions, but they may not show evidence of double taxation and the corresponding retarding effect on economic development that may also result from such actions.

Measuring double taxation (and even low or no taxation) on a macroeconomic basis may be difficult, however, because the phenomenon is generally firm specific. Nevertheless, MNEs should be encouraged to report instances of double taxation as part of the data gathering process under BEPS Action 11. In addition, a central tracking mechanism for assessing an increase in mutual agreement procedure cases and tax controversy and litigation raising double

taxation concerns should be developed. Such reporting and tracking should give an indication of whether double taxation issues have been exacerbated as a result of the steps taken pursuant to the Action Plan.

In addition, the OECD should develop measures to assess whether the variety of tax incentive regimes employed by jurisdictions to attract businesses and other economic activity contribute to BEPS and BEPS behaviours. While the OECD has acknowledged this effect throughout the BEPS project – along with acknowledging that much of the tax planning by MNEs is legal under the current international tax regime – the effect of tax incentives and preferential regimes seems to have gone generally unnoticed in the recommendations set forth in the BEPS discussion drafts released to date. Any BEPS measure should carefully distinguish taxpayer responses to intended government policy from BEPS and BEPS behaviours. For example, the combination of a generous research and development tax credit and a low tax rate could generate an extremely low (or even negative) tax rate for an MNE that has extensive research and development activities. Concededly, it may be difficult to tell the difference between BEPS and BEPS behaviours and appropriate responses to government enacted tax incentives.

To the extent the OECD is reserving its discussion of the interaction of preferential tax regimes with BEPS to the work under Action 5 regarding harmful tax practices, TEI recommends that the steps taken pursuant to Action 5 be coordinated with information gathered under Action 11 so a complete picture of the contributions to BEPS and BEPS behaviours and the effectiveness of anti-BEPS measures can be assessed in the context of tax preferences enacted across jurisdictions. One approach may be to create a separate monitoring and data reporting mechanism for laws and regulations that are objectionable due to the BEPS behaviour they promote, which would allow jurisdictions to bring pressure on states to modify their incentives to conform to acceptable approaches. Such a mechanism could also be used to delineate the laws and regimes that are merely representative of healthy tax competition rather than inappropriate incentive regimes.

Administrative Costs and Confidentiality

The Request envisions measuring BEPS on both a macro- and microeconomic level. With respect to the latter, the Request asks for “recommendations for new types of data, including types of data that taxpayers should provide to tax administrators” for purposes of measuring the effectiveness of anti-BEPS measures.⁴ The Request also asks for comment on “how the suggested data might be used in such a way to respect taxpayer confidentiality and minimise the administrative costs for tax administrations and businesses.”⁵

⁴ Request, page 5.

⁵ *Id.*

Administrative costs and confidentiality concerns arise with respect to a number of BEPS actions, particularly under Action 13 regarding transfer-pricing documentation and country-by-country reporting and potentially under Action 12 relating to aggressive tax planning. Thus, it seems Action 11 contemplates yet another reporting burden for MNEs in addition to their current tax and non-tax reporting requirements across multiple jurisdictions. To alleviate the administrative burdens of these seemingly ever-escalating data requests, TEI urges that the OECD recommend that the data required of taxpayers under Action 13 be used to satisfy the taxpayer-specific data reporting and analysis needs of Action 11. Indeed, year-over-year comparisons in the country-by-country reporting information submitted under Action 13 may be relevant in assessing the effectiveness of anti-BEPS actions, but how suitable that data will be depends on the final content and scope of the country-by-country reporting template. In addition, TEI recommends that the OECD conduct a detailed study or survey of the administrative costs of compliance with respect to the various data reporting and documentation requirements imposed by tax authorities generally and in response to the Action Plan specifically. This should include an assessment of the transfer pricing documentation burden under Action 13. Such information would allow the OECD and tax authorities to more properly balance the information reporting and documentation burden imposed on taxpayers against the authorities' need for information.

TEI also recommends that the OECD and tax administrators inventory and fully assess the data they currently possess, in addition to publicly available data, to determine whether additional information requests from taxpayers are warranted. In many cases, tax authorities do not take full advantage of taxpayer data they have already collected.

Finally, data confidentiality is a critical concern because the proposed reporting involves highly sensitive information such as key value drivers and intellectual property. To protect the confidentiality of taxpayer information, the taxpayer protections put in place under Action 13 should be implemented under Action 11. These protections include limiting the amount and extent of information reporting, limiting the tax administration personnel permitted to access the data, ensuring that data sharing across borders occurs only through formal processes (*i.e.*, via income tax treaties and tax information exchange agreements), and creating sanctions for tax administration personnel who improperly share or disclose taxpayer information. The information collected could also be reported in the aggregate to further protect the confidentiality of individual taxpayers.

Conclusion

TEI appreciates the opportunity to provide its comments on the OECD's request for input regarding BEPS Action 11. These comments were prepared under the aegis of TEI's European Direct Tax Committee, whose Chair is Nick Hasenoehrl. If you have any questions

about the submission, please contact Mr. Hasenoehrl at +352 26 20 77 46, nickha@herbalife.com,
or Benjamin R. Shreck of the Institute's legal staff, at +1 202 638 5601, bshreck@tei.org.

Sincerely yours,
TAX EXECUTIVES INSTITUTE, INC.



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