International Tax Structures in the BEPS Era:

An Analysis of Anti-Abuse Measures

Editorial Team

Madalina Cotrut (Managing Editor)

Aleksandra Bal Rijkele Betten Ridha Hamzaoui Belema Obuoforibo Ola Ostaszewska



Volume 2 IBFD Tax Research Series

Table of Contents

Fore	word				v
Gene	eral Acl	nowledge	ments		vii
Intro	oductior	1			ix
Аррі	reviatio	ns and Acı	onyms		xi
	Re	cent Devel		t One nternational Tax Structuring	
Chaj	pter 1:	A Global	Overview	against Tax Avoidance: ez and Ridha Hamzaoui	3
1.1. 1.2.	Introd Tax av	oidance: G			3 5 5
		-	Tax avoida Tax avoida	nce versus tax evasion nce versus tax planning policymakers in defining clear	5 6 7
1.3.	-	anning sch	ns facilitatin emes: Dome	g tax avoidance stic law and treaty provisions	8 10
	1.3.1.	Domesti 1.3.1.1.	source inco 1.3.1.1.1. 1.3.1.1.2. 1.3.1.1.3.	lowing for exemption of foreign- me Patent box regimes Participation exemption regimes Holding company regimes Territorial tax systems	10 10 10 11 12 12
		1,3,1.2.	Regimes al between ta 1.3.1.2.1.	lowing the use of mismatches x rules in different countries US check-the-box regime Use of hybrid financial instruments and entities	13 13 14
		1.3.1.3.	Provisions 1.3.1.3.1.	relating to residence	14

			1.3.1.3.2. Tie-breaker rule for companies	15
	1.3.2.	Tax treat	y rules	16
		1.3.2.1.	Tax sparing clauses	16
		1.3.2.2.		ne 16
		1.3.2.3.	Circumvention of thresholds found in treaty	
			provisions	17
1.4.	Counte	ring aggre	essive tax planning	17
	1.4.1.		c legislation: General anti-avoidance rules	18
		1.4.1.1.	General anti-avoidance rules generally	18
		1.4.1.2.	The concept of "arrangement" or "scheme"	19
		1.4.1.3.	The concept of "tax benefit" or "tax	
			advantage"	20
		1.4.1.4.	Compatibility of domestic GAARs with tax	
			treaties	20
	1.4.2.	Domesti	c legislation: Specific anti-abuse rules	21
		1.4.2.1.	Specific anti-abuse rules in particular	21
		1.4.2.2.	• •	22
			1.4.2.2.1. CFC rules: Main features	22
			1.4.2.2.2. Strengthening CFC rules: BEPS	
			Action 3	23
	1.4.3.	Tax treat	ies: Anti-abuse provisions	25
	1.4.4.		approach: Exchange of information and	
			ion between tax authorities	26
		1.4.4.1.	Convention on Mutual Administrative	
			Assistance in Tax Matters	27
		1.4.4.2.	Standard for Automatic Exchange of	
			Financial Account Information	27
		1.4.4.3.	OECD Aggressive Tax Planning Directory	28
		1,4,4,4,	United States: Foreign Account Tax	
			Compliance Act	29
1.5.	Conclu	ision	• •	30
Anne	exes			32

Part Two

New Roles of the Concepts in International Tax Structuring

Chapter 2:		Permanent Establishments in International Tax		
		Structuring	43	
		Rijkele Betten and Monia Naoum		
2.1.	Introd	uction	43	
2.2.	Use of	f permanent establishments for tax structuring purposes	44	

xiv

	2.2.1.	Avoidance of permanent establishment status	44
		2.2.1.1. Commissionaire arrangements	44
		2.2.1.2. Splitting up of contracts	45
		2.2.1.3. Undertaking activities of a preparatory or	
		auxiliary nature	48
	2.2.2.	Limited attribution of profits to permanent	
		establishments	50
	2.2.3.	Intentional creation of a permanent establishment	51
		2.2.3.1. Exemption regimes	52
		2.2.3.2. Financing structures	52
2.3.	Approa	ach of countries to tackling abuse structures	54
2.4.	BEPS	Action Plan	57
	2,4.1.	Artificial avoidance of permanent establishment status	
		through commissionaire agreements and similar	
		strategies	58
	2.4.2.	Artificial avoidance of permanent establishment status	
		through the specific activity exemptions	60
	2.4.3.	Splitting up of contracts	62
	2.4.4.	4	
		interaction with Actions on transfer pricing	64
2.5.	Limita	tion and restrictions regarding solutions	64
2.6.	Conclu	usions and expectations	66
Chai	pter 3:	Transfer Pricing from the Perspective of Substance	
j	F	and Transparency: Is the OECD on the Right	
		Track?	69
		Anuschka J. Bakker	
31	Introd	uction	69
3.2.			72
		ed transactions with transfer pricing relevance	- 12
		ed transactions with transfer pricing relevance Business restructurings	
	3.2.1.	Business restructurings	72 72 76
	3.2.1. 3.2.2.	Business restructurings Services	72
	3.2.1.	Business restructurings Services Intra-group financing	72 76
	3.2.1. 3.2.2.	Business restructurings Services Intra-group financing 3.2.3.1. Background	72 76 80
	3.2.1. 3.2.2.	Business restructurings Services Intra-group financing	72 76 80 80
3.3.	3.2.1. 3.2.2. 3.2.3.	Business restructurings Services Intra-group financing 3.2.3.1. Background 3.2.3.2. Intercompany loans	72 76 80 80 81
3.3.	3.2.1. 3.2.2. 3.2.3. Transf	Business restructurings Services Intra-group financing 3.2.3.1. Background 3.2.3.2. Intercompany loans 3.2.3.3. Guarantees Fer Pricing and the BEPS Action Plan	72 76 80 80 81 83
3.3.	3.2.1. 3.2.2. 3.2.3. Transf	Business restructurings Services Intra-group financing 3.2.3.1. Background 3.2.3.2. Intercompany loans 3.2.3.3. Guarantees Fer Pricing and the BEPS Action Plan Country-by country reporting	72 76 80 81 83 86
3.3.	3.2.1. 3.2.2. 3.2.3. Transf 3.3.1.	Business restructurings Services Intra-group financing 3.2.3.1. Background 3.2.3.2. Intercompany loans 3.2.3.3. Guarantees er Pricing and the BEPS Action Plan Country-by country reporting Low-value-adding services	72 76 80 81 83 86 86
3.3.	3.2.1. 3.2.2. 3.2.3. Transf 3.3.1. 3.3.2.	Business restructurings Services Intra-group financing 3.2.3.1. Background 3.2.3.2. Intercompany loans 3.2.3.3. Guarantees Fer Pricing and the BEPS Action Plan Country-by country reporting Low-value-adding services Changes to Chapter 1 of the OECD Guidelines	72 76 80 81 83 86 86 91
3.3. 3.4.	3.2.1. 3.2.2. 3.2.3. Transf 3.3.1. 3.3.2. 3.3.3.	Business restructurings Services Intra-group financing 3.2.3.1. Background 3.2.3.2. Intercompany loans 3.2.3.3. Guarantees Fer Pricing and the BEPS Action Plan Country-by country reporting Low-value-adding services Changes to Chapter 1 of the OECD Guidelines Financial transactions	72 76 80 81 83 86 86 91 94

Part Three Financing Activities

Chapter 4:		Anti-Base-Erosion Measures for Intra-Group Debt Financing		
		René Offe	ermanns and Boyke Baldewsing	
4.l.	Introd	action: Fur	nding with debt or equity?	103
4.2.	Tax su	uctures for	r group financing and the applicable anti-base	
	erosio	n measures	;	104
	4.2.1.	Tax strue	ctures using a low-taxed group financing	
		company	/	105
		4.2.1.1.	Thin capitalization rules as an anti-base	
			erosion measure	105
		4.2.1.2.	General anti-abuse rules	109
		4.2.1.3.	Restrictions in the case of notional interest	
			deduction regimes	110
		4.2.1.4.	CFC rules	112
		4.2.1.5.	Restrictions applicable to payments to tax	
			haven entities	113
	4.2.2.	Tax strue	ctures using a finance company with a	
		financing	g branch	115
		4.2.2.1.	Anti-triangular rule in tax treaties to	
			counter the use of low taxed finance	
			branches	116
		4.2.2.2.	Substance at the level of the financing	
			branch	117
	4.2.3.		ctures using back-to-back loans	118
		4.2.3.1.	Substance and residence requirement for	
			holding companies to obtain tax treaty	
			protection	119
		4.2.3.2.	Beneficial ownership requirement	120
		4.2.3.3.	Limitation on benefits provision	121
		4.2.3.4.	Anti-abuse rules in tax treaties	122
4.3.	Recen	t developm	ents of the BEPS Action Plan	122
	4.3.1.	Context	of Action 4	122
	4.3.2.	Summar	y of the three main recommendations under	
		Action 4		124
4.4.	Conclu	usion		125

Chapter 5:		Hybrid Instruments in the Post-BEPS Era Shee Boon Law and Marjolein Kinds	127
5.1.	Introdu	uction .	127
5.2.		recommendations on hybrid instrument mismatches	128
	5.2.1.	Direct hybrid mismatches	129
	5.2.2.	Hybrid transfers	130
	5.2.3.	•	132
	5.2.4.	Hybrid mismatches and other actions in the BEPS	
		Action Plan	134
5.3.	Manag	ing coordination rules under domestic law	136
	5.3.1	Relationship between the OECD recommendations	
		and other domestic law	137
		5.3.1.1. Netherlands	137
		5.3.1.2. New Zealand	139
		5.3.1.3. United States	141
	5.3.2.	Other technical considerations	143
		5.3.2.1. Timing mismatches	144
		5.3.2.2. Structured arrangements	145
		5.3.2.3. Policy exceptions	146
		5.3.2.4. Deduction/non-inclusion outcomes caused	
		by character and ownership mismatches	147
		5.3.2.5. Bona fide hybrids	148
		5.3.2.6. Tax treaty considerations	149
5.4.	Conclu	-	150
Char	oter 6:	Past, Present and Future of Tax Structuring Using	
		Hybrid Entity Mismatches	153
		Oana Popa	
6.1.	Introd	uction: Hybrid entity mismatches in the spotlight	153
6.2.	Tax st	ructures using hybrids and reverse hybrids:	
	Manip	oulating mismatches	155
	6.2.1.	(Ab)using the domestic rules for entity classification	155
	6.2.2.	Basic models of tax structuring using hybrid entity	
		mismatches	157
	6.2.3.	Practical aspects	160
6.3.	Rules	addressing hybrid entity mismatches before BEPS	163
	6.3.1.	1	163
	6.3.2.	Countries' options before BEPS	167
		6.3.2.1. GAARs: An answer to artificial features of	
		hybrid entity mismatches	167

	70 71
	• -
	71
0.3.2.2.1. CFC rules 1	
6.3.2,2.2. Rules limiting interest	
	72
6.3.2.3. Other rules	74
6.3.2.3.1. Withholding taxes 1	74
6.3.2.3.2. Anti-tax haven rules 1	75
6.3.2.3.3. Reconsideration of group	
consolidation regimes 1	76
6.3.3. Lessons for the future	76
6.4. Rules addressing hybrid entity mismatches in the BEPS era 1	77
6.4.1. OECD recommendations 1	78
6.4.1.1. Arrangements that produce DD outcomes 1	78
6.4.1.2. Arrangements that produce D/NI outcomes 1	79
6.4.1.3. Arrangements using reverse hybrids 1	79
6.4.2. Responses of countries to BEPS: Current state of	
affairs 1	79
6.4.3. Hybrid entity mismatches in the BEPS era: Closely	
scrutinized worldwide 1	82
6.5. Concluding remarks 1	82

Part Four

Selected Business Models

Chapter 7:	Business Restructurings: The Toolkit for Tackling		
	Abusive International Tax Structures	187	
	Madalina Cotrut and Laura Ambagtsheer-Pakarinen		

7.1.	Overvi	ew of potential reasons for business restructuring	187		
7.2.	Typica	business restructuring models	189		
	7.2.1.	Restructuring manufacturing activities	190		
	7.2.2.	Restructuring distribution activities	194		
	7.2.3.	Centralization of services	198		
	7.2.4.	IP and centralization	199		
7.3.	Business restructuring structures and anti-abuse measures:				
	The fig	th for substance	199		
	7.3.1.	Testing business restructurings by applying GAARs	200		
	7.3.2.	Testing substance by analysing available			
		documentation	201		
	7.3.3.	Transfer pricing analysis	203		

	7.3.4. 7.3.5. 7.3.6.	Analysis of the substance of the principal Testing the PE exposure Testing whether compensation upon conversion	206 208
	1.5.01	should be paid	213
	7.3.7.	Restricting the tax deductibility of expenses arising	
7.4.	Conclu	from a conversion	216 217
	00404		
Char	oter 8:	Intellectual Property Structuring in the Context	
		of the OECD BEPS Action Plan Ruxandra Vlasceanu	219
8.1.	Setting	the scene	220
8.2.		iring IP	225
8.3.	Impact	t of the BEPS Action Plan	233
	8.3.1.	General comments	233
	8.3.2.	Actions tackling the prevention of double	
		non-taxation	234
	8.3.3.	Action 5 on harmful tax practices	237
		8.3.3.1. Existing regimes	238
		8.3.3.2. Specific comments on Action 5	239
8.4.	Recent	t developments and a blueprint for the future	242
	8.4.1.	Domestic provisions targeting aggressive tax	
		planning	242
	8.4.2.	The redesign of IP regimes	245
8.5.	Conch	uding remarks	246
Cha	pter 9:	Taxation of the Digital Economy	249
		Aleksandra Bal and Carlos Gutiérrez	
9 .1.	Introd	uction: The digital economy as a new way of doing	
	busine		249
9.2.	Conce	pt of the digital economy	253
9.3.		allenges of the digital economy	255
	9.3.1.	Residence taxation	257
	9.3.2.	Source taxation: Physical versus digital presence	259
	9.3.3.	Source taxation: Taxation of business profits of a PE	260
	9.3.4.	Income characterization	265
	9.3.5.	Indirect taxation: EU VAT	268
		9.3.5.1. Digital supplies	269
		9.3.5.2. Distance sales	272
		9.3.5.3. Intermediaries	274

9.4.		al initiatives concerning the digital economy	276
		New PE concepts	276
	9.4.2.	New taxes on specific transactions	277
		New taxes on profits	279
9.5.	Conclu	sion	280
Chap	ter 10:	International Tax Structuring for Holding	
		Activities	281
		Andreas Perdelwitz	
10.1.	Introdu	iction	281
10.2.	Genera	l characteristics of holding companies	282
	10.2.1.	Legal forms	284
	10.2.2.	Types	285
10.3.	Plannii	ng strategies and key criteria for holding locations	285
	10.3.1.	Repatriation strategies	286
	10.3.2.	Allocation strategies	289
	10.3.3.	Key criteria for holding company locations	291
10.4.	Limits	on tax structuring with holding companies	294
	10.4.1.	General anti-abuse rules	296
	10.4.2.	Transfer pricing	297
	10,4.3.	Residence	300
	10.4.4.	Beneficial ownership requirement	303
		Interim conclusion	307
10.5.	Potenti	al impact of the BEPS Action Plan	307
	10.5.1.	Action 6: Prevent treaty abuse	307
	10.5.2.	Limitation on benefits rules in tax treaties	308
		10.5.2.1. Publicly-traded companies test	310
		10.5.2.2. Ownership/base erosion test	311
		10.5.2.3. Active business test	314
		10.5.2.4. Derivative benefits test	315
	10.5.3.	Principal-purpose test under tax treaties	317
10.6.	Conclu	sion	321

List of Authors

323