COMMENTS RECEIVED ON PUBLIC DISCUSSION DRAFT

BEPS ACTION 11: Establish methodologies to collect and analyse data on BEPS and the actions to address it

7 October 2014
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28 August 2004

To: Action 11 Focus Group
From: Kimberly A. Clausing, Miller and Mintz Professor of Economics
Reed College, Portland, OR, USA  (email: clausimg@reed.edu)
Re: BEPS Action 11 Request for Input

I. DATA SUGGESTIONS (See items A.2 and D.1 of the request.)

In my work on multinational firm tax avoidance, I make extensive use of U.S. Bureau of Economic Analysis (BEA) surveys of multinational firms; the BEA surveys both U.S. headquartered firms (and their affiliates abroad) and foreign headquartered firms with affiliates in the United States. Both surveys are done on an annual basis. Multinational firms operating in the United States are required by law to respond to these surveys, but the survey information is not shared with tax or financial reporting authorities, and confidentiality is assured. However, the aggregated data are publicly available, and they provide very useful information regarding the operations of multinational firms. Indeed, I use these data to address precisely the issues discussed in your request, regarding the “increased disconnect between the location where value creating activities and investment take place and the location where profits are reported for tax purposes.”

For example, I have used these data to estimate the revenue costs to the U.S. government from income shifting abroad in the following papers.


Recommendation 1: I strongly recommend that other countries adopt similar surveys, and that the OECD consider templates to make sure that all such surveys include relevant financial statement information, such as foreign taxes paid, etc. The OECD could also provide links to surveys or house the resulting data on their web page. As with the U.S. BEA data, access should be free and unlimited.

Tax information often involves confidentiality issues, but it would also be ideal to have data from tax returns in aggregated form. If Finance/Treasury departments could release aggregated tax information on their multinational firm taxpayers, this would be quite useful for economic research on BEPS.

Recommendation 2: Take steps to encourage government treasuries to release aggregated data on the operations of their multinational firm taxpayers, including data on their operations overseas, as well as their reported profits and tax payments by location.
For purposes of BEPS related analyses, financial reporting data are not, in present form, particularly helpful. This is for several reasons, including inadequate country breakdowns as well as discrepancies between financial and tax definitions of income. Still, financial reporting information could be far more useful if taxpayers provided more information. While multinational corporations often voice concerns that revealing their financial details by country would also reveal their business practices, such concerns are vastly overstated. In fact, this overstatement is due in part to BEPS practices themselves, since financial information is increasingly divorced from the true details about the location of economic activity. And, regardless, the usefulness of such information by competitor firms is vastly overstated.

Indeed, it would shed a great deal of light on BEPS issues if firms were required to disclose country by country reports of their income, deductible expenses, and tax payments.

**Recommendation 3:** The OECD should encourage standards that require country by country detail in financial disclosures. These disclosures should be shared with the public, and they should include information on profits and tax payments, reported by country location.

II. METHODOLOGY SUGGESTIONS (See items B.1, B.2, B.3 and B.4 of the request.)

I have done work considering the scale of multinational firm income shifting, and the likely effect on U.S. government corporate tax revenues. My methods are described in detail in the following papers, available on my web page, http://www.reed.edu/economics/clausing/


It is clear that both national accounts data and balance of payments data are affected by BEPS behavior. There has been some good work by Gabriel Zucman that uses a variety of sources to tease out the scale of individual income tax avoidance, describing likely data distortions. [http://gabriel-zucman.eu/files/Zucman2013QJE.pdf](http://gabriel-zucman.eu/files/Zucman2013QJE.pdf)

However, it is thorny and complicated to tease out BEPS behavior in these types of data. Still, this is a project on my near-term agenda for the future.

Regarding effective tax rates, the BEA survey data referenced above allow a calculation of *actual taxes paid* in different countries relative to income reported in such countries. This is an excellent effective tax rate measure, since it incorporates every subtlety of tax law that would determine true effective tax rates. Inferring such rates based on broad features of the tax code may be inaccurate, given the complexities endemic in corporate tax law. For similar reasons, statutory tax rates can also be misleading.
Comments on BEPS Action 11

Request for input

Gary Clyde Hufbauer
Peterson Institute for International Economics
September 8, 2014

1. Base erosion and profit shifting (BEPS) is not a first-order economic problem in OECD countries. A first-order problem is the woefully low level of corporate investment, especially in the United States, Europe and Japan.

2. One reason that corporate investment is low is that corporate profits tax rates are high, especially in the United States and Japan. By contrast, taxes on earnings from real estate (homes, apartments, office buildings, etc.) are generally quite low. The result is a massive distortion of investment away from more productive uses (R&D, plant and equipment) to less productive uses.

3. Any policy initiative that serves to raise effective corporate tax rates would be a big step in the wrong direction. My primary concern is that the results from BEPS research could be used to justify misguided policies.

4. That said, I have secondary concerns as well. From what I read in the “Request for input”, it’s not clear that the research program has agreed on ideal rules for determining the source of income. It’s impossible to conclude that base erosion or improper profit shifting has occurred unless income flows are measured against an agreed template of ideal source rules. Especially thorny are rules for intellectual property income, but sales income and interest income also raise source questions. The research should start with a clear statement of agreed source rules, and explain how those ideal rules differ from national practice in OECD countries.

5. Working backwards to infer BEPS from a correlation between corporate tax rates and reported corporate profits is simply not adequate. In fact, this approach, which seems to be favored by the research program, is methodologically flawed. That’s like asserting there’s something fishy in price relations between railways and shale oil producers because railways have high profits as a share of revenues and shale oil producers have low profits (or vice versa).

6. In terms of research output, the published document should clearly indicate which countries will be tax revenue winners (under static assumptions) and which will be losers if BEPS is eliminated. The characteristics, if not the names, or corporate losers should be clearly identified.

7. The published document should also, and prominently, estimate the negative effect on investment, both in plant and equipment and R&D, and by sector, in countries that are revenue winners.

8. Finally, the document should give suggestions for alternative revenue sources for countries that would be revenue losers from eliminating BEPS.
Comments on

"REQUEST FOR INPUT ON ACTION 11 OF THE BEPS ACTION PLAN REGARDING WORK ON ESTABLISHING METHODOLOGIES TO COLLECT AND ANALYSE DATA ON BEPS AND THE ACTIONS TO ADDRESS IT"

Reinald Koch, Katholische Universität Eichstätt-Ingolstadt, Germany (reinald.koch@ku.de)

Andreas Oestreicher, Georg-August-Universität Göttingen, Germany (andreas.oestreicher@uni-goettingen.de)

Comments on Categories A and B: Indicators of the scale and economic impact of BEPS and B. Economic analysis of the scale and impact of BEPS

1 Making use of marginal effective tax rates

Identifying and quantifying the scale of BEPS activities may in principle aim at observing tax planning activities directly (e.g., capturing financing strategies by observing the debt-to-asset ratio) or capture in total the consequences of these actions on the rate of return, the effective tax rate or similar indicators. Observing the consequences of BEPS directly involves strong data requirements, since many strategies are not revealed by external accounting data. This holds in particular for all strategies that rely on a heterogenous tax classification of certain types of legal form and finance or corporate residence. Compared to that, information on rate of returns and effective tax rates allows for analyzing the overall consequences of all BEPS activities applied. In this respect, using effective tax rates has the additional advantage that it reflects not only the amount of international profit shifting, but also the rate at which the remaining profits are taxed. The following discussion is therefore limited to the adequate determination of effective tax rates.

2 Determining the marginal effective tax rate

A large variety of different approaches has emerged in the academic literature as regards the definition of the ETR, necessitating a careful discussion of different options with respect to their usefulness for identifying BEPS. We focus our comments on three different aspects, a) the level of aggregation, b) the definition of the numerator of the ETR, and c) the definition of the denominator of the ETR.

The level of aggregation stands in question both with regard to the considered entity and time. As far as the considered entity is concerned, the ETR of a (multinational) group can be determined at group level, at country level or at the level of each single company. Determining the ETR at group level has the advantage that the tax position of the whole group is reflected also in those cases where financial information is not available for all subsidiaries. Nonetheless, the resultant group ETR allows only for limited conclusions regarding the scope of BEPS strategies employed. Interpretation of this indicator suffers in particular from reflecting the effects of both pure tax planning and the allocation of operative activities. In other words, setting up a sales company in a low tax country has, in principle, the same effect on the group ETR as shifting profits to a low tax country via intra-group debt. Determining the ETR at country level (or company level) alleviates interpretation, since the resultant indicator shows directly the level at which profits are taxed in a specific country or company. Besides, aggregating the numerator and denominator of the ETR over time and, thus, defining the
ETR as a long-term indicator has the advantage of reducing or removing the distorting effect of provisions determining the allocation of tax base over time, as the example below shows (see also Dyreng/Hanlon/Maydew, 2008). In this respect, a distortion is understood as an influence on the ETR that is not a consequence of applying BEPS strategies.

Example: Company A suffers a loss of 100 in year x, which can be offset in year x+1, in which company A has a profit of 200. The applicable tax rate is 30 percent. In the absence of deferred taxes for the loss carry-forward, the one-year ETR amounts to 0 in year x (0/-100) and 0.15 (30/200) in year x+1 if determination of the ETR is based on figures from audited accounts. Aggregating the numerator and denominator of the ETR over time results in a two-year ETR of 0.30 (30/100), which reflects better the actual tax burden of the company.

The unsettling effect of tax losses (or other provisions determining the allocation of tax base over time) can also be avoided or reduced if the considered entity accounts for deferred taxes. If the tax loss in the example above results in a deferred tax asset in year x than the resultant one-year ETR amounts to 0.30 both in year x and x+1, if the ETR is defined as a GAAP ETR, i.e. the numerator of the ETR captures total income tax expense (tax payments plus deferred tax expense). Using this broad definition of the numerator, thus, contributes to isolating the effect of BEPS strategies on the ETR from other influences, if compared to using a Cash ETR.

If the ETR is defined at country- or company-level, as suggested above, dividing the numerator (tax expense) by the statutory tax rate alleviates further the comparison of effective tax rates across countries and over time.

The most challenging aspect of defining the ETR in a suitable manner, is to find an appropriate definition of the denominator. Most importantly, the applied definition must ensure that the ETR reflects the effects of both conforming and non-conforming tax avoidance. In this respect, academic literature defines conforming tax avoidance as those tax planning strategies that affect tax payments (nominator of the ETR) and profits (denominator of the ETR) correspondingly (see Hanlon/Heitzman, 2010). If a company or country-specific definition of the ETR that relies on unconsolidated information is applied, than BEPS strategies that shift income cross-border take a conforming effect. Identifying BEPS by way of country- or company-specific ETRs therefore requires determining pre-BEPS income for the denominator. In this case, the ETR assesses to what extent pre-BEPS income is reduced via profit shifting activities and at what rate the remaining income is taxed. Pre-BEPS income may be determined based on a propensity score matching as the income of a comparable company that is not subject to BEPS. Comparable companies may be identified within the same group (e.g., companies resident in the home country) or within domestic groups in the same country. The first control group would rely on the notion that intra-group differences in the rate of return are a consequence of tax planning, whereas the second control group takes advantage of the fact that the profits of domestic groups are not affected by cross-border profit shifting. Both approaches, however, involve obvious shortcomings. The first control group disregards other reasons for intra-group profit differences, whereas the second approach ignores differences between purely domestic and multinational groups, as expected, e.g., by Dunning's OLI framework. Instead of relying on the profits of comparable companies, one may therefore define certain items of income and expense as being always undistorted, whereas other items are considered as being affected by tax planning. In this respect, turnover as well as most operating expenses may be regarded as being undistorted, whereas licensing expenses and financing income and expenses are frequently used for profit shifting. Based on these as-

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1 If the ETR is determined at group level, intra-group transactions are consolidated and typical profit shifting strategies are, thus, non-conforming.
sumptions and further assuming that licensing expenses are in most cases reported as other operating expenses, gross profit, defined as turnover less costs of goods sold, provides a suitable definition of undistorted profit.

3 Data

The main hindrance to assessing the magnitude of BEPS adequately based on company microdata is the availability of suitable data. As already discussed above, many of the (aggressive) BEPS strategies cannot be observed directly in published accounting data, since they rely on the heterogenous classification of legal forms, financing contracts and company’s residence by tax authorities. Application of these strategies can thus only be identified directly if an international panel of original tax data is available. Access to confidential tax data is, however, in most countries strongly restricted. In Germany, e.g., corporate tax statistics are made available only with a significant time-lag and for one out of three tax years. Besides, to the best of our knowledge no attempts have been made to aggregate tax data across countries. Having access to such an international panel of tax data would contribute substantially to improving the validity of empirical tax research, e.g. with regard to tax motivated profit shifting. Therefore, we propose that the OECD encourages its member states tax authorities to make tax return data available for research (under defined conditions that guarantee security and confidentiality, where necessary).

Given the non-availability of tax data, accounting information provided in the financial statements constitute the second-best alternative. In this respect, determination of company- or country-specific ETRs inevitably requires unconsolidated financial information. The most comprehensive source of data is provided by Bureau van Dijk, which publishes consolidated and unconsolidated financial statements of European companies (AMADEUS) or worldwide (ORBIS) in a standardized format. Besides, AMADEUS and ORBIS provide company profiles including detailed information on, e.g., shareholders and subsidiaries, industry and legal form. Whereas the use of a standardized format alleviates the international comparison of indicators, any aggregation brings with it the loss of detail. The information provided by Bureau van Dijk, e.g., does not allow for a distinction between interest and dividend income as well as between intra-group and third-party transactions. One important limitation of these databases in comparison to official statistics (e.g., national FDI-statistics or tax statistics) is that they do not provide a full coverage, but rely on the extent to which companies publish their reports. Comparing the number of companies included in AMADEUS (Updated 172) with that reported by EUROSTAT (Statistics on Business Demography) reveals that AMADEUS includes about 85 percent of all companies (see Oestreicher et al., 2014 for details), but that only for 70 percent of these companies detailed financial information is provided. What is even more, depending on the information released by the business sector means that these databases also provide no random sample. It must rather be assumed that information is lacking in particular for entities that are used for tax planning purposes. Nonetheless, given the restrictions of the above mentioned official statistics to single countries, AMADEUS and ORBIS appear for us to be the most suitable sources of data to analyze BEPS on the basis of company micro data.

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2 Operating revenue, profit and loss for period, total assets and total fixed assets are reported in at least one year.
Comments on Category E: Tax burden of US multinationals in Europe

In order to demonstrate how ETRs determined as described above may be used to quantify the scope of profit shifting activities, we summarize briefly the results of an analysis we conducted on the tax burden of US multinationals on their EU profits. To this end, we identified 245 US multinationals with significant EU operations in AMADEUS (Update 172). We aggregated gross profit, tax expense and tax base (determined as tax expense divided by the applicable statutory tax rate) for these EU subsidiaries over the years 2000 to 2009 and determined effective tax rates as tax expense (tax base) scaled by gross profit. The resultant long-term GAAP ETRs were compared to the tax burden of EU multinationals on their foreign EU activities, which was determined accordingly. The results of this analysis are reported in Table 1.

Table 1: Tax Burden of US- and EU multinationals on their foreign EU operations

<table>
<thead>
<tr>
<th>Aggregation at EU level</th>
<th>Aggregation at group level (mean)</th>
<th>Aggregation at group level (median)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax base / Gross profit</td>
<td>Tax expense / Gross profit</td>
<td>Tax base / Gross profit</td>
</tr>
<tr>
<td>US MNEs</td>
<td>18.00% 4.75% 17.70% 4.70%</td>
<td>14.60% 4.00%</td>
</tr>
<tr>
<td>EU MNEs</td>
<td>22.93% 6.76% 20.00% 5.00%</td>
<td>15.60% 4.00%</td>
</tr>
<tr>
<td>EU MNEs (significant non-EU operations)</td>
<td>24.73% 7.35% 21.15% 5.39%</td>
<td>16.43% 4.22%</td>
</tr>
<tr>
<td>EU MNEs (CFC rules)</td>
<td>27.51% 8.15%</td>
<td></td>
</tr>
</tbody>
</table>

The results reported in Table 1 show that US multinationals are more successful in reducing the tax burden on their foreign EU operations than their EU counterparts. If tax expense, tax base and gross profits are aggregated at EU level (i.e., over all groups) US multinationals pay 4.75 percent tax on their gross profit (Column 2), whereas the tax burden of EU multinationals for their foreign EU operations is substantially higher (6.76 percent). This finding is not a consequence of EU multinationals having less opportunities to shift profits outside Europe as the results reported in the line below indicate. If only EU multinationals with significant non-EU operations are considered, the tax burden is even higher (7.35 percent) and is further increased if only EU multinationals are considered, for which a CFC regulations is applied in the home country (8.15 percent). Qualitative conclusions are no different if the tax base is scaled by gross profit, indicating that findings are not driven by differences in the statutory tax rates of countries, to which operations are allocated. Differences between EU and US multinationals are somewhat smaller if the tax burden is determined as the mean (median) of the group-specific ETRs (Columns 3 to 6). These results indicate that differences in Columns 1 and 2 are partly driven by tax planning strategies of large multinationals.

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3 A more detailed analysis will be sent by the authors upon request.
4 In order to qualify as a US multinational with significant EU operations, we required the US multinational to have at least 10 EU subsidiaries, the proportion of EU subsidiaries to be at least 20 percent of total group companies and the aggregate amount of gross profit reported by the EU subsidiaries in the years 2000 to 2009 to be at least 10 Billion EUR.
5 At least 20 percent of all subsidiaries are located outside Europe.
Figure 1 depicts the development of the tax burden (determined as tax expense scaled by gross profit) of US multinationals on their foreign EU operations over time (grey line with the dotted line being the linear trend line). It becomes apparent that between 2000 and 2009 the tax burden declined continuously, pointing to a more intensified application of tax planning strategies in recent years. Interestingly, the overall tax burden of the same US multinationals on their EU and non-EU operations (black line) remained constant.

**Literature**


Response to Section B.1. of the OECD Request for Input on BEPS (4 August 2014)

by Dominika Langenmayr

Section B.1. of the OECD’s request for input asks about a baseline or “counter-factual” of corporate activity that is unaffected by base erosion and profit shifting (BEPS) behaviour. BEPS is often measured by comparing effective tax rates (ETRs) of multinational enterprises (MNEs) with those of purely domestic firms. Differences between these firm groups’ ETRs may arise for two reasons:

1) Tax planning, profit shifting and other activities aimed at lowering the tax burden, especially in an international context (henceforth “BEPS activities”).
2) Tax advantages for MNEs that are inherent in the tax system, and from which they profit without active tax planning.

In the following, I will explain the second source in more detail and offer some suggestions on how to differentiate between these sources empirically.

The arm’s length principle does not imply equal tax payments of MNEs and domestic firms

MNEs are on average larger, more productive and more profitable than domestic firms (Helpman et al., 2004). These differences imply that the arm’s length principle (ALP) cannot guarantee that MNEs and domestic firms generally have similar ETRs. The ALP states that transactions between different subsidiaries of multinational corporations have to be treated for tax purposes as if they had taken place between independent parties, i.e., on the market. It thus presumes that there is no fundamental difference between multinationals and other firms.

In Bauer and Langenmayr (2013), we point out that well-studied, systematic differences between MNEs and domestic firms may partially explain the lower effective tax burden of MNEs. In particular, we identify two reasons why arm’s length prices for sales from low-tax to high-tax countries are systematically too high, implying lower ETRs of MNEs, even for MNEs who do not engage in BEPS (they can, of course, actively shift profits to further lower their tax rates).

A first reason for lower tax payments arises from the high average productivity of MNEs. In fact, it is the higher productivity that allows these firms to incur internationalisation costs and to become multinationals in the first place. They can thus produce the input at a lower cost than the price at which it sells on the market. Second, market prices include a mark-up that arises from the bargaining between the firm and the independent supplier. This mark-up also implies that market prices are higher than input prices within the firm. If the multinational then uses the market price to price intra-firm transactions for tax purposes (as the tax law requires it to do), it pays less tax in its home country and more in the location where it produces the input – but the latter is potentially a strategically chosen low-tax jurisdiction. As a result, the multinational company pays less tax than a comparable domestic firm.

Can this inherent tax advantage for MNEs be avoided?

Even correct application of the ALP thus implies a lower effective tax rate of MNEs, compared to domestic firms. Neither the academic literature nor the different tax systems worldwide offer a sensible alternative
to the ALP within the current separate accounting tax system. Thus, to avoid this favourable treatment of MNEs, one would have to change to a different tax system, such as a destination-based cash flow tax (Auerbach and Devereux, 2013). However, as the OECD’s action plan notes that the OECD does not consider different tax systems a viable alternative, the remainder of this statement will focus on possible adjustments to effective tax rates to correct for this bias in the ALP.

Implications for the measurement of BEPS

1) Studies comparing the effective tax rates of MNEs to those of domestic firms to measure BEPS should compare only firms with similar productivity. In such a comparison, most of the visible difference in ETRs should stem from BEPS activities. A possible productivity measure is, e.g., the value added per employee \( \frac{\text{Sales} - \text{Costs}}{\text{Employee}} \) (for further productivity measures see Tomiura, 2007).

2) Different definitions of ETRs can be used to gauge the relative importance of the different reasons due to which MNEs pay lower taxes.
   a. **Effective tax rate before BEPS**
      To measure ETR differentials that arise due to productivity differences (as explained above), and are less likely due to BEPS, it is advisable to look at tax payments relative to an adjusted earnings measure (“EBITAF”). This measure “EBITAF” are earnings before interest, taxes, amortization and fees for intellectual property. It thus refers to an earnings measure that cannot be affected by the most common ways of profit shifting. Comparing tax payments relative to EBITAF between domestic and multinational firms allows estimating how much tax savings arises due to systematic productivity differences between these firm groups. It thus provides a benchmark against which a comparison of the overall effective tax rate can be carried out.
   b. **Overall effective tax rate**
      Traditional ETR measures commonly refer to tax payments relative to earnings before income taxes. When the difference in the overall ETR between two firms (or groups of firms) is larger than the difference between the respective ETRs before BEPS (as defined in a.), this difference likely arises because of profit shifting activities.

3) For a more detailed measure, additional information from firms would be necessary. An important first step would be the mandatory reporting of claimed, but uncertain tax benefits in a company’s annual report. Similar legislation is already in place in the United States (“FIN 48”). These tax risks should be differentiated according to its source (e.g. reserves for pensions etc., license fees, transfer pricing...).

Conclusion

MNEs may have lower tax payments than purely domestic firms for two reasons: BEPS activities and a favouritism of MNEs that is inherent in the tax system and its guiding principles (i.e. the ALP). Differentiating between those sources is important when estimating the extent of BEPS. Taxation differences inherent in the ALP cannot be addressed by the actions currently proposed by the OECD.
References:


Dear Sirs,

As suggested by my colleague Prof. Michael Devereux, I am sending you some brief recommendations about Action 11. I have preferred to be as synthetic as possible. Of course, should you need further details, do not hesitate to contact me.

B.3 **Effective tax rates (ETRs).** These indicators are widely used. In particular, forward-looking ETRs can help to understand the effects of taxation on a company’s choices. Unfortunately, the standard measures (i.e., the King-Fullerton and Devereux-Griffith ones) are based on the assumption that only three sources of finance are used: new equity issues, debt and retained finance. No hybrid securities are considered, although, in the real world these financial instruments are widely used. Panteghini (2012) calculates ETRs when convertible and reverse convertible bonds finance an investment. Formulas are easily manageable and show that tax effects crucially depend on credit market conditions (default risk and its expected cost, the threshold level above which conversion takes place and so on). This approach could be improved to understand tax effects in a better way.

B.4 **Potentially available data.** Bundesbank has collected a dataset, MiDi,\(^1\) on German multinationals. This dataset contains quite interesting information on intra-company transactions (regarding, e.g., inbound and outbound Foreign Direct Investment and intra-company interest payments). These data allow to understand tax effects in a more detailed way.\(^2\)

To improve the effectiveness of MiDi, it would be useful to match its information with that contained in the financial statements collected by Bureau van Dijk (Amadeus, regarding European companies, and Orbis, about all the world).\(^3\) I am not sure that Bundesbank allows this matching for privacy reasons, but OECD could convince this Central Bank.

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\(^2\) A good example is provided by Egger et al. (2014). Thanks to MiDi, the authors can disentangle internal and third-party borrowing. In doing so, they can estimate that internal borrowing is highly sensitive to taxation.

\(^3\) For further details see [http://www.bvdinfo.com](http://www.bvdinfo.com).
In order to improve the understanding of BEPS, the extension of the MiDi analysis to other OECD countries would be quite useful. Moreover, other information about intangibles and royalties should be gathered.

Best regards,
Paolo Panteghini

References
OECD Request for input
(ref. : BEPS ACTION 11: Establish methodologies to collect and analyse data on BEPS and the actions to address it)

September 17, 2014

By email : CTP.TPS@oecd.org

To Whom It May Concern:

We are pleased to respond to the Request for input on BEPS Action #11: Establish methodologies to collect and analyse data on BEPS and the actions to address it taking place from August 4, 2014 to September 19, 2014.

This document may be posted on the OECD website. Full credit goes to Robert Robillard.¹

1. Background

1.1. The international tax rules embedded in the OECD Model Tax Convention (OECD MTC)² mostly date back to the 1920s. At the time, they were created and enacted by the International Chamber of Commerce and the League of Nations.³

1.2. These rules have shown remarkable resilience and, dare we say, great efficiency in eliminating double taxation pertaining to individuals all across the globe.

1.3. However, when it comes to the tax treatment of business profits emerging from any type of corporate entity, these rules have demonstrated the obvious shortcomings of any type of corporate taxation.⁴

¹ Robert Robillard, CPA, CGA, MBA, M.Sc. Economics, is the Transfer Pricing Chief Economist at RBRT Transfer Pricing (RBRT Inc.) and also Professor at Université du Québec à Montréal; 514-742-8086; robert.robillard@rbrt.ca.


⁴ For greater certainty, the terms “corporate entity” and “corporate taxation” in this document are meant to include any other tax units except for “flesh and blood” individuals.
1.4. The application of articles 7 and 9 of the OECD MTC has proven to be a perpetual source of uncertainty for the corporate sector as more rules and comments are added through time.

1.5. On the one hand, the use of articles 7 and 9 has been at the origin of numerous tax disputes and litigations between taxpayers and tax authorities, especially in the last 15 years all across the globe. Transfer pricing audits are obviously private in nature. However, tax court cases provide a glimpse of the state of affairs.5

1.6. Moreover, in the July 2008 version of the OECD MTC, the Commentary on article 7 concerning the taxation of business profits contained 21 pages of “instructions” for the proper applications of that article, most of which pertains to corporate entities. The July 2014 version now contains 44 pages. Are we nearer to clarity and ease of use? Not from a practitioner point of view, that much is certain.

1.7. On the other hand, the use and sometime abuse of articles 7 and 9 by tax administrations through the erratic application of the arm’s length principle as “defined” by the 371 pages of the OECD Transfer Pricing Guidelines6 has created countless double taxation cases between tax authorities all over the world.7

1.8. A similar statement can be suggested as to the applicability of articles 4 and 5 when it comes to the taxation of corporate entities. What constitutes the status of “resident” for tax

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5 In Canada, see among others: Canada v. GlaxoSmithKline Inc., 2012 SCC 52, [2012] 3 SCR 3; GlaxoSmithKline Inc. v. Canada, 2010 FCA 201 (CanLII); Canada v. General Electric Capital Canada Inc., 2010 FCA 344 (CanLII); Canada v. General Electric Capital Canada Inc., 2010 F.C.A. 290 (CanLII); Canada v. General Electric Capital Canada Inc., 2010 FCA 92 (CanLII); Smithkline Beecham Animal Health Inc. v. Canada, 2002 FCA 229 (CanLII); McKesson Canada Corporation v. The Queen, 2013 T.C.C. 404 (CanLII); Alberta Printed Circuits Ltd. v. The Queen, 2011 TCC 232 (CanLII); General Electric Capital Canada Inc. v. The Queen, 2009 TCC 563 (CanLII); General Electric Capital Canada Inc. v. The Queen, 2009 TCC 246 (CanLII); GlaxoSmithKline Inc. v. The Queen, 2008 TCC 324 (CanLII); General Electric Capital Canada Inc. v. The Queen, 2008 TCC 256 (CanLII); HSBC Bank Canada v. The Queen, 2007 TCC 307 (CanLII); Glaxo Smithkline v. The Queen, 2003 TCC 258 (CanLII).

6 OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, July 2010, as modified since then (which include over 75 new pages of “guidance” in the newly released Chapters 5 and 6 on 16 September 2014).

7 Again, double taxation cases are obviously private in nature. However, the ever-increasing “closing APA balance” of the Canadian APA program provide us with another glimpse of the state of affairs (Canada, Advance Pricing Arrangement. Program Report, 2013-2014, Canada Revenue Agency, p. 9, available online http://www.cra-arc.gc.ca/tx/nrrsnts/cmp/p_mp-eng.html).
purposes and a “permanent establishment” for the application of corporate taxation have also created unexpected problems, nowadays magnified by e-commerce.\footnote{See for example: OECD, 2010 Report on the Attribution of Profits to Permanent Establishments, July 2010; OECD, Revised Proposals Concerning the Interpretation and Application of Article 5 (Permanent Establishment), 19 October 2012 to 31 January 2013; OECD, “Taxation Aspects of Electronic Commerce: Publication of reports and technical papers”, available online \url{http://www.oecd.org/tax/treaties/ecommercereportsandtechnicalpapers.htm}; and OECD, Addressing the Tax Challenges of the Digital Economy, OECD Publishing, 16 September 2014, available online \url{http://dx.doi.org/10.1787/9789264218789-en}.

1.9. Once again, in spite of all these shortcomings related to corporate taxation, these rules have shown remarkable resilience and great efficiency in eliminating double taxation pertaining to individuals all across the globe.

1.10. To sum things up, regarding international taxation, all these issues should come as no surprise as far as corporate taxation is concerned. As very aptly summarized by Ross (1988): “No finite and feasible system of business taxation can collect positive revenues.”\footnote{Stephen Ross 1988, “Comment on the Modigliani-Miller Propositions”, \textit{Journal of Economic Perspective}, Vol. 2, No. 1, pp. 127-33; p. 132.}

2. Who pays taxes after all?

2.1. This seemingly audacious tax proposition derives from modern taxation theory which teaches us, through the wisdom of Edwin R.A. Seligman, that “the settlement of the tax burden [falls] on the ultimate taxpayer”.\footnote{Edwin R.A. Seligman 1921, \textit{The Shifting and Incidence of Taxation}, Columbia University Press, New York, p. 1, available online \url{https://archive.org/details/shiftingandincid00seli}.} Nowadays this is known as “tax shifting”.\footnote{Historically, it is notable that Mr. Seligman was a member of the group of economists appointed by the League of Nations to study the key principles of taxation of cross border activities (\textit{See Report on Double Taxation submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman, and Sir Josiah Stamp}, League of Nations Document No. E.F.S.73.F.19. 1923, available online \url{http://adc.library.usyd.edu.au/view?docId=law/xml-main-texts/brulegi.xml;chunk.id=item-1;toc.depth=1;toc.id=item-1;database=publicat;brand=default}).}

2.2. Richard Musgrave, another well-known economist, tells us that “the term \textit{shifting}, in the conventional usage, refers to the process by which the direct money burden is pushed along through price adjustments, from the point of impact (where the statutory liability is imposed) to the final “resting” place.”\footnote{Richard A. Musgrave 1959, \textit{The Theory of Public Finance}, McGraw-Hill, New York, p. 230.}
2.3. In broader terms, shifting of one’s tax burden is in fact recognized all over the world as perfectly legal.\textsuperscript{13} Theoretically, it should not matter if that shifting ends up being an added fiscal burden for the society as a whole as allowed by the jurisprudence or, as the case maybe for a given business, in the increases of the prices of its products or the modification of the compensation of its employees.

2.4. Furthermore, we would add that provided that this burden cannot be shifted, it should be diminished through the optimization of its localization which, again, is perfectly legal and in no way immoral. Localization being however much more than a simple geographical issue.\textsuperscript{14}

2.5. In a few words, corporate entities do not pay taxes. Moreover, as very eloquently expressed by Gresik (2001), “Governments cannot accurately measure transnational profits they plan on taxing.”\textsuperscript{15}

2.6. In answer to the purported problems of “base erosion and profit shifting”, Musgrave and Musgrave (1973/1984) would therefore have explained to the OECD member countries: “Those who take the integrationist position view the problem of taxation at the corporate level merely as a way of including all corporate-source income in the individual income tax base. Their basic proposition is that, in the end, all taxes must be borne by people, and that the concept of equitable taxation can be applied to people only. Moreover, they hold that income should be taxed as a whole under a global income concept, independently of its source. […] The integrationist’s position can be brought out most clearly by asking this question: What would be your view of corporate taxation if in fact corporations made it a practice to

\textsuperscript{13} In Canada, it was stated a long time ago: “Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.” (Inland Revenue Commissioners v. Duke of Westminster \textbracketsymbol{[1936]}, AC 1, [1935] All ER Rep 259, 51 TLR 467, 19 TC 490, p. 14; available online www.commonlaw.uottawa.ca).

\textsuperscript{14} Interestingly enough, the previously mentioned panel of 1923 limited itself to the observation that individuals may shift their tax burden from country to country by “dissolving existing intermediate entities so that the foreign shareholder becomes a direct holder, it is possible for the individual to shift according to his own interest from one class of assets to the other and to regulate under which scheme of taxes he will fall.” (Report on Double Taxation submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman, and Sir Josiah Stamp, League of Nations Document No. E.F.S.73.F.19. 1923, p. 49[4053], available online http://adc.library.usyd.edu.au/view?docId=law/xml-main-texts/brulegi.xml;chunk.id=item-1;toc.depth=1; toc.id=item-1;database=collection=brand=default).

distribute all profits as dividends and to retain no earnings? The integrationist would answer that, in this case, no corporation tax would be called for.”

2.7. Simply put, in order to eradicate “base erosion and profit shifting”, corporate taxation should be repealed.

2.8. This proposal would, in itself, take care of action #11: “Establish methodologies to collect and analyse data on BEPS and the actions to address it” since most of the countries around the world have already implemented comprehensive processes to address tax avoidance on their territory and tax evasion (which is illegal).

2.9. But obviously, repealing corporate taxation usually meets with very strong headwinds in the political sphere since “corporations ought to pay their fair share of taxes”.

2.10. Sadly, numerous academic publications have espoused that somewhat naive view of the taxation world. Musgrave and Musgrave (1973/1984) would have explained to the OECD member countries that “those who take [that view, the absolutist view] believe that the integrationist approach rests on an unrealistic view of the corporation. The large, widely held corporation—which accounts for the great bulk of corporation tax revenue—is not a mere conduit for personal income. It is a legal entity with an existence of its own, a powerful factor in economic and social decision making, operated by a professional management subject to little control by the individual shareholder. From this it is concluded that, being a separate entity, the corporation also has a separate taxable capacity which is properly subject to a separate and absolute tax.”

2.11. The latter view of the corporate tax world is nonetheless flatly unsustainable. This evidence has recently been stated once again: “No competent student of taxation believes that corporations pay the corporate income tax. Only people pay taxes. Things and abstractions do not pay taxes. A corporation is, in law, a legal person, but that is, in fact, a legal fiction. Therefore, corporations do not really pay the corporate income tax. Conservative Nobel Prize–winning economist Milton Friedman is well known for espousing that view, but liberal economists share it as well. The liberal Nobel economist Wassily Leontief told The New York Times 20 years ago:


17 To be clear, we suggest that corporate entities should be transparent for taxation purposes. The tax burden would ultimately fall on the individual shareholders of any corporate group or structure, that is the “flesh and blood” individuals, a highly desirable result to start with for tax efficiency purposes.

Corporate income taxes fall ultimately on people. Economists have tried but have never succeeded in finding out how the weight of these taxes is ultimately distributed among income groups. There can be little doubt that elimination of corporate income taxes would simplify our tax system and limit its abuse.\(^\text{19}\)\\n
2.12. Anyone interested in taxation will recognize this fact.\\n
2.13. In Canada, the Carter Commission ventured directly on that political landmine saying in the 1960s: “Because income tax is collected from corporations, trusts, and cooperatives, it does not mean that these organizations bear the burden of the tax. Ultimately, the burden of the tax on the organization is the relative reduction in the power of people to consume. This reduction can take the form of reduced payments to people who sell goods and services to the organization, increased prices for those who buy goods and services from the organization, reduced incomes to those who hold interests in the organization or reduced sale prices received for these interests by those who dispose of them.”\(^\text{20}\)\\n
2.14. Recently, the Canadian Chamber of Commerce also reminded us that: “according to an Oxford University study, a $1 increase in corporate taxes tends to reduce real median wages by 92 cents.\(^\text{14}\) The American Enterprise Institute for Public Policy Research found a one per cent increase in corporate tax rates leads to an almost equivalent decrease in wage rates.”\(^\text{21}\)\\n
3. **BEPS works with apples instead of oranges**\\n
3.1. The OECD members allege that “base erosion and profit shifting” are suddenly major taxation issues. It is suggested that: “Base erosion constitutes a serious risk to tax revenues, tax sovereignty and tax fairness for OECD member countries and non-members alike.”\(^\text{22}\)\\n
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3.2. No allusion whatsoever is however made to the dreaded “tax havens”.

3.3. Nowhere in the documents related to that initiative can the expression “tax haven” be found. Worthy of note, it is missing in action in the *Action Plan on Base Erosion and Profit Shifting*. 23

3.4. Soft to the touch, instead of an abrasive attack on tax havens, the building blocks of the BEPS initiative comprise the notions of “tax fairness” and “fair tax environment”. 24

3.5. Nonetheless, sixteen years later, we cannot help but see permeate through these lenses the remnants of the 1998 plea which stated the necessity to “*develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases […]*” 25

3.6. Coming back to the BEPS initiative, “tax fairness” is hence suggested.

3.7. We subscribe to that intention without any reservation.

3.8. However, the OECD should not preoccupy itself with that concept as it applies to corporate entities and corporate taxation.

3.9. Taxation theory as seen above is quite clear in regards to the relevance of corporate taxation.

3.10. Simply stated, there is no such thing as “tax fairness” when it comes to the comparison of the taxation of individuals and corporate entities. It is like trying to compare apples to oranges.

3.11. Instead, the examination of the “effective” tax burden and tax rate in comparison to the “statutory” tax burden and tax rate of low income individuals, high income individuals and high-net-worth individuals would be much more promising to ensure “tax fairness”.

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3.12. Along the way through that investigation, OECD member countries might discover patches and pockets of “real tax unfairness”; a subject which would need more space that what is available at this time and place.

3.13. As was once said: “Would you tell me, please, which way I ought to go from here?” To which it was wisely answered: “That depends a good deal on where you want to get to.”

3.14. But as then went on the dialogue:

- I don't much care where.
- Then it doesn't much matter which way you go.
- So long as I get somewhere.
- Oh, you're sure to do that, if only you walk long enough.”

3.15. In other words, as the BEPS initiative keep suggesting and countries keep implementing more and more technical rules to “regulate” international taxation and the use of tax havens by corporate entities, we may not like the coming end-result much more than the actual situation.

3.16. In fact, the number of double tax cases will likely grow exponentially in the next decade as will tax litigation cases.

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26 Lewis Carroll, *Alice in Wonderland*; the Cheshire Cat in answer to Alice questions...
A network approach to analyse and monitor treaty shopping

This document is a response to the OECD’s Request for input on Action 11 of the BEPS Action Plan regarding work in establishing methodologies to collect and analyse data on BEPS and the actions to address it.

The document is submitted by Maarten van ‘t Riet and Arjan Lejour from CPB Netherlands Bureau for Economic Policy Analysis.

Summary

The international links and the spillovers between countries can systematically be analysed and monitored by a network approach. The network approach identifies Treaty Shopping by calculating the cheapest tax routes. Centrality indicators from network analysis identify the most attractive conduit countries. The network approach can be used for policy simulations.
A network approach to analyse and monitor treaty shopping

1. **BEPS follows from increased economic interconnectedness of countries and different national rules for taxing multinational firms**
   
   Firms increasingly have a presence in more than a single jurisdiction, either through productive operations or intermediate deliveries or by financing structures involving various degrees of ownership. Multinational firms thus face tax obligations in different countries which have different national rules for taxation of corporate income. By shifting profits the multinational enterprises can exploit the differences in the tax codes, reducing their taxable bases, and reducing their overall tax burden.

2. **These international links and the spillovers between countries can systematically be analysed and monitored by a network approach**
   
   The economic links through the productive and financial activities of multinational firms take place in a network of jurisdictions. Recognizing this network dimension allows for systematic analysis of the international links and tax spillovers. By representing the international corporate tax system as a network, techniques from mathematical graph theory can be applied. Network concepts can be used to construct indicators for descriptive and monitoring purposes.

3. **The focus is the economic analysis of Treaty Shopping, a part of BEPS**

   The particular focus of the network approach is the economic analysis of treaty shopping. Treaty shopping occurs when multinational enterprises, rather than investing directly in a host country, funnel the investment through a third country to take advantage of tax treaty provisions not found between the host and the home country of the investment. This is an economic definition emphasizing the indirect financing. The consequences of this rerouted financing in terms of reduced corporate taxes for multinationals and national tax revenues are subject of the economic analysis.

4. **The network approach identifies Treaty Shopping by calculating the cheapest tax routes**

   When foreign earned profits are repatriated as dividends several forms of taxation may apply. These include host country non-resident withholding taxes and the corporate income taxes of home countries, possibly mitigated by double tax relief methods stipulated in national tax codes. Bilateral double tax treaties may stipulate reduced rates for withholding taxation. Taking into account this information the network approach identifies treaty shopping by calculating the cheapest tax routes over the network.

   A current application features a network of 108 higher and middle income countries, including many tax havens, for which the relevant tax data have been collected.

5. **A first indicator is the percentage of country pairs for which Treaty Shopping reduces the tax burden for MultiNational Enterprises**

   For each combination of two countries it can be determined whether treaty shopping is profitable in terms of tax costs for the multinationals when repatriating profits. A first indicator of the network analysis is therefore the percentage of all country pairs for which this is the case.
For the current application on a set of 108 countries, indirect routes (treaty shopping) are cheaper than the direct routes for 66 percent of the country pairs.

6. **Treaty Shopping reduces the worldwide average double tax rate**
By making use of the cheapest tax routes over the network multinational enterprises can reduce their double tax burden. The potential reduction, compared to the tax costs of the direct route, can be computed for each country pair, and then averaged by country and worldwide.

For the current application the worldwide average potential reduction is nearly 7 percentage points.

7. **These indicators derived from the network methodology provide a measure of the divergence of national tax codes**
International corporate taxation may involve double taxation. Unilateral double tax relief and bilateral double tax treaties mitigate this and treaty shopping allows for even further reduction of the remaining double tax rates. The indicators, mentioned above, of the potential for treaty shopping are worthwhile in their own right and at the same time they provide a measure of the divergence of national tax codes. Changes in the tax parameters will be reflected in the indicators, where lower values indicate more conformity.

8. **Centrality indicators from network analysis identify the most attractive conduit countries**
Exemption of foreign-source income from domestic corporate taxation, a high number of double tax treaties and low or negligible withholding tax rates on dividends contribute to the attractiveness as a conduit country. Centrality measures from network analysis formally combine these elements in a single indicator, allowing for ranking of countries. High ranking countries in this respect fulfill necessary conditions, though not sufficient, for the role of a conduit country.

9. **The centrality measure is significant in explaining FDI stocks**
The network approach generates measures of treaty shopping potential. These measures can be used as input into further empirical analysis, explaining bilateral or aggregate FDI flows and stocks.

The centrality measures have been entered in a cross-sectional regression analysis and prove to be significant. There is more promising work to be done in this area.

10. **Treaty Shopping interacts with other elements of BEPS**
Treaty Shopping reduces, first of all, the double taxation of foreign earned corporate income. However, in combination with other elements of BEPS, such as thin capitalization and transfer pricing, the taxable bases in source countries are also at risk of reduction. The full potential for multinational enterprises of this interaction may well be double zero taxation.

The novel network approach, so far, does not take into account the base erosion in source countries. It systematically analyses the international linkages when repatriating dividends. It yields potential reductions which effectively, in the interaction with other BEPS elements, will even be higher.
Efforts to extend the methodology could lead to an enhanced understanding of the international corporate tax system.

11. **The network approach can be used for policy simulations**

The network approach lends itself to policy simulation. Policy proposals can be translated into changes in tax parameters or restrictions on the system. The network indicators then can be recomputed, including new rankings of countries, thus providing a consistent overview of the responses to the policy as far as treaty shopping is concerned.

12. **The ultimate consequence of corporate taxation in an international setting is that only coordinated global action addressing treaty shopping can be effective**

As firms will always search for the cheapest tax routes, partial or regional measures are insufficient to address treaty shopping. Only strongly coordinated global action can be effective.

A policy simulation with the network framework where the OECD countries attempt a crackdown at tax havens shows very little impact on the indicators of treaty shopping.

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3 An alternative definition is more legalistic, equating treaty shopping with treaty abuse.


5 Centrality rankings for the current application will be shortly available.
Response to the OECD Request of Inputs on BEPS Action 11

by

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This response to the OECD request for inputs briefly addresses selected issues within the OECD action plan for which the author has acquired experience in the empirical evaluation of already existing BEPS measures. In this statement, the relevant studies are mentioned and briefly summarized. The interested reader is kindly referred to the relevant publications and working papers.

Action 3

CFC rules may trigger a tax liability for a parent company if a foreign subsidiary of this parent company is receiving low-taxed income on passive investment (e.g. holding bonds). Depending on the exact definition of passive income, CFC rules are a potentially suitable instrument to restrict tax planning by multinationals, including double dip structures that seek to achieve double deductions of interest in different countries (Mintz and Weichenrieder, 2010).

A recent paper that looks into the questions of whether German CFC rules affect company behavior of German multinationals is Ruf and Weichenrieder (2012). The paper draws on a confidential database of the Deutsche Bundesbank and exploits observations between 1996 and 2006. The study finds that German CFC rules were quite effective in restricting investments in low-tax jurisdictions. The German regulations seem to be responsible also for the fact that the number of tax-haven
affiliates that receive equity from their German parent to lend it to foreign affiliated companies in high-tax countries was very limited.

In Europe, measures against tax base shifting are sometimes endangered by rulings by the Court of Justice of the European Union. A salient decision in this respect was the decision of 12 September 2006 (C-196/04), which held that the UK CFC rules had been in contradiction to the right of free establishment. Following the decision, many EU countries, including Germany, changed their CFC rules to make them more lenient towards (passive) investments in member countries of the European Economic Union (EEA) as compared to non-EEA countries. This differential change yields another opportunity to empirically evaluate the working of CFC rules. This is done in Ruf and Weichenrieder (2013). Firm level data suggests that the court decision and the change in legislation that followed gave an increased preference for low-tax European countries compared to non-European countries, at least in the case of German multinationals. While this may suggest that the court ruling has been counterproductive to restrict base shifting, it confirms that, in principle, unilateral rules can have measurable impacts.

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**Action 4**

It is now well-documented that multinational firms tend to increase the debt ratio of affiliates in high-tax countries compared to ratios in low-taxed countries (e.g. Mintz and Weichenrieder 2010). Against this background, thin-capitalization rules may be used to stop limit the use of debt instruments in high-tax countries. The working of thin-capitalization rules can be studied by looking at incidences where the rules have been changed. A tightening of rules happened 2001 in Germany, which is analyzed in Weichenrieder and Windischbauer (2008). The authors find that tightening the regulations in 2001 had some limiting effect on leverage. Foreign affiliates reacted by reducing intra-company loans and increasing equity, with no significant evidence of reduced real investment. At the same time, it may be mentioned that other studies did find that anti-avoidance rules retard real investment.

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**References**


RESPONSE TO REQUEST FOR INPUT: OECD BEPS ACTION 11

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RESPONSE TO REQUEST FOR INPUT: OECD BEPS ACTION 11

George R. Zodrow and John W. Diamond

In this response to the request for input issued by the OECD in connection with Base Erosion and Profit Shifting Action 11, we focus on two topics: (1) a brief summary of some dynamic computable general equilibrium modeling work that we have done examining the economic effects on the US economy of implementing the comprehensive base-broadening, rate-reducing US reform proposed by Dave Camp, Chairman of the House Ways and Means Committee, including a discussion of the modeling of the effects of income shifting; and (2) comments on the new research needed to facilitate such modeling of the macroeconomic effects of income shifting in a CGE framework.

I. INCOME SHIFTING AND ESTIMATES OF THE EFFECTS OF US TAX REFORM

In a recent analysis prepared for the Business Roundtable in the United States (Diamond and Zodrow, 2014), we used a large scale, dynamic, overlapping generations, computable general equilibrium (CGE) model of the US economy (the Tax Policy Advisers or TPA Model) to analyze the short and long run economic effects of implementation of the tax reform proposal put forth as a legislative discussion draft by Representative Dave Camp (R-MI), Chairman of the House Ways and Means Committee in the United States House of Representatives.1 The Camp discussion draft provides for a comprehensive base-broadening, rate-reducing (BBRR) revenue neutral reform of both the business and individual income taxes. The primary reforms of the corporate reforms include a phased-in rate reduction to 25 percent, financed by the elimination of a wide range of business tax preferences, and a move to a territorial system for taxing the foreign source income of US multinational companies, coupled with current taxation of foreign-source income earned from intangibles derived from sales to foreign markets at a 15 percent rate, subject to credits for foreign taxes paid. For the individual income tax, the proposal would use

1 The reform proposal was released on February 26, 2014 and is available at http://waysandmeans.house.gov/UploadedFiles/Statutory_Text_Tax_Reform_Act_of_2014_Discussion_Draft_022614.pdf. Analysis of the draft legislation by the Joint Committee on Taxation is available at https://www.jct.gov.
the revenues raised from a variety of base-broadening provisions to finance a move to a new two-rate (10 percent and 25 percent) rate structure, supplemented by a 35 percent bracket on certain forms of income, including most labor income.

We simulated the effects of the reform proposed by Chairman Camp using the TPA Model. The domestic component of the model includes both corporate and non-corporate composite consumption goods and owner-occupied and rental housing, with the corporate sector subject to the corporate income tax and subdivided into domestic and multinational firms as described below, and the non-corporate sector taxed on a pass-through basis at the individual level. Investment and employment decisions in the model are made by far-sighted profit-maximizing firm managers who take into account all business taxes (including all tax preferences) as well as the costs of adjusting their capital stocks. Households make consumption, labor supply, and saving decisions to maximize their welfare over their lifetimes, again taking into account the features of the tax system. The model simulates the short and long run effects of the reform, and compares the results to those that would occur with continuation of the current tax system in the United States.

The international component of the model includes a relatively simple foreign or “rest-of-the-world” (RW) sector, with international trade and capital movements between the US and RW. Following the work of Becker and Fuest (2011), the model differentiates between highly mobile firm-specific capital that earns above-normal returns (e.g., intangibles, including intellectual property) and much less mobile ordinary capital that earns normal returns. Firm-specific capital is allocated across the US and RW by both US-based and RW-based multinationals, generally following the approach used by de Moij and Devereux (2011) and Bettendorf et al. (2009) in the development of their CORTAX model which has been used to analyze various tax reforms in the EU. A key feature of our model – and an important determinant of the simulation results – is the extent and nature of income or profit shifting between multinational parents and subsidiaries. We assume that the extent of income shifting out

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2 Several approaches have been used to empirically implement the notion of “above-normal” returns. In a recent analysis by the US Department of the Treasury, Cronin et al. (2013) calculate above-normal returns as the extra returns that arise when expensing of all purchases of capital (i.e., consumption tax treatment) replaces deductions for depreciation (and other capitalization provisions) under the income tax; they estimate that 62 percent of the return to capital is accounted for by above-normal returns. In an earlier study, Gentry and Hubbard (1997) compare before-tax stock market returns to a riskless rate of return on bonds of 10 percent and arrive at a similar figure (roughly 60 percent).
of the US is reduced as the US reduces its corporate income tax rate. Specifically, we model the reversal of income shifting as a constant semi-elasticity function of the difference between the combined federal and state US corporate income tax rate and the average effective tax rate in a typical tax haven; that is, we assume that some reversal of income shifting would begin immediately with a reduction in the US rate, but that all income shifting would be reversed only if the US rate fell to the average effective tax rate (including the costs incurred in shifting and deferring income) of the typical tax haven.3

The general messages for corporate tax reform of the simulations of the Camp proposal and other simulations we have performed are two-fold. First, neglecting income shifting (and to a lesser extent the reallocation of firm-specific capital), a base-broadening, rate-lowering reform is likely to have negative (or perhaps small positive) effects on economic growth. The key issue is a familiar one – the rate reduction applies not only to new investment but to existing capital, resulting in a windfall gain for old capital that does not reduce the cost of capital but reduces tax revenues and thus limits the amount of rate reduction that can occur within the context of a revenue-neutral tax reform. Second, the likelihood that such a reform will lead to positive economic effects is much larger to the extent that income shifting is initially large and is significantly reversed with reductions in the statutory corporate income tax rate. The key issue in this case is that the reversal of income shifting provides an essentially “free” source of revenue – that is, reduced income shifting allows further corporate income tax rate reductions without the negative effects on the cost of capital and the level of investment of eliminating business tax preferences. Thus, a thorough understanding of income shifting and how it would be affected by changes in relative tax rates is critical to accurately estimating the effects of corporate tax reforms.

II. THE NEED FOR FURTHER RESEARCH

Our work has identified three general areas in which further research would be extremely beneficial in better understanding the role played by income shifting in the modern global

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3 We use a tax haven rate on the grounds that a reduction in the US statutory tax rate to a higher rate, such as the average foreign effective tax rate on foreign income earned by US multinationals, would be unlikely to result in a complete reversal of income shifting for the United States. We typically assume an average effective tax haven tax rate (including the costs incurred in shifting and deferring income) of 5–7 percent.
The first and most important topic is the responsiveness of income shifting to international differences in statutory tax rates. There are currently a wide range of estimates in the literature, with the influential work of Clausing (2011, 2013) suggesting a tax semi-elasticity of income shifting of 3.3 while in a recent review of the income shifting literature Heckemeyer and Overesch (2013) conclude that the literature suggests a consensus estimate of 0.8. More importantly, information on the extent to which statutory rate reductions in a high-tax country would result in the reversal of income shifting would be very useful, as would a better understanding of the structural relationship between these variables; for example, in the US case, the key issue is whether a rate reduction from 35 to 25 percent would result in a reversal of income shifting consistent with current estimates of the tax semi-elasticity of income shifting (as assumed in our model), or if income shifting would begin to be reversed only if the rate were dropped significantly below, say, 25 percent.

A second and closely related issue is the extent of existing profit shifting. The work of Clausing suggests that for the United States the amount of income currently shifted is on the order of 20-30 percent of current corporate income tax revenues, but other estimates are smaller. As demonstrated by the discussion above, an accurate determination of the amount of income shifting is critical to estimating the macroeconomic effects of tax reforms.

Finally, further research on the sensitivity of foreign direct investment to tax differentials would be very useful, especially if that work focused on the differential mobility of ordinary capital earning normal returns and firm-specific capital earning above-normal returns. Additional research on the magnitude of such above-normal returns would also be helpful.

Thank you for giving us the opportunity to present our views to the OECD’s Base Erosion and Profit Shifting project.
REFERENCES


Introduction

The Luxembourg Investment Fund Association (ALFI) welcomes the opportunity to submit its comments on the OECD Public Discussion Draft “BEPS Action 11: establish methodologies to collect and analyse data on BEPS and actions to address it” (hereafter referred to as “Discussion Draft”).

ALFI fully supports the OECD’s work and shares the OECD’s point of view that action is needed in order to prevent double non-taxation, as well as cases of no or low taxation created by artificial arrangements.

However, we consider that it is imperative that the OECD’s work on the items of the BEPS Action Plan addresses the particular situation of Collective Investment Vehicles (CIVs) and manages to balance appropriately all competing considerations to make sure that the actions undertaken in this respect are proportionate and do not go beyond their objectives.

General comment on CIVs within the context of BEPS

Although the BEPS works is clearly mainly focused on multinational enterprises (MNEs), ALFI is concerned that the recommendations developed to address BEPS behaviours might impact, deliberately or inadvertently, CIVs which must however be left out of the scope of the BEPS work for a certain number of reasons.

Indeed, CIVs are primarily put in place in order to allow portfolio investors to pool their funds rather than investing directly, and thus benefit from economies of scale and other commercial advantages (including better risk-spreading).

The crucial role played by CIVs in the economic growth (notably by giving the ability to small and medium enterprises to have more easily access to financing) has also long been recognised by the European commission that has taken a series of steps and regulations over the past years in order to facilitate cross-border fundraising and investments for CIVs within the Single market.

In order to facilitate the international diversification of CIVs and eliminate barriers to cross border investments, most countries have therefore set out a specific tax regime for CIVs that provides for quasi tax neutrality between direct investments and investments through a CIV, so that taxation only arises at the level of the investors.
Consequently, the purpose of CIVs is, by essence, not to avoid tax. Furthermore, as CIVs are mostly widely-held, diversified and regulated, they should almost never effectively be used as a tool for tax avoidance or treaty shopping.

In the fifteen actions identified by the OECD to address BEPS, the OECD is typically targeting structures where the interaction of different tax regimes from different countries leads to the non-taxation of MNEs profits. The BEPS work is indeed built on the recognition that profit-shifting behaviours by MNEs, through certain corporate structures, are a significant concern that must be addressed. CIVs should therefore rarely, if never, be concerned by these cases of aggressive tax planning. As a result, ALFI is of the opinion that all BEPS actions, including BEPS Action 11, should not apply to CIVs. If necessary, the situation of CIVs should rather be dealt with separately, taking into account their particular nature.

**Difficulties for CIVs to meet the requirements of Action 11**

The Discussion Draft on Action 11 does not expressly mention the situation of CIVs which could mean that its recommendations could apply indistinctly to both MNEs and CIVs.

As mentioned above, ALFI believes that CIVs should expressly be left out of the scope of Action 11. Should it not be the case, we anticipate practical difficulties for CIVs that would mainly be due to the impossibility to collect data (notably due to the fact that CIVs do not always have access to information about their investors or because investors in a CIV may change daily). In practice, the impediment to the collection of appropriate data would mainly result from the fact that the international CIV industry is built around financial intermediaries which imply that there may be a number of layers between the issuer of a security and the beneficial owner, and that interests in CIVs are often registered at the CIV level through nominee/omnibus accounts.

Moreover, collecting and analysing data would inevitably create an additional burden that would be contrary to the fundamental objective of CIVs and would reduce the advantages of CIVs over direct investments.

In its previous work, such as in the Report on the treatment of Collective Investment Vehicles (2010) or in the TRACE implementation package (2013), the OECD took into account the particular challenges CIVs have to face. As an example, one of the objectives of the TRACE work on procedural problems for claiming treaty benefit was indeed to “develop systems that are as efficient as possible, in order to minimise administrative costs and allocate the costs to the appropriate parties”. Consequently, BEPS Action 11, if applied to CIVs without any further distinction, could contradict the past objectives pursued by the OECD. Any proposal should therefore consider the specific position of CIVs.

ALFI is also concerned that some commercially sensitive information may have to be disclosed. This might be harmful to investors’ financial interests, compromising their investment performance, or could lead to a breach of contractual confidentiality.

Finally, ALFI would like to stress the importance of ensuring that the indicators and tools that will assist in the monitoring of the impact of BEPS, are effectively designed so as to keep the compliance costs on taxpayers to a minimum, maintain the confidentiality of data and taxpayers, and are also easy for tax authorities to administer.

Action 11 should thus, at least, reflect the commitment to the principle that any measure of the effectiveness and economic impact of the actions taken to address BEPS will be, first, based on
exploitation of existing data (including new transfer pricing and country-by-country information) rather than imposing additional reporting burdens on taxpayers

**ALFI recommendations**

The ALFI therefore recommends that CIVs are expressly excluded from the scope of Action 11 or that, at least, their particular nature is taken into account. The OECD should seek to avoid unnecessary additional administrative burdens and related costs on CIVs. Furthermore, any measure of the effectiveness and economic impact of the actions taken to address BEPS should, first, be based on exploitation of existing data rather than imposing additional reporting burdens on taxpayers.
BIAC response to the OECD request for input on BEPS Action 11:
Establish methodologies to collect and analyse data on BEPS and the actions to address it

1. The Business and Industry Advisory Committee (“BIAC”) thanks Working Party 2 (“WP2”) for the opportunity to respond to the OECD’s request for input on BEPS Action 11 to establish methodologies to collect and analyse data on BEPS and the actions to address it.

2. BIAC notes the technical nature of the request, and believes that economists and governmental bodies may be best placed to provide the detailed input required at this stage. That being said, we have identified a number of comments that we would like to share at this stage, prior to the development of specific proposals by WP2.

3. As a general comment on the scoping of other BEPS Actions, we would welcome close collaboration between WP2 and the OECD’s other Working Parties so that data and analysis is made available to assist those Working Parties in clearly and tightly defining and identifying the problems that require targeted solutions.

4. We understand there will be a full consultation process when initial proposals have been developed and we look forward to providing a more detailed response to those proposals.

New vs. existing data

5. Section D of the request for input asks for “recommendations for new types of data, including types of data that taxpayers should provide to tax administrators, to be collected as part of future indicators”. BIAC supports the use of more sophisticated and consistent techniques by tax authorities to assess both micro and macro level data. However, we do not believe that any additional or new data should be collected from taxpayers at this stage.

6. Through the OECD’s BEPS Action Plan, taxpayers will be asked to produce and provide substantial amounts of additional information to tax authorities through the Country-by-Country Reporting (“CbCR”) template and Transfer Pricing Documentation (“TPD”) requirements under Action 13. In addition, Action 12 on disclosure requirements will require additional reporting of certain transactions. Apart from these two actions, where additional reporting will be specifically mandated, a number of other actions will also require taxpayers to prepare and compile new and additional types of information to prove compliance with the proposed laws and guidelines. On top of the BEPS project, Multinational Enterprises (“MNEs”) also face an ever growing number of reporting requirements from other sources, such as FATCA1, CRD IV2 and the European disclosure requirements.

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1 Foreign Account Tax Compliance Act
2 Capital Requirements Directive IV
for extractive and logging/forestry industries\(^3\) for example. We strongly advise against adding to the substantial burden faced by MNEs, especially before the usefulness of all this new data has been established. We believe that existing data and new data provided by other BEPS Actions should be sufficient to allow for extensive analysis. However, if new data is determined to be necessary, we would encourage the OECD to provide an analysis as to why existing data cannot satisfy the need in order to avoid duplicative requirements and additional costs. In addition, such requirements should permit companies the flexibility to provide data in a format that is not already prepared (much like the flexibility we have seen provided under Action 13 with respect to the source of financial data).

7. We welcome the acknowledgement in the request for input that, through the collection of data, there is a “need to maintain the confidentiality of taxpayers and minimise administrative and compliance costs upon taxpayers and tax administrations”. A full impact assessment taking into account the cost and burden for taxpayers and tax administrations should be undertaken before any proposals are finalised. Any economic costs should be more than outweighed by the benefit. We note in this regard that several organisations have developed estimates of the cost of compliance with the OECD’s latest CbCR proposals (through the time and systems changes that will be required). Those estimated costs are very significant, and are a substantial concern to the business community. We also note that the economic cost will not only be limited to the cost of complying with reporting requirements, but also the increased cost to tax administrations and taxpayers of additional cross-border disputes and litigation.

8. We believe that Action 11 provides an excellent opportunity to reach international agreement on how existing micro and macro data is gathered and used. This should include an exploration of existing sources of information (including publically available commercial databases) and the best automated tools that can be used to accurately mine and assess that data. Developing an inventory of what governments already collect may also be useful in developing best practices of how data can be used. We also believe that it should be made clear to taxpayers how governments will use micro and macro level data to ensure accountability.

**Developing a consistent framework**

9. In relation to some of the more specific items mentioned in the request, the difficulty of achieving an internationally consistent (and workable) approach would be significant. For example, section B.3. of the request for input identifies Effective Tax Rates (“ETRs”) as a possible useful indicator and asks for proposals on which specific ETRs should be used. We note in this respect that expanded ETR data collection would impose a substantial additional burden for business as concepts will vary across countries, companies and industries. It would be a significant challenge for the OECD to develop a consistent and meaningful ETR definition that would contribute to understanding whether BEPS Actions are effective. Many companies already publish ETR calculations, and in a number of cases, provide forward guidance on how they believe their ETR may change over time. To the extent that ETR data is used, it should be gathered from information that is already calculated and published.

10. In order to effectively compare specific data items, it would be necessary to develop consistent and useful international definitions of the data required. Such definitions would have to take into account the various different ways that MNEs gather and report what might be considered to be the same or similar types of data. Imposing a stringent definition for reporting items might well disadvantage large sectors of the economy if substantial investment is required in terms of systems or information reporting processes to comply.

**Action 11, beyond the BEPS project**

11. As noted above, various Actions under the BEPS project will result in taxpayers gathering and providing many new types of additional data to tax authorities. Rather than being a discreet project aimed at delivering a data solution within the time parameters of the BEPS project, we believe that work on Action 11 should continue beyond the current BEPS project time-frame to monitor the

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\(^3\) EU Accounting Directive: Chapter 10: Extractive industries reporting - Government
impact of the data collected through the other Actions, develop new tools (where necessary and relevant) over time, and promote the international adoption of best practices for the gathering and use micro and macro level data. This should contribute to the development of more sophisticated, accurate and consistent approaches to data collection and use across governments.

12. Part of this ongoing role should include assisting member governments to assess the impact of OECD BEPS proposals that will be implemented through local laws. We believe that guidelines should be developed to assist countries in determining whether the proposals (and new laws) have been successful in tackling BEPS concerns, but that methodologies should also be developed to understand the broader impact on trade, investment, and double taxation.

13. We strongly believe that the promotion of cross-border trade and investment and the mitigation of double taxation should remain central to the OECD’s work.

Please do not hesitate to contact us if you have any questions.

Sincerely,

Will Morris
Chair, BIAC Tax Committee
CBI RESPONSE TO THE OECD REQUEST FOR INPUT ON BEPS ACTION 11: ESTABLISH METHODOLOGIES TO COLLECT AND ANALYSE DATA ON BEPS AND THE ACTIONS TO ADDRESS IT

1. The CBI is pleased to comment on the OECD’s request for input on Action 11: Establish methodologies to collect and analyse data on BEPS and the actions to address it, published on 4 August 2014.

2. As the UK’s leading business organisation, the CBI speaks for some 190,000 businesses that together employ around a third of the private sector workforce, covering the full spectrum of business interests both by sector and by size.

Our comments

Overview

3. The CBI recognises the political pressure that the OECD is under and the incredibly tight time-frame of the BEPS project.

4. As a result of BEPS Actions 12 and 13 and a number of other global initiatives on improving tax transparency, business is already facing a considerably increased compliance burden associated with providing significant additional amounts of data to tax authorities. The type of data that will be produced, especially under Action 13, as a high level tax risk assessment tool, should be capable of being used to construct the appropriate economic analysis required to monitor BEPS.

5. The CBI is concerned about the timing and approach taken to collect the data requested in the paper. We believe that work to collect data on the extent of BEPS activities and their impact would have been beneficial if undertaken at the start of the project to ensure recommendations on each Action are targeted in a proportionate way at the main causes of BEPS.

6. We also believe that economists, academics and government bodies as they may be better placed than the business community to provide the detailed input needed at this stage.

7. We stand ready to work constructively with the OECD to ensure that future work in this area is well targeted and does not result in overly-burdensome requirements that could damage trade and investment. We look forward to providing our input through the public consultation process when proposals under Action 11 have been developed further.

New v Existing Data

8. We do welcome the acknowledgement that there is a “need to maintain the confidentiality of taxpayers and minimise administrative and compliance costs upon taxpayers and tax administrations”. A full impact assessment taking into account the cost and burden for taxpayers and tax administrations...
should be undertaken before any proposals are finalised. Any economic costs should be more than outweighed by the benefit.

9. We do not believe that any new or additional information other than what is required under other BEPS Action plans should be required. Under the OECD BEPS Action 13, taxpayers will be required to produce and provide to tax authorities considerable amounts of additional information through the country-by-country reporting template and the transfer pricing documentation. Under Action 12, additional disclosure will be required in respect of other transactions.

10. In addition, there are a significant number of other tax reporting regimes that are increasing the burden on business. For example, the Capital Requirements Directive IV and the Extractive Industries Transparency Initiative have led to a number of Financial Services and Extractive groups publishing public data. Further reporting to tax authorities on income has also increased under FATCA and the forthcoming Common Reporting Standard (CRS). In the UK, tax computations and accounts are submitted in iXBRL format which should enable the UK Government to easily obtain and analyse relevant information.

11. Overall, there should be sufficient information provided by taxpayers under the other BEPS Actions and other tax reporting frameworks to enable a detailed economic analysis to be conducted.

Developing a Consistent Framework

12. The CBI recognises that achieving an internationally consistent (and workable) approach will be a substantial challenge. For example, section B.3. identifies Effective Tax Rates (ETRs) as a possible useful indicator and asks for proposals on which specific ETRs should be used. Companies in different countries report profits, taxable profit and taxes paid in a variety of different ways as required under local and international accounting and tax law.

13. Developing a consistent and meaningful ETR definition that would contribute to understanding whether BEPS Actions are effective will be difficult. Many companies already publish ETR calculations, and in a number of cases, provide forward guidance on how they believe their ETR may change over time. To the extent that ETR data is used, it should be gathered from information that is already calculated and published.

14. We are concerned that any expanded ETR data collection would impose a substantial additional burden on business as concepts will vary across countries, companies and industries.

Action 11 Timeframe

15. It would have been preferable that the extent of BEPS and the ways in which the effectiveness of counter-measures would be measured had been established at the start of the project. This would have ensured recommendations on each Action are targeted in a proportionate way at the main causes of BEPS. We still do not know whether the proposals issued on the 16th September achieves this, and therefore this creates additional uncertainty over whether the proposals will need to change again in future or create an increased compliance burden for business if additional information will be required at a later point in time.

16. We believe that work on Action 11 should continue beyond the current BEPS project time-frame to monitor the impact of the data collected through the other Actions, to develop new tools (where necessary and relevant) over time, and to promote the international adoption of best practices for the gathering and use micro and macro level data. This should contribute to the development of more sophisticated, accurate and consistent approaches to data collection and use across governments.

17. Part of this ongoing role should include assisting member governments with guidelines that should be developed to help countries in determining whether the proposals (and new laws) have been successful; not only in tackling BEPS concerns, but also in understand the broader impact on trade, investment, and double taxation.
Dear Mr. Saint-Amans,

The Confederation of Netherlands Industry and Employers VNO-NCW thanks you for the opportunity to provide comments on the OECD request for input on BEPS Action point 11: Establish methodologies to collect and analyse data on BEPS and the actions to address it that was published on 4 August 2014.

From the very start of the BEPS project we have expressed concerns that each of the Action points could result in measures that have fundamental impact on international tax policy while there is no reliable data available on the magnitude of BEPS, nor any agreed upon methodology to gather and analyse data. We are therefore pleased that OECD is moving forward on this Action. Proper understanding of the BEPS issues and insight in its scope and dimensions are vital to designing effective and proportionate measures against BEPS.

Also, we feel that for effective and targeted measures there needs to be a better understanding of what the expected outcome of the existing international tax principles is and what should be seen as a disconnect between value creation and taxation. The work on Action 11 therefore needs to include a comprehensive analysis of where and how value is created in today’s globalised economy with value chains that often are split over different jurisdictions.

Looking at the content of the request for input on Action 11 we are somewhat disappointed that the document does not elaborate more on already existing material
and methodologies. Recital 8. states that the aim of Action 11 is to produce an overview of different studies and methodologies that will give a range of the scale of BEPS and its economic impact, as well as to develop a range of indicators of BEPS. However, instead of building on the analysis of available existing data that the OECD already did for Chapter 2 and Annex B of Addressing Base Erosion and Profit Shifting (OECD, 2013), recitals A.1. and A.2. just request to provide suggestions for indicators and data.

This is unexpected, because OECD was very critical regarding the existing available studies in the 2013 document. In fact, OECD concluded that:

(i) these studies cannot be regarded as providing more than circumstantial evidence of the existence of BEPS,
(ii) these studies cannot give an indication whether low ETRs are the result of aggressive tax planning or deliberate tax incentives,
(iii) the analysis in some cases was more driven by availability of data than objective and reliable methodology and that the data might simply not be sufficient to indicate the level of BEPS, and
(iv) the methodology chosen and the data used seem to be driven more by the intention to support a given conclusion than to achieve a conclusion on the basis of the analysis.

Vis-à-vis recital B.3. we would question the usefulness of (both national and global) ETRs for measuring the scale and/or economic impact of BEPS in general.

This is in part because there are many different types of ETRs, but certainly also because a low ETR could entirely be determined by the national tax system and its incentives and disincentives. Therefore, one has to be very cautious that by looking at the ETR the outcome of deliberate tax policy is not misconstrued as an undesirable effect of tax planning or avoidance.

An example of such a misinterpretation is the study conducted by the National Audit Office on how tax reliefs are developed, implemented and administered in the UK. The aim of the study was to ascertain the effectiveness of the tax expenditures in realising their respective policy goals. However, the outcome of the study triggered an article on 28 March 2014 in the Financial Times reporting that 20% of big businesses in the UK did not pay corporate income tax due to tax planning and tax avoidance.

Furthermore, in practice the outcomes of studies on global ETRs have been very different even though these studies focussed on similar groups of companies. For instance, the PwC study on effective tax rates shows that the ETRs of US based

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3 http://www.ft.com/cms/s/0/46aa42bc-b5d4-11e3-b40c-00144ffebd0.html#axzz3Bh7prqmH
multinational are significantly higher than the ETRs of multinationals that are headquartered in other OECD countries. At the same time, Gravelle\textsuperscript{5} shows by comparing a number of studies that the global ETRs for US based multinationals are comparable to those of multinationals based in other countries. And finally, the 2014 Citizens for Tax Justice (CTJ) report\textsuperscript{6} states that US based multinationals have in fact lower ETRs than multinationals based elsewhere.

Moreover, all three studies share that they do not make a distinction between intended effects on ETRs of deliberate tax incentives and unintended effects of possible tax planning or tax avoidance.

With reference to recital D.1. we feel the OECD should be disinclined to gather new types of data, especially if this means that taxpayers will be faced with extra reporting and compliance costs. In addition, new types of non-longitudinal data are not very likely to yield more reliable results than the data that is already available. We therefore feel that – although the available existing data is very divergent – it should be possible to realise the aim of Action 11 by further examining the existing studies and data.

In any case, more work is needed on the existing data first before coming to a conclusion that new types of data are required. Moreover, further work should also give clearer insight as to what sort of specific data is lacking to come to reliable indicators of the scale and economic impact of BEPS.

If ultimately the decision should be that new data are to be collected, it will be important to also measure any unintended effects from the BEPS actions, such as increases in double taxation, increases in Mutual Agreement Procedures and any negative impact on Foreign Direct Investments, international trade, job creation and economic growth.

Lastly, we are supportive of the notion that Action point 11 should result in forming a baseline to be able to monitor and gage the effectiveness and economic impact of the actions taken to address BEPS on an on-going basis.

In conclusion, we would suggest that members of Working Party No. 2 and the Action 11 Focus Group form a taskforce with a limited number of representatives from the business and academic community. This taskforce could then be requested to jointly determine – within the BEPS timeframe – what could be reliable indicators of the scale and economic impact of BEPS on the basis of available existing studies and data and if, or to which extent, it would be necessary to develop a range of alternative indicators to get a clear and objective understanding of the magnitude and economic impact of BEPS.


This ensures both efficient and effective allocation of time and resources of all parties involved, as well as the possibility to collectively build on the work already done by OECD.

We hope you will take our comments into consideration in further developing this Action point. Of course, we are available to elaborate on these comments should this be helpful and we look forward to further discussion on this important issue.

Yours sincerely,

Jeroen Lammers
Manager Fiscal Affairs
Via Email: CTP.TPS@oecd.org

**BDI comments on the OECDs request for input on BEPS Action Item 11**

Dear Sir or Madam,

BDI* refers to the OECD request for input “Establish methodologies to collect and analyze data on BEPS and the actions to address it”, issued on 4 August 2014 and likes to thank you for the possibility to provide our comments.

We welcome the approach to find a common understanding on the definition and distinctive description of BEPS and its actual scale. However, we are sceptical towards the feasibility of drawing generally accepted conclusions from collected data especially on a macro-economic level as to whether e.g. an investment constitutes a BEPS measure or not. As the request is of a rather technical nature we believe that researchers and governmental bodies may be best placed to provide the detailed input required at this stage. We have nevertheless identified the following comments that we would like to share. They are of a more general dimension but from a business point of view they are absolutely essential aspects that need to be borne in mind while discussing the technical details of BEPS Action Item 11.

**Limited scale of BEPS from a German perspective**

To start with, from a German point of view it needs to be emphasized that the legislative tax framework in Germany is already one of the strictest in the world: Interest deduction is limited and the respective rules have an exacerbating effect in an economic crises. German CFC legislation

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* BDI (Federation of German Industries) is the umbrella organization of German industry and industry-related service providers. It speaks on behalf of 37 sector associations and represents over 100,000 large, medium-sized and small enterprises with more than eight million employees. A third of German gross domestic product (GDP) is generated by German industry and industry-related service.
stipulates – with 25% – an extremely high „low tax threshold“. The highly complex rules concerning redeployment of functions prevent cross-border relocations of intangibles and, in this form, cannot be found in any other jurisdiction. And lastly, there already is an intricate set of anti-abuse clauses, activity clauses, subject-to-tax clauses and switch-over clauses. In effect this means that the risks of base erosion and profit shifting are almost completely precluded under German law and German tax treaties.

No additional data requirement

Section D of the request for input asks for “new types of data” as well as “additional tools” that could be used for monitoring the effectiveness of BEPS counter measures. From a business perspective we would like to point out that the amount of data already being collected by the tax authorities is large and there is surely potential to use the existing data in a more structured and efficient way. Also, with a view to the BEPS process (e.g. Action Item 12 and 13) and other sources (such as FATCA, CRD IV), a substantial amount of new and additional reporting will be required from taxpayers. The usefulness of this data still needs to be established and it needs to be made sure that the right conclusions are drawn from it. Above all, it must be guaranteed that conclusions will not be drawn automatically. Against this background we strongly recommend to refrain from adding to the substantial administrative burden already borne by businesses by introducing additional data requirements for taxpayers.

We welcome the acknowledgement in the request for input that there is a need to maintain taxpayer’s confidentiality and to minimize administrative and compliance costs. We nevertheless fear that this objective will turn out to be an enormous challenge. In order to gain a more precise conception of the potential consequences and of the cost-benefit ratio for taxpayers and tax administrations we would recommend a full impact assessment before any proposals are finalized.

Focussing also on the dimension of double taxation

Besides collecting and assessing data on the impact of BEPS measures and counter-measures, the focus of the ongoing work must continue to also be put on finding effective ways of diminishing the scale of existing double taxation. We believe that the promotion of cross-border trade and investment and the mitigation of double taxation should remain central to the OECD’s work.

Please do not hesitate to contact us if you have any questions.

Sincerely,

Roland Franke

Dr. Karoline Kampermann
VIA E-MAIL

Mr. David Bradbury  
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Centre for Tax Policy and Administration 
Organisation for Economic Co-operation and Development 
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France 
CTP.TPS@oecd.org

Re: Response to Request for Input on BEPS Action 11

Dear Mr. Bradbury:

This letter is submitted on behalf of the International Alliance for Principled Taxation (IAPT or Alliance) in response to the OECD’s August 4, 2014 request for input on BEPS Action 11 regarding the establishment of methodologies to collect and analyse data on BEPS and the actions to address it.

The IAPT is a group of about two dozen major multinational corporations based throughout the world, and representing a broad range of business sectors.1 The group’s purpose is to promote the development and application of international tax rules and policies based on principles designed to prevent double

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1 Member companies are engaged in businesses as diverse as consumer products, media, mining, telecommunications, oilfield services, transportation, computer technology, energy, pharmaceuticals, manufacturing, entertainment, software, beverages, IT systems, publishing, electronics, and financial services.
taxation and to provide predictable treatment to businesses operating internationally. The Alliance appreciates the opportunity to be able to provide input to the OECD on this Action Item. Our comments are set forth in the Annex to this letter.

We look forward to the opportunity to provide further input as the work of Working Party 2 on Action 11 continues.

Sincerely yours on behalf of the Alliance,

Mary C. Bennett
Baker & McKenzie LLP
Counsel to the Alliance
IAPT Comments in Response to August 4, 2014 Request for Input on BEPS
Action 11

1. Introduction

1. As a group of corporate tax executives, the IAPT members may not be ideally placed to offer technical input on a number of issues identified in your request, which are more appropriately addressed by economic analysts or government statisticians. Nevertheless, we did want to share some observations of a more general nature with the OECD at this stage.

2. Measuring the Scale and Economic Impact of BEPS and BEPS Counter-Measures

2.1 Defining the Objective

2. It is not clear from the Action Plan or request for input what the nature of the economic impact is that the OECD is interested in measuring in relation to BEPS behaviors or BEPS counter-measures. For example, is the focus on tax revenues only, or on broader economic impacts on the national (or wider) economy? When it comes to measuring the economic impact of actual or proposed BEPS counter-measures, we would suggest that not only tax revenues but also elements such as double taxation, volumes of international disputes, administrative burdens, and impacts on cross-border trade and investment (including reduced economic activity in developing countries) should be taken into account.

3. An underlying assumption of Action 11 seems to be that BEPS behavior, even if assumed occurring in material amounts, is adversely affecting important measures of economic welfare, e.g., economic growth, employment, foreign direct investment, etc. Action 11, however, does not articulate the specific economic objectives that should be promoted or how the prevention of BEPS behavior would help achieve the unarticulated objectives. Without articulation of the important economic objectives, and at least a theory of how prevention of BEPS will help achieve the goals, there can be no objective basis for assessing whether the OECD’s BEPS efforts will have succeeded.

4. A long-held principle in international taxation has been that tax policies should be tax neutral with respect to the free flow of capital. Action 11 does not mention this important and long-held economic view or whether tax policy changes specifically to prevent BEPS behaviors might also have an unintended consequence of interfering with the free flow of capital.

5. Another long-held principle in international taxation has been that related parties should aim to transact business like unrelated parties, and that the arm’s length principle is the best measure to ensure this occurs. As the OECD’s Transfer Pricing Guidelines recognize, an objective of the arm’s length principle is to achieve tax parity between associated and independent enterprises and thus to avoid distorting their relative competitive positions and impeding growth in international trade and investment. Action 11 should consider the economic impact of any deviations from the arm’s length principle that might result from the BEPS project.
6. There needs to be some consensus around the definition of BEPS and what objective indicia might be relevant to demonstrate its existence. For example, if the objective is to determine whether income is aligned with the location of value-adding activities, there needs to be a consensus around what those are and where they are located. The OECD needs to consider, for example, whether data such as those to be generated under the country-by-country (CbC) reporting template will reliably show where value-adding activity takes place.

2.2 Challenges in Achieving the Objective

7. Nearly all of the profit shifting studies available discuss a fundamental problem that must be addressed before proceeding with the study, namely which measure of the tax rate should be used. Various experts have argued for or against the various measures to be used in an analysis of possible profit-shifting: (i) statutory tax rate, (ii) ETR, (iii) whether ETR should include federal-level income taxes only or also other indirect and state level taxes, (iv) marginal tax rates, or (v) projected future tax rates. There is no common consensus as to the best tax measure to use. The first step in Action 11 should be to discuss and reach a common understanding as to the appropriate tax rate to use in assessing whether BEPS is occurring, how large the problem might be, and how changes in particular tax policies might impact the preferred measure of tax rate.

8. The most extensive literature available analyzes profit shifting by U.S. multinationals. The studies rely on both aggregate level data, as well as disaggregated tax return data of U.S. taxpayers. Notwithstanding the wealth of information available in the United States, and the large number of studies that have analyzed the data, no clear answers have emerged as to whether U.S. multinationals have engaged in profit shifting in response to low taxation opportunities. This raises the question of why the OECD should assume that the proposed data collection and analysis will bring any more clarity to the issue.

9. Action Item 11 proposes to analyze profit-shifting by creating a baseline of corporate activity unaffected by BEPS behavior. There are many conceptual problems related to such an approach, including: (i) the BEPS initiative presumes that BEPS behavior is occurring, particularly by multinational companies located in the United States and Europe; (ii) many countries have already taken (or are proposing to take) steps to prevent or mitigate alleged BEPS behaviors. These circumstances will make it very difficult if not impossible to identify a meaningful set of corporate behaviors unaffected by BEPS behaviors or counter-measures and to create a baseline for the most important set of multinationals that the OECD believes may be behind the BEPS behaviors.

10. Many important countries have adopted tax policies that are intended to attract investment into the jurisdiction. Countries are therefore seeking to induce redeployment of capital into specific jurisdictions. This raises the question of how Action 11 will distinguish between what it considers to be improper BEPS behavior and asset redeployments that are induced by the tax policies of specific local jurisdictions.
11. National measurements of the revenue impact of tax measures tend to be based on complicated models which vary country-to-country, and it is difficult to see how the OECD could easily “internationalize” that exercise.

3. Administrative Burden and Confidentiality

12. We note that the request asks for “recommendations for new types of data, including types of data that taxpayers should provide to tax administrators, to be collected as part of future indicators for monitoring the effectiveness of BEPS counter-measures and to improve economic analysis of BEPS”.

13. We would suggest that the OECD first study data collection practices already in effect in participating countries and analyze the comparative experience with those practices and their usefulness in measuring the impact of BEPS behaviors and counter-measures. In particular, countries should examine whether they are fully analyzing the potentially useful data points that may already be available to them through existing data sources.

14. We would also note that the BEPS Action Plan itself calls for substantial new data reporting obligations on taxpayers, including the extensive transfer pricing documentation and CbC reporting requirements called for under Action 13 and the mandatory disclosure of aggressive or abusive transactions, arrangements, or structures called for under Action 12. Tax administrations will also be receiving new data in the form of spontaneous exchanges of tax rulings on preferential regimes under Action 5. We would suggest that the OECD first analyze the usefulness of these data sources in measuring the scope and impact of BEPS and BEPS counter-measures before seriously considering the introduction of any additional data requirements on taxpayers.

15. We are pleased to see the reference to the need to respect taxpayer confidentiality in Section D.1 of the request for input. As in the case of the discussions relating to the CbC report and transfer pricing documentation under Action 13, this continues to be a key concern for business.

16. Finally, no additional reporting obligations on taxpayers should be recommended without a full consultation with the business community. As the experience of the development of the CbC reporting template amply demonstrated, input from the business community is critical to ensuring that reporting requirements are designed in such a way as to minimize administrative burden and cost on business while providing well-targeted data.
Irish Tax Institute

BEPS Action 11 –

Establishing methodologies to collect and analyse data on BEPS and actions to address it

September 2014
About the Irish Tax Institute

The Irish Tax Institute is the leading representative and educational body for Ireland’s AITI Chartered Tax Advisers (CTA) and is the only professional body exclusively dedicated to tax. Our members provide tax expertise to thousands of businesses and individuals in Ireland and internationally. In addition many hold senior roles within professional service firms, global companies, Government, Revenue and state bodies.

The Institute is the leading provider of tax qualifications in Ireland, educating the finest minds in tax and business for over thirty years. Our AITI Chartered Tax Adviser (CTA) qualification is the gold standard in tax and the international mark of excellence in tax advice.

A respected body on tax policy and administration, the Institute engages at the most senior levels across Government, business and state organisations. Representing the views and expertise of its members, it plays an important role in the fiscal and tax administrative discussions and decisions in Ireland and in the EU.
The Irish Tax Institute welcomes the opportunity to contribute to the debate on ‘BEPS Action 11 – Establishing methodologies to collect and analyse data on BEPS and actions to address it’

We have focused our response on two issues raised in the Request for Input:

- The calculation of Effective Tax Rates (ETRs) for use in the study of the economic effects of BEPS; and
- Compliance and administration costs.

**Effective Tax Rates**

Effective tax rates (ETRs) are an important measure of the burden imposed by the tax system. Calculating ETRs in the context of companies based on where the company is incorporated, is equivalent to calculating the effective tax rate of an individual based on the country that issued their passport.

For corporate income taxes ETRs at the level of the company are a key metric. These can be determined from financial statements using the tax charge from the income statement or the actual tax payment made on a cash-flow basis. However, when trying to assess the effective tax rate imposed by a particular country’s corporate income tax regime, company-level ETRs are inappropriate, as companies can operate across many jurisdictions. Hence the ETRs that emerge from company-level analyses can be the result of the interplay between several different tax regimes and attributing the resulting ETR to a single country or jurisdiction can be misleading.

This has happened in Ireland’s case where the effective tax rate of some Irish-incorporated subsidiaries of US MNCs has been calculated using company-level data. These US companies are not restricted to operating in Ireland and their effective tax rates are the result of profits that arise in jurisdictions with very differing tax rates. There are many instances in which the calculation of ETRs can give such misleading results.

If the purpose is to determine the effective tax rate imposed by the corporate income tax regime in a particular country, then the analysis must be restricted to profit that is subject to income tax in that regime. This cannot be done with data from the financial statements of companies that operate across multiple jurisdictions.

**National Accounts Framework basis**

The national accounts framework used to estimate aggregates such as Gross Domestic Product and National Income provides measures of income and profits earned within jurisdictional boundaries. For the corporate sector, Gross Operating Surplus is a close proxy for EBITDA (earnings before interest, tax, depreciation and amortisation) and Net Operating Surplus is analogous to EBIT (earnings before interest and tax). Using the corporate income tax received by the tax authority of the same country, it is relatively straightforward to calculate an ETR using these income measures. This will approximate the tax burden imposed by the corporate income tax regime in that country, although there are two caveats. These have offsetting effects.
First, the measures of Operating Surplus in the national accounts framework do not make a full allowance for the interest that companies pay. This will have the effect of increasing the income measure in the denominator and making the ETR appear smaller. Second, the sum of the tax collected may be the result of profits earned abroad. These foreign profits will not be included in Operating Surplus and any tax paid on them has the effect of increasing the tax amount in the numerator and making the ETR appear larger.

**Data collected by tax authorities**

An alternative approach to determining a country-level effective tax rate could be achieved by requiring tax authorities to produce an aggregate tax computation table for their corporate income tax following a uniform format. This would aggregate the data collected by the tax authority. The computation could start with the aggregate of gross trading profits and show the impact that deductions such as capital allowances, trade losses carried forward and other allowable charges as well as additions, such as non-trading income like rental income, foreign-source income and dividends, have on the calculation of taxable income. The computation could then show how the rates of corporate income taxation are applied to that taxable income to give the gross tax due. Finally, it would then show the amount of any tax reliefs or credits that are applied to give the net amount of tax actually due. If this was provided in a standard format from each tax jurisdiction it could be used to highlight the different features of regimes that affect the effective tax rate.

A related question to the effective tax rate concerns the tax base, that is whether Operating Surplus or Taxable Income is artificially eroded or inflated in advance of the steps outlined above to calculate an effective tax rate. By its nature this is difficult to determine but international transfer pricing agreements which can facilitate the shifting of the existing tax base can be assessed by each tax authority. If there are difficulties in this area it can addressed with amendments to the set of transfer pricing rules and regulations. There is also the possibility that the tax base is shifted at the initial phase via the investment decisions made before the stream of profits is existent. The income and taxing rights will flow to the jurisdiction in which the investment is located.

**FDI data**

There has in the past been some discussion that the use of Foreign Direct Investment (FDI) data from Balance of Payments statistics can be used to measure this. This would not be appropriate as the FDI data from this source are not necessarily reflective of new investment. In the Balance of Payments, the retained-earnings of foreign-owned companies are included in the FDI data. In many cases retained earnings do not correspond to new investment in that country and are inappropriate for any analysis that purports to explore base shifting. Ireland, for example, has a large presence of foreign-owned MNCs. In 2012, the retained earnings in Ireland of foreign-owned companies were €22 billion (c.12.5% of GDP). In the Balance of Payments these are counted as FDI inflows but in the majority of cases did not lead any additional investment of capital formation in Ireland and so had no effect on the tax base. If an attempt was made to analysis current base shifting using this approach it would lead to misleading results for countries that have historically been successfully in attracting foreign investment as the FDI figures are affected by the retained earnings of existing enterprises.
Minimising the compliance costs for taxpayers

The Request for Input recognises that in considering what existing or new data may need to be collected to properly analyse the impact of BEPS, it is necessary to take “into account the need to maintain the confidentiality of taxpayers and minimise administrative and compliance costs upon taxpayers and tax administrations”.

This is vital. Significant costs are already incurred by businesses in providing information to tax authorities and this burden will increase substantially as a result of new BEPS initiatives such as Country by Country Reporting. Methodologies adopted to monitor BEPS and the effectiveness of BEPS actions should, as much as possible, make use of the vast range of information which is already provided by taxpayers rather than creating additional layers of compliance and data reporting.
Centre for Tax Policy and Administration
Organisation for Economic Co-Operation and Development
Paris, France

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.

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2 Request, page 4.
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. 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.”

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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. Hasenohrl 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.

Mark C. Silbiger
International President
Dear Sirs

COMMENTS ON REQUEST FOR INPUT ON ACTION 11 (ESTABLISH METHODOLOGIES TO COLLECT AND ANALYSE DATA ON BEPS AND THE ACTIONS TO ADDRESS IT) OF THE BEPS ACTION PLAN

We refer to the above titled document.

We note the wide scope of the work in this area. We wish to comment specifically on a number of the questions raised in the Request for Input.

A. INDICATORS OF THE SCALE AND ECONOMIC IMPACT OF BEPS
You ask for indicators which could be tracked to show trends over time for an individual country or globally.
The difficulty with any such indicators is to filter out factors which alter the trends, but which are not related to BEPS project initiatives. These could include:

- Changes to the Tax Rate in an individual country
- GDP growth or shrinkage – there is some evidence in our country\(^1\) that over time there is an average elasticity in the proportion of 1:1.1 between overall tax revenues and GDP
- Non BEPS project changes to the tax regime in an individual country – this might include new Double Taxation Agreements being concluded, or new incentives such as additional relief for Research and Development. Such developments could mask the consequence of measures within the BEPS project.

A frequently used existing measurement in international comparisons is the ratio of Corporation Tax receipts to GDP for a country\(^2\). This measurement has the merit of using GDP whose measurement is governed by international standards. The use of existing recognised standards would contribute significantly to the acceptance of measured comparisons. Any comparisons for BEPS purposes would have to be adjusted for the factors mentioned above (except for the GDP to tax elasticity ratio).

Any measurements would have to be interpreted in the context of FAQ63 published along with the BEPS deliverables on 16 September 2014 – “The BEPS project is not about increasing corporate taxes… Non- or low-taxation is not itself the concern, but it becomes so when it is achieved through practices that artificially separate taxable income from the activities that generate it.”

### B. ECONOMIC ANALYSIS OF THE SCALE AND IMPACT OF BEPS

#### B.3 EFFECTIVE TAX RATES

At least some of the impetus for the BEPS project as a whole has been generated by disquiet at the apportionment of tax revenues between countries in which multinational organisations operate. It seems to us that some of that disquiet has stemmed from a lack of agreement as to the best method of computing the apportionment of taxes between territories. At the root of this lack of agreement are disputes over effective tax rates. Observations and arguments have been generated on the basis of not like for like comparisons.

On the face of it, the computation of the effective tax rate for a company should be a matter of dividing the company profit by the amount of tax paid for the same period. There is legitimate

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\(^1\) Report of the Tax Forecasting Methodology Review Group 2008, Department of Finance, Dublin, April 2008

discussion as to which amounts should constitute the numerator and the denominator in this formula.

The analysis may also be carried out either at the macroeconomic level, or at the level of the individual companies concerned. Macro studies arrive at effective tax rates from aggregate macroeconomic data. Micro approaches either use actual financial statements of the companies concerned, or extrapolations of hypothetical models.

A recent paper published by the Department of Finance in Ireland\(^3\) examined instances of each of these three different approaches to the computation of effective rates of tax using model companies, official national statistics; and financial reports. The paper concluded that an approach based on national aggregate statistics is the most suitable. Within that approach, it advanced the thesis that measurements based on Net Operating Surplus and Taxable Income best represent the effective Corporation Tax rate in Ireland.

It does not of course follow that these findings necessarily constitute the best approach to effective tax rate measurement in every country. However the approach does ringfence apparent distortions in the effective rate computation which arise because of foreign activity by individual companies. It seems to us that such a ringfencing would be essential in tracking the effect of BEPS project initiatives on individual countries.

Whatever methodology is used, there has to be consistency by way of international agreement on the method. Ideally that methodology should apply existing sources of data, before establishing additional reporting or information collection requirements to avoid duplication of effort or additional burden to taxpayers.

E. OTHER COMMENTS
Measures to counter Base Erosion might be relatively straightforward to measure on a global basis. If anti Base Erosion measures are effective, it would be expected that over time and all else being equal, aggregate corporation tax revenues would increase. One difficulty in this measurement might be the level of corporate losses coming forward as a result of the global recession. The tax effect of these losses would have to be absorbed before Base Erosion results become evident. Effective Base Erosion measures would result in the more rapid absorption of such losses, but we can think of no way in which that more rapid absorption could be quantified consistently across territories.

\(^3\) Technical Paper on Effective Rates of Corporation Tax in Ireland. Department of Finance, Dublin. April 2004
Measures to counter profit shifting by definition involve tax revenue shifting. If a company is in the future precluded from moving taxable profit from Country A to Country B, then the corporation tax revenue in Country B would be expected to decrease.

We conclude that the success or otherwise of BEPS project tax regime changes might well be measured, but only become evident over an extended period of time.

You may wish to note that this response is from a representative body. The Consultative Committee of Accountancy Bodies – Ireland is the representative committee for the main accountancy bodies in Ireland. It comprises Chartered Accountants Ireland, the Association of Chartered Certified Accountants, the Institute of Certified Public Accountants in Ireland, and the Chartered Institute of Management Accountants, which represent a combined membership of some 40,000 accountants. Brian Keegan, Director of Taxation at Chartered Accountants Ireland (brian.keegan@charteredaccountants.ie, +353 1 6377 347) may be contacted if any further details in relation to this letter are required.

Yours faithfully

Paul Dillon, Chairman, CCAB-I Tax Committee
September 16, 2014

VIA EMAIL

Mr. Pascal Saint-Amans
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Re: USCIB response to OECD’s Request for Input on BEPS Action 11

Dear Mr. Saint-Amans,

This letter is the response of the United States Council for International Business\(^1\) (USCIB) to the OECD’s request for input on Item 11 of the Action Plan on Base Erosion and Profit Shifting (BEPS).

The request seeks suggestions for ways to measure the scale of BEPS and the effectiveness of countermeasures, and guidance regarding the data that would be necessary to implement these measures. The request notes that Working Party No. 2 of the Committee on Fiscal Affairs has reviewed the existing literature on BEPS, including the academic papers and government reports summarized in a 2013 OECD report.\(^2\)

In view of the highly technical nature of this request, economic researchers in academia and government are likely to be in the best position to provide the input that is being sought. That said, USCIB has several high-level comments and observations that are set forth below.

Among the main objectives of OECD are to promote growth, employment, and rising standards of living among its members and to facilitate international trade and investment. With respect to tax policy, the OECD historically has pursued these objectives through guidelines and model agreements that seek to mitigate double taxation, resolve intergovernmental disputes, and facilitate enforcement of tax laws.

In developing measures of BEPS under Action 11, the OECD’s fundamental objectives should not be overlooked. Policies that increase taxes paid by multinational enterprises at the expense of double taxation or reduced standards of living may be viewed as effective in reducing BEPS if a blinkered approach is adopted. For example, special measures that allocate intangible income to the place where

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1. USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

significant people functions occur may lead companies to relocate activities to low-tax jurisdictions. This ostensibly would reduce BEPS, but may come at the cost of an inefficient allocation of resources.

USCIB appreciates that the request for input recognizes the importance of preserving the confidentiality of taxpayer data and minimizing administrative burden. Based on responses of 260 multinational enterprises in 20 countries to a March 2013 survey, 76% of respondents expect that new systems will be required to comply with new country-by-country reporting standards, and 70% of these expect system costs in excess of $250,000.\(^3\) Large amounts of financial data already are reported to governments and shareholders; thus, Working Party 2 should survey member countries and inventory private sector databases to determine what data already is available before recommending that taxpayers report additional information. A list of some of the private sector databases containing corporate financial statement information for OECD and other countries is attached to this letter.

Working Party 2 also should take note of the additional information that taxpayers will be required to provide as a result of the new transfer pricing documentation guidelines agreed under BEPS Action 13 and the mandatory disclosure of aggressive tax transactions that will be developed under BEPS Action 12. Further, USCIB believes it would be inappropriate to use BEPS Action 11 to undercut decisions made on Action 13; specifically, Action 11 should not require taxpayers to report data that were deleted from the country-by-country reporting template.

The Statistics of Income Division of the Internal Revenue Service routinely edits tax returns of multinational enterprises and this information is used by the U.S. Treasury Department for policy analysis. Apparently, few other OECD member countries utilize tax returns of multinational enterprises for policy analysis. Before requiring taxpayers to provide additional information to tax authorities, consideration should be given to whether governments have adequate resources to utilize this information productively.

USCIB previously commented on the importance of treating taxpayer information in a confidential manner in the context of transfer pricing documentation.\(^4\) USCIB believes that inter-governmental sharing of taxpayer information should only occur pursuant to exchange of information provisions of tax treaties and other agreements.

BEPS measures will need to be interpreted with appropriate caution for a number of reasons. First, a review of the profit shifting literature by Dhammika Dharmapala shows that BEPS measures based on industry- or country-level data overstate BEPS behavior as compared to measures based on firm-level data.\(^5\) Second, in the case of transfer pricing, absent a detailed functional analysis that accounts for all

\(^3\) See, PwC, “OECD’s Base Erosion and Profit Shifting: Country-by country reporting,” April 2014. Available at: [http://image.edistribution.pwc.com/lib/fe9d13707566057876/m/1/Global+survey+results+-+UK.pdf](http://image.edistribution.pwc.com/lib/fe9d13707566057876/m/1/Global+survey+results+-+UK.pdf)


the facts and circumstances of a transaction, it will be difficult to draw definitive conclusions regarding the extent of BEPS behaviors. Third, measures that indicate the presence of BEPS may reflect the failure of governments to enforce existing rules rather than the need for additional legislation. Fourth, effective tax rate measures based on unconsolidated financial or tax data may show that holding companies have low ex post effective tax rates if the foreign taxes paid with respect to inter-corporate dividends are not taken into account. Fifth, exclusion of companies with losses and differences in the timing of recognition of book and taxable income may artificially cause ex post effective tax rates based on the current tax provision or cash tax payments to appear low. Sixth, differences in countries’ financial accounting rules may make it difficult to compare effective tax rate measures.

The request for input parenthetically defines BEPS behaviors as: “… cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it.” Thus, to measure the scale of BEPS, one must posit the activities that generate value and their relative contributions and determine whether discrepancies between the reporting of taxable income and the activities that generate this income are “artificial.” These issues are at the heart of BEPS Action 4 (relating to the deduction of related party financial payments) and Actions 8-10 (relating to the application of transfer pricing rules to intangibles, risks and capital, and other high-risk transactions). The deadlines for the reports on Actions 8-10 extend to September 2015 (and to December 2015 for Action 4). Measures of BEPS logically should build upon the reports on Actions 4, 8, 9 and 10 scheduled to be issued next year, and the timetable for Action 11 should be extended accordingly.

We appreciate the opportunity to comment on the development of methodologies to measure BEPS behaviors. We look forward to providing more detailed comments after Working Party 2 develops its initial proposals.

Sincerely,

William J. Sample  
Chair, Taxation Committee  
United States Council for International Business (USCIB)

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APPENDIX

Selected Databases Containing Corporate Financial Information for OECD and Other Countries

1. Oriana (Bureau van Dijk)

Coverage: Oriana covers approaching 10 million companies in 40 countries: Australia, Bahrain, Bangladesh, China, Fiji, Hong Kong, India, Indonesia, Iran, Iraq, Israel, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Malaysia, Marshall Islands, Nepal, New Zealand, Oman, Pakistan, Palestinian Territory, Papua New Guinea, Philippines, Qatar, Russian Federation, Saudi Arabia, Singapore, South Korea, Sri Lanka, Syria, Taiwan, Thailand, Turkey, United Arab Emirates, Vanuatu, Vietnam and Yemen.

Features: Standardized company financials searchable by various criteria including:
- Company name
- BvD identification number
- Status (active, dissolved, etc.)
- legal form (public, private, other)
- Date of incorporation
- Location
- Industry code (primary and or secondary SIC, NAJC and NACE industry codes)
- Directors
- Advisors & auditors
- Ownership (including BvD independence indicator)
- Financials (key financials, balance sheet, profit & losses accounts)
- Number of employees
- Ratios (return on capital employed, return on total assets, liquidity ratio, etc.)
- Accounts types (consolidated versus unconsolidated financials)
- Stock data
- Customized data

2. Orbis (Bureau van Dijk)

Coverage: Orbis covers over 85 million companies around the world, including: Europe 46 million companies; North America 23 million companies; South and Central America 7 million companies; Far East and Central Asia 8 million companies.

Features: Standardized company financials searchable by various criteria including most of the features available in Amadeus and Oriana.

3. Osiris (Bureau van Dijk)
Coverage: The database aims to include all publicly listed companies worldwide. Osiris also includes de-listed companies and major unlisted companies if they’re significant within their sector. Osiris covers around 70,000 companies across the globe.

Features: Standardized company financials searchable by various criteria including most of the features available in Amadeus and Oriana.

4. Amadeus (Bureau van Dijk)

Coverage: Amadeus contains information for the following countries: Albania, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Rep. of Macedonia, Malta, Rep. of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom.

Features: Standardized company financials searchable by various criteria including:
- Company name
- BvD identification number
- Status (active, dissolved, etc.)
- Legal form (public, private, other)
- Date of incorporation
- Location
- Industry code (primary and or secondary SIC, NAIC and NACE industry codes)
- Directors
- Advisors & auditors
- Ownership (including BvD independence indicator)
- Financials (key financials, balance sheet, profit & losses accounts)
- Number of employees
- Ratios (return on capital employed, return on total assets, liquidity ratio, etc.)
- Accounts types (consolidated versus unconsolidated financials)
- Stock data
- Customized data

5. OneSource (Thompson Reuters):

Coverage: The Reuters Fundamentals database comprises of more than 70,000 companies from over 110 countries. All data is sourced directly from public filings such as annual reports and 10-Ks. This expanded financials database features over 100 line items and data points per company, and lists the original data source. Additionally, users have access to streams of data that are updated daily and display information such as the company's most recent financials, as well as detailed business activities and segmented financial data.

Features: Standardized company financials searchable by various criteria including:
• Lines of business (primary SIC and NAIC industry codes)
• Location
• Summary of financials and other items (sales, sales growth, assets, employment, ownership, auditor)
• Income statement (sales, cost of goods sold, depreciation and amortization, interest expenses, etc.)
• Balance sheet (assets, liabilities, and shareholder's equity accounts)
• Statement of cash flows
• Liquidity ratios (current ratio, quick ratio and working capital)
• Operating ratios (asset turnover, inventory turnover, receivables turnover)
• Profitability ratios (gross margin, operating margin, return on equity, return on assets, sales over number of employees, etc.)
• Leverage ratios (interest coverage, total debt over equity, tax rate, etc.)
• Valuation ratios (price over sales, price over book value, free cash flow over shares, etc.)
• Stock information
• Banking company data (interest income, interest expense, loans, loan loss reserves, etc.)
• Insurance company data (premiums earned, net investment income, etc.)
• Utilities company data (fuel expense, direct operating expenses, utility plant, etc.)
• Select individual companies (search by name or ticket number)

6. **Mergent**

**Coverage:** Non-U.S. Fundamental Company Database- more than 35,000 publicly traded non-U.S. companies in nearly 100 countries. Coverage includes companies featured in prominent global indexes such as Morgan Stanley Capital, Dow Jones Global, Wall Street Global, Financial Times, Standard & Poor's Global, Eurotop 300 and many more.

**Features:** Standardized company financials searchable by various criteria including:
• Company name
• Industry code (primary and I or secondary SIC and NAIC industry codes)
• Income statement (sales, cost of goods sold, operating income, etc.)
• Balance sheet (asset and liability accounts)

7. **Alibaba.com**

**Coverage:** Worldwide

**Features:** Brief business description and link to company webpage, if available. However, public companies cannot be filtered so each potential comparable’s webpage needs to be visited to determine if public financial data is available. Searchable by various criteria including:
• Keyword
• Country
• Product
• Industrial category (suppliers or buying leads)
• Company type (e.g., manufacturer vs. wholesaler/distributor)
  Note: This is a free database.

8. **SPARK**

**Coverage:** Russia, Ukraine, Kazakhstan

**Features:** Standardized company financials searchable by various criteria including:
- Company name
- Search possibilities for consumers of commodities or services
- By ownership

9. **DataGuru.in at http://www.dataguru.in**

**Coverage:** India

**Features:** Standardized company financials searchable by various criteria including:
- Company name
- Size of company as determined by number of employees
- Size of company as determined by revenue numbers
- Industry
- Company type (branch, private subsidiary, state owned, public independent, etc.)

10. **Microdatabase Direct Investment (MiDi) (Deutsche Bundesbank)**

**Coverage:** Germany

**Features:** Direct investment stocks of foreign affiliates of German companies and German affiliates of non-German companies.

11. **Ruslana (BvD)**

**Coverage:** Russia, Kazakhstan, Ukraine

**Features:** Standardized financials including:
- National GAAP or IFRS
- 63 profit and loss items
- 74 balance sheet items
- 10 cash flow items
- 28 financial and profitability ratios
- Financial information up to 10 years
- Company name, previous company names, registered numbers
- Registered office address and contact information
- Current and annual stock data and valuations
- Trade description, NAICS and NACE codes, national identification codes, standard peer group
- Names of bankers, advisors, auditors, previous auditors
- Audit details
- Number of employees
- Company type, date of incorporation, filing changes, accounting reference date company status, data on insolvent companies
KPMG’s Global Transfer Pricing Services member firm professionals (KPMG) are pleased to provide comments to the Organisation for Economic Co-operation and Development’s (OECD) request for comments in: “BEPS ACTION 11: Establish methodologies to collect and analyse data on BEPS and the actions to address it.” In preparing its comments, KPMG has primarily focused on some of the basic conceptual issues that should be considered in measuring the impact of the BEPS initiative.

In this regard, KPMG’s comments are focused on the following key areas:

1) The need to isolate the impact of harmful tax practices from legitimate tax competition;
2) Objectives, and the need to include measures of the effectiveness of Action 14 (Dispute Resolution); and
3) The need to avoid imposing additional burdens on taxpayers with respect to the provision of data.

**Isolating the Impact of Harmful Tax Practices From Other Factors**

Whatever quantitative measures are used to measure the impact of BEPS, and of the action plans, have to distinguish between the effects of legitimate tax competition – which is not a target of BEPS – and harmful tax practices. This is particularly true in the context of relying upon measures, such as ETR, which are as sensitive to legitimate tax competition as to harmful tax practices. This also ties into the need to evaluate the effectiveness of dispute resolution, as increases in ETR that reflect double taxation should be viewed as a negative outcome of actions taken to address BEPS.

In formulating the BEPS action plan, the OECD has made it clear that it is not trying to harmonize tax rates or discourage legitimate tax competition; instead it intends to prevent the erosion of local tax base as a result of harmful tax practices or of MNEs avoiding income taxes due to mismatches in local laws. Therefore, there is nothing in the BEPS action plan that prevents an MNE from legitimately putting resources in countries with lower tax rates, and earning an appropriate return on those resources.
The guidance that is emerging on intercompany lending is an example of this. The current guidance clearly recognizes that CFC A in country A can lend money to CFC B in Country B, and charge an arm’s length interest on that loan. Such an intercompany transaction clearly has the effect of shifting taxable profits from Country B (which generally allows a deduction for interest on intercompany loans, although often subject to some restriction under thin capitalization rules) to Country A, where interest income is generally taxable. If Country A has a tax rate of 20% and Country B has a tax rate of 30%, this will lead to a reduction in the overall taxes paid by the MNE. However, there is nothing in this transaction that is inconsistent with international tax rules or which is inherently an abusive tax practice that should be subject to the BEPS action plan, provided that the interest rates and other terms of the loan are arm’s length, and appropriate substance is maintained in Country A.

There is a BEPS issue around intercompany lending if the loan transaction outlined above allows some of the taxable income to escape the corporate tax net entirely. Thus, BEPS does come into play if the rules of Country A and Country B are such that the loan generates a tax deduction in Country B while allowing the interest income in Country A to go untaxed due to an income characterization issue, special ruling, etc. However, measures of the effectiveness of the BEPS action plan that focus largely on average corporate ETR would wrongly treat reduction in tax rates associated with legitimate loans in the same way as reductions in ETR due to harmful tax practices.

There are a number of other circumstances in which the effective tax rate of an MNE is likely to be a relatively poor measure of the effectiveness of the BEPS action plan, in that it is affected by a range of variables that are not related to base shifting. For example, if a company invests 100 in R&D over the course of years 1 and 2, and realizes just 80 in profits over the course of years 3 and 4, the economic activity has been a failure in terms of generating positive profits, and the fact that no income taxes are paid in years 3 and 4 due to the use of loss carryforwards (despite the apparent profits when those years are examined in isolation) should not be viewed as evidence of base erosion. Similarly, the mere fact that the effective tax rate (based for example on taxes divided by EBIT) is lower than the statutory rate should not be viewed as evidence of a harmful tax practice. This could, for example, occur because of other local tax rules – e.g., because the MNE is taking advantage of R&D tax credits.

Similar considerations apply to the creation of “counter-factual” baselines that may be used to assess the impact of BEPS. It would not be appropriate to simply calculate a baseline ETR based on statutory tax rates applied to EBIT profits.

**Objectives and Scope of Action 11:**

The objective of Action 11 is described as: “Develop recommendations regarding indicators of the scale and economic impact of BEPS and ensure that tools are available to monitor and evaluate the effectiveness and economic impact of the actions taken to address BEPS on an ongoing basis”. KPMG believes that this mandate should extend to all of the BEPS actions, and specifically that it should include Action 14, Dispute Resolution. An important result of the BEPS actions should be more consistent and coordinated rules around documentation and dispute resolution, which would make it easier for MNEs to comply with the very complex mix of international rules and thereby facilitate international investment by providing higher certainty.
The existence of inconsistent rules (tax authority A believes that all profits should be taxed where R&D takes place while tax authority B believes that all profits should be taxed where R&D is funded) not only leaves MNEs exposed to a significant risk of double taxation but also forces them to either direct investments or set up structures that are driven to mitigate the adverse impact of local tax rules.

Given the above, the measurement of the effectiveness of the BEPS action plan should include the measurement of:

- The consistency of documentation requirements across different national jurisdictions, especially documentation needed for risk assessment purposes. In this regard, it would be very useful to measure the incremental costs that are incurred by MNEs when individual jurisdictions incorporate idiosyncratic requirements into their local transfer pricing requirements, over and above those recommended by the OECD Guidelines.
- The effectiveness of MAP, CA and APA procedures in leading to the rapid and effective resolution of differences among the tax authorities of different countries as to where profits should be taxed. Therefore, the OECD should seek to measure and publicize information about the effectiveness of international dispute resolution programs, including the amount of double tax relief that is granted, the time that it takes to reach resolution, and perhaps even a measure of the aggregate double tax cost of the unresolved adjustments that are pending in MAP procedures.
- Data on the adoption and implementation of programs designed to facilitate the resolution of international tax disputes (e.g., APAs, domestic programs such as the US CAP program that allow taxpayers and tax authorities to come to agreements on tax issues prior to filing a tax return). Measures of the effectiveness of multilateral dispute resolution (e.g., tri-lateral MAPS) are likely to be especially important.

Measures Should Rely Upon Existing Sources of Data

The new documentation requirements that the OECD is expected to recommend are going to impose substantial new compliance burdens on taxpayers, and KPMG believes that it would not be appropriate to impose additional costs on MNEs by requiring the production of additional data. Therefore, the data used to measure BEPS should be drawn from information that is already provided to tax authorities (including that which will be provided under the new guidance on documentation) or is available in the public domain and not through the imposition of new demands on taxpayers. In this regard, the data that are already provided to tax authorities through local tax forms, public filings, and (going forward) through the new documentation requirement that are expected in the new OECD Guidance should provide an adequate basis for measuring the impact of the BEPS initiatives.

The ultimate responsibility for the collection and evaluation of data on the effectiveness of BEPS should reside with tax authorities themselves. Tax authorities are the only public bodies that have access to information on the specific harmful tax practices targeted by BEPS (e.g., hybrid financing).
Moreover, tax authorities both have access to the requisite data and have a strong incentive to evaluate whether or not the new rules that they have put in effect in response to the OECD’s efforts are effective.

However, the OECD can facilitate this process by incorporating, as part of its guidance, recommendations on how individual tax authorities can measure the effectiveness of their actions against harmful tax practices. Such guidance should be an integral part of the recommendations of each of the OECD action steps. Thus, the recommendations on the steps to prevent double non-taxation due to the use of hybrid entities should include recommendations on how to measure effectiveness.

The OECD should then aggregate and evaluate the effectiveness of the actions across countries. This aggregated evaluation would include an assessment of how many countries adopted the recommendations of the OECD, and the effectiveness of the actions carried out by the countries that adopted the OECD recommendations. The analysis carried out by the OECD should have a mechanism for including taxpayer input (possibly through BIAC or some similar organization).

Finally, the OECD guidance should address likely taxpayer concerns around the confidentiality and appropriate use of data collected to measure BEPS and the effectiveness of actions taken to address it. A number of the suggestions contained in the OECD’s request for comments on Action 11 suggest the sharing of confidential data either among tax authorities or with other groups that may evaluate these data. The sharing of such data should be done in a way that provides absolute protection of confidentiality. In addition, the OECD guidance should emphasize that the approaches used to collect and evaluate regulations put into effect to combat harmful tax practices should only be used for monitoring; not auditing – mixing of the data collection efforts for monitoring and auditing is likely to undermine the monitoring effort -- and should also respect the confidentiality of the tax return data filed by MNEs.

About KPMG

KPMG is a global network of professional firms providing Audit, Tax and Advisory services. We operate in 155 countries and have more than 155,000 people working in member firms around the world. The independent member firms of the KPMG network are affiliated with KPMG International Cooperative (“KPMG International”), a Swiss entity. Each KPMG firm is a legally distinct and separate entity and describes itself as such.
REQUEST FOR INPUT ON ACTION 11 OF THE BEPS ACTION PLAN
Response by NERA Economic Consulting

1. Introduction: what data is Action 11 looking for?

Action 11 focuses on collecting and analyzing data on BEPS. What data are available and/or useful? The aim of BEPS is “to ensure that profits are taxed where the economic activities that generate them are carried out and where value is created.” (RFI, p. 2)

The Action Plan refers to the report Addressing Base Erosion and Profit Shifting (OECD, 2013) (“BEPS report”) which noted that there are several studies and data indicating that there is an increased disconnect between the location where value creating activities and investment take place and the location where profits are reported for tax purposes. The BEPS report further noted that additional work needs to be done

1. to evaluate such studies and data,
2. to develop measures of the scale and effects of BEPS behaviours, and
3. to monitor the impact of measures taken under the Action Plan to address BEPS.

The current Request for Input (“Request”) focuses squarely on the measures and tools for the work objectives 2 and 3. In this context, CFA’s Working Party no. 2 and its Action 11 Focus Group (hereafter “WP2”), author of the Request, have relied on information from the available studies and data regarding the disconnect between locations of respectively value creation and profit reporting. So, it is worthwhile to first take a brief look at the studies and data relating to BEPS behaviours.

2. Evaluation of existing studies and data relating to BEPS behaviours

The existing studies and data concerned can be found in Chapter 2 and Annex B of the BEPS report.

Chapter 1 of the BEPS report opens with the “growing perception that governments lose substantial corporate tax revenue because of planning aimed at shifting profits in ways that erode the taxable base to locations where they are subject to a more favourable tax treatment.” For a substantiation of this perception, it refers to (a) newspaper articles, (b) vocal manifestations by NGOs and (c) statements from an impressive line-up of politicians. Yet, it is not clear that proof is indeed included in Chapter 2.

Chapter 2 first looks at data on corporate income tax revenues and establishes them at a level of around 3% of GDP and 10% of total tax revenues. The data show that both ratios are higher in the period 2007-2010 than they were in 1965 and 1975. Average nominal CIT rates in the meantime have dropped from 32.6% in 2000 to 25.4% in 2011. The
Conclusion of the report is that “these trends … do not necessarily imply either the existence or non-existence of BEPS practices”.

Chapter 2 then turns to data on Foreign Direct Investments (“FDIs”). Interesting information is given on FDI statistics and on the use of SPEs (the so-called special purpose entities) but, again, no tangible conclusion is reached regarding BEPS from macro-level data.

Finally, Chapter 2 deals with a third category of data, coming from studies relating more specifically to BEPS. The report dedicates a separate Annex B to these studies and seemingly finds here the indications that it was looking for.

Annex B describes in the first place 7 studies of effective tax rates (“ETRs”), mainly constituted by corporate income taxes (“CIT”) of (categories of) MNEs, and concludes that it is questionable whether any of the foregoing studies provide conclusive evidence that BEPS behaviours are prevalent.” Nevertheless, a number of interesting, and possibly relevant, conclusions could be drawn from some further evaluation (not done by WP2 so far) of the studies. We mention a few.

- Larger US-based MNEs have ETRs comparable to EU MNEs, in spite of the statutory tax rate being 10% higher in the US than the average rate in the EU;
- IP-rich MNEs show a long-term ETR of around 22%, where the purely domestic players in the US reach levels of over 36%;
- ETRs of US parent companies (22.8% in 2006) are lower than those for US affiliates of non-US enterprises (28.8% in 2006);
- The upper quartile of ETRs of 280 large US MNEs is about 15%-points higher and the lower quartile about 10%-points lower than the average ETR of these large US MNEs;
- ETR of top tech companies in the US declined from 23.6% in 2009 to 16% in 2011; simultaneously, US companies have been accumulating foreign retained earnings to astronomical amounts.

Solid conclusion is that, one way or the other, the US system for taxation of foreign profits in general, and of IP-rich MNEs in particular, seems to invite BEPS behaviour by US MNEs. But also, and most significantly, it can be concluded that the behaviour appears to be very different from one MNE to another. These conclusions suggest that the only relevant focus for studies and data on BEPS so far appears to be data per individual MNE. Macro-data do not appear to deliver information that is useful for effective measures addressing BEPS.

The above conclusions, both on the US system and on the focus for useful BEPS data, are convincingly confirmed by the next 4 studies in Annex B, which are using data from taxpayer returns.
The last category in Annex B contains 9 studies under the heading “other analyses of profit shifting”. Interestingly, and not surprisingly, a report of the US Congressional Research Service concludes in 2010 that there is ample and clear evidence that profits appear in countries inconsistent with an economic motivation.

Similarly, a study conducted by the EU Commission staff in 2006 on the behaviour of European MNEs concludes that: “international profit shifting by an individual MNE depends on its international structure and on the international tax regime it faces in each of the countries in which it operates”. The relevant conclusion for the EU may be that, if it wants to reduce BEPS behaviour, it should align its CIT taxation in the EU.

What all the reports together however deliver as a message, implicitly or explicitly, is a confirmation of earlier conclusion on focus: concentrate on micro-data sources for identification of corporate profit shifting activities.

Summarizing, some of the studies and data mentioned and analyzed in the BEPS report do indeed give what can be qualified as evidence of BEPS behaviour – but only the ones that look at micro-level data (i.e., per MNE). Effective action should be based on this firm conclusion. Efforts to develop information tools using macro-data in isolation seem to be ineffective. The only indication of a more categorical character, if any, could be that the US tax system for US-based MNEs seems to invite more active BEPS behaviour than can be observed in other MNEs.

We wish to emphasize that the reservations expressed here above do not intend to dispute the appropriateness of the BEPS initiative; they just indicate that part of the questions that the current RFI is asking may be misdirected. BEPS as a phenomenon, let alone its size, cannot be derived from aggregate information on flows of payments between nations. The question whether or not there is BEPS and if so, to what extent, can only be judged at the level of individual MNEs. For this reason, the type of information that the current Request is looking for, risks feeding speculative perceptions based on unfounded conclusions.

3. How can “BEPS behaviour” be identified?

The BEPS initiative aims (Request par. 2) “to ensure that profits are taxed where the economic activities that generate them are carried out and where value is created.” That aim, only realistic per individual MNE, links activities carried out in a certain jurisdiction to an appreciation of the fruits of these activities in terms of “value created”. Where the identification of activities carried out is the subject of confirmed approaches to functional analysis, the reference to value creation is relatively new. It has not received an authoritative definition as yet in the context of either the Transfer Pricing Guidelines (Chapter VI in particular) or the BEPS report. As “value creation” is the core notion of the BEPS initiative, it is critically important that it is defined unequivocally. In this
respect, it is our recommendation to revise the Transfer Pricing Guidelines’ Chapter I where it concerns the description of the functional analysis and extend this with authoritative guidance regarding value chain analysis (VCA).¹

Once it is identified how, in a tax payer’s business, value is created, i.e., what the value drivers are and their respective, relative contribution to value creation, responsibility for these contributions can be linked to the functions-assets-and-risk profile of group entities concerned and to the jurisdictions that these entities are operating from.

The insight thus acquired should enable a company to identify its own “base tax rate” (BTR). Differences between BTR and ETR can then be identified, explained and communicated with tax authorities and, if deemed useful and appropriate, shareholders and the public in general.

4. Conclusion

In conclusion, we believe that analyses should prioritize micro-level data. We also believe that value chain analysis should play a bigger role in transfer pricing in general and needs to be reflected somehow in any analysis looking at BEPS evidence. Only with such bottom-up approach, based on micro (MNE) level data, it may be possible to make inferences from macro-level data.

Paris / Chicago
September 19, 2014

Pim Fris
Harlow Higinbotham
Emmanuel Llinares

¹ See also our Comments of September 12, 2012 to the Discussion Draft – Revision of Chapter VI of the OECD Transfer Pricing Guidelines.
19 September 2014

Via email: CTP.BEPS@oecd.org

Dear Sirs,

Request for input: BEPS Action 11

We appreciate this opportunity to provide some initial thoughts following the OECD’s public request for input on BEPS Action 11 (Establish methodologies to collect and analyse data on BEPS and the actions to address it). This response reflects the views of the PwC network of firms. We also look forward to having an opportunity to comment further when the OECD sets forth proposed BEPS metrics in a future consultation document.

Government, supranational and academic information

As identified in the request for input, a number of academic papers and government reports have already been considered by Working Party 2 in connection with Action 11. We anticipate that information already compiled by governments, supranational bodies and academia will provide the best source of information on the impact of BEPS activities to date. However, further analysis may be required to identify the appropriate trends, particularly in relation to spillover effects, as noted below.

The validity of particular findings must also be thoroughly reviewed with at least one, or preferably multiple, back-up sources.

Limiting new burdens

We think that any proposals should be constrained by the burden which would be imposed on different stakeholders, including business. The diversion of resources toward a further administrative process will necessarily detract from activity which could help the OECD achieve its overarching aims of promoting international trade and investment. The exploitation of existing data should be pursued instead wherever possible and the amount of additional work required kept to a minimum.

We believe the analysis of new data in future should be technologically automated as far as is possible. This also covers the gathering of the data and, in that regard, recourse should be made to the systems being put in place for delivering the country-by-country reporting template and transfer pricing documentation to be introduced under Action 13 (for sharing of information for high level risk analysis). The same applies, to a lesser extent because of its more limited scope, with the Common Reporting Standard (for automatic exchange of information). However, we don’t believe that the
information required for country-by-country reporting should be increased as a result or that business
should be asked to produce, for Action 11, data which has been considered and rejected for Action 13.

The aggregation and analysis of raw data should be carried out wherever possible by governments and
supranational bodies. The extent to which reliance is placed on business doing any pre-processing
should be limited.

Identifying impacts

There are a number of potential difficulties in identifying the impacts of particular transactions or
structures. We’ve seen some of these difficulties both in the recharacterisation of arrangements where
anti-avoidance rules are being applied and in the approaches being put forward by some territories for
the establishment of transfer prices.

Some of the potential spillover effects may include for example the inefficient allocation of resources
by entities keen to establish substance in low-tax countries. On the other hand, increased awareness of
businesses’ tax management practices may lead to a greater reluctance to operate in low tax
jurisdictions. The possible reactions are wide-ranging, uncertain and are highly dependent on
stakeholders’ understanding and perception of the BEPS changes.

It is also difficult to distinguish between the impact of taxpayer behaviour from that of governments’
policy decisions and the enforcement of compliance rules. This would be made more difficult by the
anticipated inconsistent adoption by territories of BEPS recommendations and their interpretation of
revised OECD guidelines. Businesses will also respond differently, some being more aggressive in their
attitudes to future tax planning than others.

A more long-term analysis of trends seems to be critical if the breadth of the impacts of BEPS is to be
identified.

Measuring economic impacts

The OECD has previously recognised (2010)\(^1\) that corporate income tax is one of the most harmful
taxes as regards distortion of market economies. For example, reducing the profits of firms inhibits
both domestic and foreign direct investment, hinders productivity through a number of channels,
including distorting relative factor prices, causing high compliance costs and hindering technology
transfers and knowledge improvements.

In measuring the impact of BEPS actions it is important to consider not only the narrow impacts on
tax revenues and effective tax rates, but the broader macroeconomic impacts, including the dynamic
impact on tax revenues due to changes in economic growth.

The US, UK and a number of other countries already carry out quite sophisticated economic analysis
and modelling of the impact of potential tax policy changes, e.g HM Revenue and Customs (2013)
analysed the effects of corporate tax cuts on the UK economy using a Computable General Equilibrium
model. The European Commission has also (2011 and 2013) commissioned analysis using a Dynamic
Stochastic General Equilibrium model to examine the effects of the Financial Transaction Tax
proposals. Such models are commonly used by governments to examine the effects of changes in
effective tax rates and the underlying principles and subsequent review of differences between forecast
and actual figures ought to provide a basis for quite robust ex-post analysis.

Effective tax rates

Care should be taken in any analysis which seeks to consider effective tax rates.

The different ways in which territories implement changes resulting from the BEPS Action Plan may have a profoundly anti-competitive impact.

The following also represent a few examples of the other inconsistencies which can affect such analysis:

- countries’ financial accounting rules
- unconsolidated financial or tax data and intra-group transactions
- the treatment of losses, and
- deferred tax resulting from differences as to when amounts are recognised for accounts and tax purposes.

Confidentiality

If it is found necessary to require individual entities to supply additional information for Action 11, the confidentiality of that information needs to be considered. In particular, the sharing of individual taxpayer information should only be done in accordance with exchange of information provisions of tax treaties and other bilateral or multilateral agreements.

Next steps

As we found with discussions on Action 1 (Digital), the outcomes of the discussions still to take place as part of the BEPS Action Plan will have a fundamental impact on what are considered unacceptable BEPS behaviours. It therefore makes sense to make sure that any proposals put forward in relation to measuring BEPS in future are not finally determined until the rest of the project is virtually complete.

We are keen to participate further in the consideration of proposals under Action 11.

Yours faithfully,

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BEPS Action 11 RFI

Dear Mr. Neubig,

RoeverBroennerSusat welcomes the opportunity to submit comments on the Request for Input, “BEPS Action 11: Establish methodologies to collect and analyse data on BEPS and actions to address it”. We appreciate this opportunity to share our views and hope you find our comments useful in your work on BEPS.

RoeverBroennerSusat supports the aim of the BEPS Action Plan in relation to measuring the scale and economic impact of BEPS. In addition to providing general comments regarding the measurement of the scale and economic impact of BEPS, it is our intention to direct your attention towards specific issues of relevance for small and medium-sized companies (SMEs). Regarding existing available data and new types of data a major concern should be seen in the importance of taxpayers’ data protection rights.
A. Indicators of the scale and economic impact of BEPS

We concur with the OECD that indicators are to be understood as tools aimed at providing general magnitudes rather than precise estimates. Hence, we consider it vital to explicitly acknowledge the relatively high degree of uncertainty when interpreting empirical studies and respective indicators on BEPS. While we agree with the assessment of the OECD that the existing empirical studies provide abundant circumstantial evidence that BEPS behaviors are widespread, we are concerned that some methodologies applied in these studies could systematically overestimate the scale and economic impact of BEPS. Referring to the studies included in Chapter 2 and Annex B of “Addressing Base Erosion and Profit Shifting” (OECD, 2013):

- Definition of BEPS: In order to contribute to our understanding of the scale of BEPS respective empirical studies should be based on a definition which differentiates between tax evasion and tax avoidance as precisely as possible. The definition should further reflect that not all profit shifting is to be considered as constituting harmful tax avoidance. A case in point is the definition applied by Gravelle: “A multinational firm that constructs a factory in a low-tax jurisdiction rather than in the United States to take advantage of low foreign corporate tax rates is engaged in avoidance”¹. In our opinion a case such as the one referred to by Gravelle constitutes an example of desirable tax competition and should not be classified as BEPS. This issue should also be taken into account when interpreting empirical studies based on econometric models. A case in point may be seen in the analysis conducted by Dischinger, who identified “a decrease in pre-tax profits of 7.4% if the statutory tax rate difference of an affiliate firm to its parent increases by 10 percentage points”². While the analysis provides indirect evidence for profit shifting, the correlation between pre-tax profits and statutory tax rate differences does not appear to constitute an adequate basis on which reliable estimates regarding magnitude of BEPS could be based. Studies such as the one presented by Dischinger should merely be regarded as a starting point for future research and the results should be interpreted and communicated with appropriate reservation.

- Moving beyond circumstantial evidence: Studies analyzing highly aggregated data, such as comparing the foreign profit share of US MNEs relative to the GDP of respective trading partners³, were instrumental for putting BEPS on the political agenda. At this stage of the BEPS project, however, it appears reasonable to focus on more specific research objectives. Particular attention should be devoted to identifying specific channels for profit shifting as well as analyzing the impact of the company size on the level of profit shifting.

- Critical evaluation of studies: The Committee on Fiscal Affairs’ Working Party No. 2 should conduct a critical evaluation whether specific methodologies are conceptually suitable for

³ Gravelle (2013),
quantifying the magnitude of BEPS. The result of the evaluation should be published by the OECD in order to facilitate the discussion regarding appropriate methods. Various studies are frequently cited by researchers as well as the media as empirical evidence for the substantial economic impact of BEPS. An assessment by the OECD regarding the adopted methodology could contribute to eliminating those studies from the discussion that are ill-suited for quantifying the magnitude of BEPS. Potential cases are e.g. Zdanowicz⁴, Pak and Zdanowicz⁵ and Clausing and Avi-Yonah⁶.

- According to Pak and Zdanowicz the lost revenue due to transfer pricing of goods alone was estimated at $53 billion in 2001⁷. The analysis is based on estimating lost tax revenues in the USA due to over-invoiced imports and under-invoiced exports. The methodology adopted is to define those prices as suspicious that exceeded the upper quartile import price and those that were below the lower quartile export price. The aim of the analysis is to detect trade-based money laundering and terrorist financing. In this context the definition applied by Pak and Zdanowicz may be adequate. In the context of transfer pricing it seems, however, at least questionable to assume that each deviation from the inter-quartile range reflects aggressive tax planning or tax avoidance. Considering that the analysis is based on a rather broad categorization of products (16,390 import commodity codes and 8,568 export commodity codes), the respective product groups are highly heterogeneous (not differentiating for quality, brands etc.) which results in excessively wide price ranges. More likely than not this approach will misclassify a significant number of arm’s length transactions as suspicious. Thus, in a transfer pricing context the aggregated approach adopted by Pak and Zdanowicz seems to inevitably overestimate the lost tax revenues.

- Clausing and Avi-Yonah estimate the revenue gain from moving to a formula apportionment based on sales⁸. While Gravelle acknowledges that “this estimate is not an estimate of the loss from profit shifting (since sales and income could differ for other reasons)”⁹, he still interprets the result as “suggestive of the magnitude of total effects from profit shifting”. The interpretation offered by Gravelle appears to be rather misleading. Formulary apportionment does not account for the value added attributable to intangible property. Hence, it seems generally questionable whether formulary apportionment is superior to the arm’s length principle regarding the alignment of taxation and economic activity. Asserting that the revenue gain from moving to formulary apportionment would be sugges-

⁷ Pak and Zdanowicz (2002).
⁹ Gravelle (2013).
tive of the magnitude of profit shifting occurring under the arm’s length principle without appropriately addressing the conceptual differences between the two opposing paradigms appears to be somewhat presumptuous.

B. Economic analysis of the scale and impact of BEPS

We concur with the OECD regarding the advantages of firms-specific approaches over aggregate approaches in regards to separating BEPS behaviours from real economic activity. In our estimation, the methodology adopted by the Swedish National Tax Agency in creating a “Tax Gap Map” (in particular regarding the international tax gap) constitutes a positive example of utilizing firm-specific data. Considering the following, we find that adopting a similar button-up methodology in order to develop a kind of “BEPS Map” would be a sensible complement to the existing macroeconomic studies:

- The approach is based on the documented results of tax audits (e.g. transfer pricing adjustments), the so-called audit method. It is based on the assumption that a tax audit will generally lead to an arm’s length outcome. As the results are based on a detailed audit process, it appears plausible that the tax gap attributable to profit shifting will be identified with comparably high accuracy. By focusing on firm-specific data in a tax audit context, most BEPS behaviours will effectively be separated form real economic activity. A significant caveat of this method is that the available data covers only a limited (non-random) sample of taxpayers and that the results must be extrapolated in order to estimate the total magnitude of profit shifting. While degree of uncertainty will thus remain substantial it should be acceptable in the context of designing a tool for providing a general magnitude of BEPS.

- A defining characteristic of the Tax Gap Map is that it differentiates between various types of taxes as well as between different groups of tax payers. A BEPS Map should analogously differentiate between specific channels for profit shifting as well as between large and small MNEs (including respective subgroups to adequately account for size differential among SMEs). In order to identify the tax avoidance strategies that are relevant for specific groups of tax payers a more differentiated analysis is required. Developing a more nuanced understanding of the effects of BEPS is a vital precondition for devising targeted counter-measures. In particular, the tax gap attributable to specific tax avoidance strategies adopted by SMEs should be analyzed. The respective analysis should be aimed at determining sensible threshold levels for safe harbor clauses in order to reduce the high compliance burden of SMEs were applicable.

- For SMEs it is imperative that any instrument designed to collect data and monitor the effectiveness of actions taken to address BEPS will not result in additional administrative burdens. The BEPS Map could be prepared without stipulating new tax compliance controls or requiring tax payers to provide additional data to the tax authorities. By relying on collating, structuring and analyzing existing information administrative burdens for tax payers will be minimized.
Applying an audit approach utilizes the expertise of local tax authorities and ensures that vital stakeholders collaborate on this project. The role of the OECD would be to facilitate, monitor and administer the integration of national BEPS Maps. The OECD should further establish a best practices process to continuously refine the tool.

C. Economic analysis of the impact and effectiveness of actions to address BEPS and
D. New types of data to be collected and tools to monitor the effectiveness of the actions taken to address BEPS on an ongoing basis

The purpose of the following comments is not to provide suggestions on existing and new types of data and methodologies for the purpose of enhancing transparency. However as an audit and tax advisory firm with predominantly focus on SMEs we would like to stress certain legal as well as economic issues that according to previous OECD measures might otherwise not get the attention they merit. From our perspective a major concern should be seen in the importance of taxpayers’ data protection rights.

Before we focus on our data protection concerns, we want to summarize relevant tax data collection-mechanisms which apply to German tax payers assuming a double tax treaty between two states is in force and the respective double tax treaty refers to the OECD Model Tax Convention on Income and on Capital.

The current version of Article 26 of the OECD Model Tax Convention already gives the possibility to states to exchange information, including bank information, on the basis of bilateral double tax treaties. The information is no longer limited to cases of tax fraud or in order to carry out the treaty but can be more general. Since the new Commentary in 2012 the exchange of information under Article 26 of the OECD Model Tax Convention also can comprehend groups of people that satisfy specific criteria. Any information received under Article 26 paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State. Article 26 explicitly states that the provisions of paragraphs 1 and 2 shall not be construed so as to impose on a Contracting State the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to the public policy (ordre public). However, denying an obligation does not mean that tax secrets cannot be disclosed. Ever since the decision of the German Federal Constitution Court, the fundamental right to self-determination over personal data is undeniable. This fundamental right protects the unlimited collection, retention, use, disclosure and disposal of personal and economic information. However, it allows the disclosure of data, also abroad, if this is in the predominant general German interest, a precise legal basis exists, the use is specifically defined and the disclosure is necessary to fulfill the purpose. Furthermore, as a result of the fundamental right, the taxpayer in the vast majority of cases has the right to be heard before the data transfer takes place. The German tax secrecy within the meaning of Sec. 30 AO also applies to exchange of information with Contracting States but is not infringed if the exchange of infor-

10 Sec. 30 paragraph 2 no. 2 German Tax Code; Abgabenordnung hereinafter “AO”.
11 see Becker et al. DBA-Kommentar, Article 26, note 69.
12 BVerfGE 65, 1.
information is permissible pursuant to Sec. 30 paragraph 4 no. 1 (information request) or if it is au-

thorized by a law\textsuperscript{13} or international agreements. Article 26 of the OECD Model Tax Convention

as used in various double tax treaties is such an international agreement and thus a legal basis

for the exchange of information.

On 29 October 2014, several officials from different jurisdictions will sign the global OECD

standard at the annual meeting “Global Forum on Transparency and Exchange of Information

for Tax Purposes” as a multilateral treaty. This treaty is a further development into the direction

of increased transparency of taxpayers by extensively drawing on the US-Foreign Account Tax

Compliance Act (hereinafter “\textit{FATCA}”). The new standard foresees the automatic exchange of

all types of investment income including interest, dividends, income from certain insurance con-

tracts and similar types of income as well as information of shell companies.

Having said the above we would like to point out three major concerns. Firstly, the OECD as a

promoter of the economic and social well-being of people has a responsibility to ensure data

integrity and data protection. Secondly, when establishing methodologies to collect data, partic-

ular attention should be paid to include only those data that a vast majority of the countries

which draft or potentially draft their double tax treaties on basis of the OECD Model Tax Con-

vention on Income and on Capital (hereinafter “\textit{Contracting States}”) effectively can manage to

collect and use. In the contrary case the action would risk to ultimately backfire because the

number of Contracting States would be quite limited. Thirdly, as already emphasized under A) and B), we regard it as imperative that the measures to be implemented – especially with re-

spect to new types of data – do not result in additional administrative burdens for taxpayers,

particularly SMEs. Hereinafter we will develop these three concerns and demonstrate that they

are linked to each other.

It should be borne in mind that a unique level of data protection rights among the Contracting

States does not exist. Even though the OECD Model Tax Convention is used as template for

bilateral treaties, we would really appreciate if the OECD goes the next step to level the playing

field of data protection rights for tax payers. To reach this objective, we consider as imperative that the collection of data is limited to an extent that the majority of Contracting States effective-

ly can handle the OECD measures to action 11 and also comply with the safeguards. We would

appreciate a set of mechanisms which guarantee a specific OECD determined minimum level of

data protection which the Contracting States have to comply with. Only if this minimum level of

tax payers’ rights is met we would consider it acceptable to exchange basic data on a general

level.

As a further safeguard, we would suggest to limit the general and regular exchange of data in a

first step to the information that are determined to be relevant for determining BEPS (in contrast
to accepted tax planning and structuring) taking into consideration the interest of the taxpayers

regarding sensitivity and data protection. This sensitivity of data should be derived by an aver-
age consideration of taxpayers’ interests and need and determined by the OECD. Whether a

respective type of data qualifies as BEPS-relevant or not should be examined by the question

\textsuperscript{13} E.g. Sec. 117 paragraph 3 AO.
as to where to draw the line between legitimate tax planning and aggressive tax planning which results in BEPS.

Beyond the regular exchange of data, Contracting States could be allowed to exchange specific catalogue data which are much more sensitive upon detailed reasons by the Contracting State which requests for data exchange ("Requesting Contracting State"). Within the detailed reasons the Requesting Contracting State should need to specify and justify why the requested data are relevant to avoid BEPS.

From a German perspective we have strong concerns that, in contrast to the above explained two-steps mechanism, a mere "one size fits all"- approach to combat BEPS would not satisfy the conditions of data protection as a fundamental right to self-determination over personal data, as defined by the German Federal Constitution Court.

The limitation of data collection is not only necessary in order to ensure constitutional compliance but also for practical reasons. **The OECD should ensure that the costs for collecting and analyzing data are reasonable as compared to the expected outcome.** This is especially relevant if collecting data means that taxpayers have to bear the cost. **In this case SMEs would probably have a relatively higher burden than big companies.** Moreover, the competitiveness of SMEs operating in a state adopting the measures proposed by the OECD would sink in relation to SMEs operating in a state not adopting the OECD measures.

***
In order to conclude, RoeverBroennerSusat wants to point out that empirical studies on tax evasion, including its definition, have to be treated with caution. RoeverBroennerSusat welcomes safeguards to data protection but holds that even more effort is necessary as well for constitutional compliance as for appropriateness of the cost triggered by collecting additional data. Special consideration should be given to the additional burden of taxpayers.

Yours sincerely,

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Input from Costa Rica on BEPS ACTION 11: Establish methodologies to collect and analyse data on BEPS and the actions to address it.

Prepared by Julia Villareal González, Assessor
International Taxation Department

In accordance with the request for input released on August 4, 2014, related to the document entitled “Request for input, BEPS action 11: Establish methodologies to collect and analyse data on BEPS and the actions to address it”; we are sending the following comments:

Regarding section “A. Indicators of the scale and economic impact of BEPS” we consider that it should be taken into consideration the different tax periods some countries have. For example, Costa Rica’s tax period corresponds from 01 October to 30 September.

Thus, it is important to identify countries with different taxable periods, other than those from 1st January to 31th December; which would be necessary in order to make the appropriate adjustments and be able to compare in a consistent way the information between countries with different fiscal years closing. For example, knowing the different tax periods would be helpful when comparing dividend distribution dates.

Another aspect to be taken into account is the different dates for holidays in each country. For example, Costa Rica’s Mother’s Day is celebrated on 15 August and the fiscal year closing is on September 30, as mentioned above. Therefore, in August sales will increase without reducing the cost of product sales or profits obtained from these sales due to the high demand for goods or services. However, a month later traders will need to decrease their inventories before the fiscal year closing, so they offer attractive discounts by reducing their profits, but increasing sales volume.

In accordance with the above, it would be important that countries report information about holidays and different fiscal closing mechanisms that would alter the normal behavior of transactions.

An essential element of Costa Rican tax system is that private taxpayer information obtained by the tax authorities is confidential. This involves the protection of data and documents that reflect the economic and financial situation of the taxpayer. Therefore, such information cannot be used for anything other than tax purposes.

Moreover, the information exchanged under an international agreement that includes the exchange of information in tax matter is also confidential and is protected in the same way than internal information.
Comments from China on the Request for Input (RFI) on BEPS Action 11

A. Indicators of the scale and economic impact of BEPS

A.1. Indicators should be understood as tools aimed at providing general magnitudes or ranges which could be tracked to show trends over time for an individual country or globally, rather than necessarily being precise estimates of the scale and economic impact of particular BEPS behaviors (i.e. cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it.) or its total impact. Please provide any suggestions for possible indicators or sets of indicators that could be used on the basis of available existing data. Suggested indicators could be based on entities, cross-border groups of enterprises, tax jurisdictions or the global level, however, all types of indicators are welcome. Please note any caveats or limitations with the suggested indicators and data.

(a) We agree that indicators should be aimed at providing general magnitudes rather than necessarily being precise estimates of the scale and economic impact of particular BEPS behaviors. But we take the opinion that designing the indicators should start from all types of arrangement, such as transfer pricing, excessive debt. We can find the traces and outcomes of the arrangement, make the indicators more reasonable. If the impacts of different BEPS behaviors on an indicator are in the same direction, the aggregated indicator can be appropriate for the general magnitude, otherwise, we have to design particular indicator for different types of BEPS arrangement, which will be more difficult.

(b) We all know that the use of intermediary companies in low or no tax jurisdictions plays a large part in BEPS, which leads to extreme high FDI inflows and outflows in low or no tax jurisdictions, as well as abnormally low profit of MNEs in high tax jurisdictions. Thus indicators could be constructed based on FDI data, Financial Reporting by the companies, and Balance of International Payments.

(c) The indicators that we suggest are:

1. Indicators based on FDI data

   \[
   \begin{align*}
   \text{FDI inflows from no/low tax countries} = & \frac{\text{total FDI inflows}}{
   
   \text{FDI outflows from no/low tax countries}} = \frac{\text{total FDI outflows}}{
   
   \text{inward FDI positions from no/low tax countries}} = \frac{\text{total inward FDI positions}}{
   
   \text{outward FDI positions from no/low tax countries}} = \frac{\text{total outwards FDI positions}}{
   
   \text{For an individual country, there could be some particular indicators,}

   \text{For country X: } \frac{\text{return investment}}{\text{total FDI inflows to country X}}

   \text{For country X: } \frac{\text{bypass investment}}{\text{total FDI inflows to country X}}
   \end{align*}
   \]
Where return investment and bypass investment should be estimated by existing data.

2. Indicators based on financial reports of companies

For country X:

\[
\begin{align*}
\text{average ROE of MNEs} & \quad & \text{average ROE of domestic companies} \\
\text{average gross profit margin of MNEs} & \quad & \text{average gross profit margin of domestic companies} \\
\text{average interest expense rate of MNEs} & \quad & \text{average interest expense rate of domestic companies} \\
\text{total profit} & \quad & \text{total labour costs} \\
\text{total profit} & \quad & \text{total labour costs} \\
\text{total equity} & \quad & \text{total debts} \\
\text{total equity} & \quad & \text{total debts}
\end{align*}
\]

For a company,

\[
\begin{align*}
\text{profit} & \quad \text{labour costs} \\
\text{value of patents} & \quad \text{R & D expenses} \\
\text{royalty and licence payments} & \quad \text{total costs} \\
\text{interest deducted from the tax base} & \quad \text{interest included in the tax base}
\end{align*}
\]

A.2. Please describe in detail what relevant data are currently collected and available for analysis in a specific country or for a larger group of countries. Please describe any other existing datasets that you are aware of that could be utilised to analyse and monitor BEPS, such as commercially available datasets. Please note whether the dataset contains information on companies’ country of incorporation and/or tax residence.

(a) For analysis in China, we are restricted by limitation of data, the existing data is not designed for monitoring BEPS, so we may know some indicators have relation with BEPS, but we don’t know the exactly relation.

(b) First, China Statistical Yearbook provides most of macro-level data, such as National Accounts, FDI, Balance of Payments, Main Indicators on Enterprises by Registration Status.

(c) For micro-level data, the State Administration of Taxation of China collects company level data through three channels, but without special focus on MNEs or CFCs. The first one is Yearly Tax Survey, which has been ongoing for twenty years. The sample includes about 800,000 companies.
For each company, the following indicators are collected: company characteristics, such as industry, ownership, location; tax data, including tax base, tax rate, and tax liability of every tax; financial data, such as operating income, sale cost, management cost, financial cost, investment income, operating profit, and net profit, without employees, fix asset, intangible asset, loan, royalties income or expense, labor cost, R&D, and more detailed income or cost.

(d) Secondly, we pay special attention to the key companies that contribute a large proportion of tax revenue, in other words, large enterprises. The list of key companies is not determined by the State Administration, however, is determined by its branch, for example, the list for a county is determined by the County Tax Revenue, as well as a city and a province. The information is gathered from bottom to top. The list may changes every year. Similar to the tax survey, the indicators include company characteristics, tax indicators and basic financial indicators, without full information of financial statements. The most difference with the tax survey is that the key companies sample is without sampling design.

(e) Thirdly, as well as other countries in the world, the State Administration of Taxation collects corporate income tax return data for every company. It should be the best data sources, as it includes the most detailed tax and financial information for every company in China.

**B. Economic analysis of the scale and impact of BEPS**

B.1. Measuring the scale and impact of BEPS (or the effects of counter-measures) could benefit from a baseline or “counter-factual” concept of corporate activity unaffected by BEPS behaviour. Please provide any suggestions on how to define and measure the non-BEPS counter-factual, or what issues should be excluded in a quantitative measure of BEPS.

(a) We know that it is difficult to define a baseline and measure the non-BEPS counter-factual, maybe is also unrealistic. An approximate approach is necessary. We suggest that the financial status of purely domestic companies could be a baseline when we look at how much the corporate activity is affected by BEPS behaviour in MNEs. If we introduce appropriate control variables, the difference of the indicators between MNEs and purely domestic companies is a good measure of BEPS in average level.

(b) There is an alternative method of measuring the scale of BEPS. We can select a sample of companies by stratified sampling, measure the scale of BEPS for each company by auditing, then the scale of BEPS for the whole economy can be calculated. In this way, the baseline or “counter-factual” is not necessary.

(c) For measuring the impact of BEPS, especially the effectiveness, it is tricky that the baseline should be the economy with existing tax environment, rather than the economy without tax. We are aware a basic conclusion of economics, that tax makes distortion, leads to efficiency loss. For example, high tax rate in China will discourage investment from foreign investors; some profitable chance is blundered away. Compare to no-tax case, the allocation of capital is distorted. With BEPS, foreign investors could make the investment happen without increase tax burden. The distortion is offset, where there is an increase of efficiency.

B.2. Please identify any potential methodologies for estimating the scale and impact of particular BEPS behaviours (either individually or in aggregate) based on available existing data for an individual country or globally. Methodologies using both available aggregate
statistics as well as micro-level data are welcome. Please note any caveats or limitations with the suggested methodologies. For example, many data items in national accounts, financial statements, and tax returns may be impacted by BEPS behaviours, so what adjustments might be needed to reflect the BEPS behaviours, if any.

(a) We suggest that the key clue is the abnormal ROE of MNEs compare to ROE of purely domestic companies.

(b) Method 1: a simple estimation. If we assume that the ROE of foreign invested enterprise should not lower than ROE of purely domestic companies in average, we can estimate the gap of the two ROEs in use of the Main Indicators on Enterprises by Registration Status provided by National Bureau of Statistics.

Method 2: estimating the BEPS behaviours in aggregate based on micro-level data. The focus is identify the different ROEs of MNEs and purely domestic companies with more controlled variables. We can build a panel data econometric model,

\[ R_{it} = \alpha_{i} + \gamma_{t}D_{MNE} + controls \]

where \( R_{it} \) is the dependent variable, which may be ROE or other indicators of profit margin, \( D_{MNE} \) is a dummy variable of MNEs, \( \gamma \) is a direct measure for “BEPS”, which is our interest. Other control variables are sizes, industries, location, capital stock per capita etc.

B.3. Effective tax rates (ETRs) are used in many studies of the economic effects of BEPS. There are many different types of ETRs. Please suggest which specific ETRs should be used when measuring different types of BEPS behaviours and how to interpret them. If citing a particular analysis please be clear about the specific ETR being used, why it was selected, and any limitations. Effective tax rate measures may not capture all of the legislative and regulatory elements that affect BEPS behaviours. Please discuss any considerations of those other factors and how they might be included in an empirical analysis or how ETRs might be adjusted for them.

No suggestion, as we have few studies on ETRs.

B.4. Please provide suggestions for currently available and potentially available data, methodologies, and available studies to assess BEPS-related spillover effects. Spillover effects may occur across countries (e.g. BEPS-related tax policy aspects of one country that affects other countries’ economies) as well as within countries (e.g. competitive effects). Please note any caveats or limitations with the suggested methodologies.

No suggestion.

C. Economic analysis of the impact and effectiveness of actions to address BEPS

C.1. Please provide any suggestions on additional existing available data and methodologies to develop economic analysis of the effects of BEPS counter-measures. If these data or
methodologies are already mentioned above, please note their relevance for this purpose and indicate how they should be used. Are there specific sources of data, methodologies or analyses of any actions taken to address any of the particular BEPS behaviours discussed in the other BEPS action items?

(a) We believe that the BEPS counter-measures will increase “profit margin” of MNEs in high tax rate countries. By comparing the average change before and after BEPS counter-measures in the profit margin for the MNEs and purely domestic enterprises (Difference in difference), we can estimate the effect of BEPS counter-measures. If it is statistical significant, we can say the counter-measures work. We can also calculate scale of effect with the coefficient of DID.

(b) Secondly, forward-looking ETRs can be uses to examine effects of counter-measures. The formulae for calculating forward-looking ETRs can be built base on BEPS strategies, then the changes of some elements directly reflect the effects of specific BEPS strategies. The data collected from country by country reporting is necessary for calculating forward-looking ETRs.

D. New types of data to be collected and tools to monitor the effectiveness of the actions taken to address BEPS on an ongoing basis

D.1. Please provide any recommendations for new types of data, including types of data that taxpayers should provide to tax administrators, to be collected as part of future indicators for monitoring the effectiveness of BEPS counter-measures and to improve economic analysis of BEPS. Please note how the data could be used, and any caveats or limitations of the dataset. Also, please comment on how the suggested data might be used in such a way to respect taxpayer confidentiality and minimize the administrative costs for tax administrations and businesses.

No suggestion.

D.2. Please provide any recommendations for additional tools, beyond those indicators specified in A.1., that could be used to monitor the effectiveness and economic impact of the actions taken to address BEPS on an ongoing basis.

No recommendation.

E. Other comments

E.1. Please provide any other comments you may have regarding Action 11 of the BEPS Action Plan, including any additional information that you would consider useful in identifying tools and methodologies to analyse BEPS and the actions to address it.

No comment.

E.2. If you have conducted research and analysis of the scale and economic impacts of BEPS and potential countermeasures, we invite you to share your analyses and datasets.
E.3. Responses to this invitation should be sent electronically (in Microsoft Word format) by email to CTP.TPS@oecd.org by 19 September 2014 at the latest. Unless otherwise requested at the time of submission, responses to this invitation will be posted on the OECD website. In order to maximise the effectiveness of your input we suggest you provide only brief comments or references to any publications that may contain more details. If you are making this submission on behalf of an organisation, please provide the name of the organisation.
BEPS MONITORING GROUP

Action 11: Establishing Methodologies to Collect and Analyse Data on BEPS and the Actions to Address It

19 September 2014

This response is submitted by the BEPS Monitoring Group (BMG). The BMG is a group of specialists on various aspects of international tax, set up by a number of civil society organizations which research and campaign for tax justice including the Global Alliance for Tax Justice, Tax Justice Network, Christian Aid, Action Aid, Oxfam, Tax Research UK. This response has not been approved in advance by these organisations, which do not necessarily accept every detail or specific point made here, but they support the work of the BMG and endorse its general perspectives.

This response has been prepared by Francis Weyzig, with input from Veronica Grondona, Jorge Gaggero, Matti Kohonen, James Henry, Alex Cobham and Sol Picciotto, and with comments from other members of the Group.

We welcome the opportunity to comment on the Consultation Document on BEPS Action 11 regarding work on establishing methodologies to collect and analyse data on BEPS and the actions to address it, published by the OECD on 4th August 2014.

We will begin with some general comments, and then address some (but not all) of the specific questions posed in the Discussion Drafts.

1. GENERAL COMMENTS

In our view, the main problem is the lack of suitable data, and perhaps more importantly, problems of access to such data as do exist. A number of approaches are possible towards quantifying the scale and impact of BEPS, and hence the effects of anti-BEPS measures. We suggest that these can best be explored if researchers all over the world and the public at large have access to suitable data. This would enable the wide public debate on the important issue of BEPS to be based on robust evidence, produced by many researchers using a variety of approaches, in a context of mutual evaluation, peer-review and cross-checking. Moreover, journalists and civil society organizations have played an important role in investigating and exposing BEPS practices and therefore it is essential that they have maximum access to relevant data as well.

All existing data sources have critical shortcomings. Relevant data sources for assessing BEPS include company accounts, company tax filings, aggregated revenue data, and customs data. In the next sections we will provide some further comments and evidence about these various sources. The shortcomings of these sources mainly concern the limited number of countries they cover or the limited amount of detail they provide.

Access to data is a major problem. Moreover, some key sources are not publicly available and are accessible only for a small group of researchers under highly restrictive conditions. Such sources can usually not be combined, thus making it impossible to produce larger data sets that combine existing micro data from different countries to enhance coverage and produce a more complete picture of the operations of globally operating firms.
Therefore we emphasise that the data generated by country-by-country reporting of multinational enterprises should become publicly available to enable research on BEPS. The modalities of data distribution are currently under development by the OECD as part of the BEPS project. The data from country-by-country reports will be the only source that covers all countries worldwide and provides comprehensive information on the total operations of globally operating firms. Moreover, these data will be collected on a common template and provide key information on both the location of economic activities and the location of profits and taxes. This will make the country-by-country data truly unique and very suitable to assess BEPS. If the data would not become publicly available, possibilities to assess BEPS and the effects of anti-BEPS measures would remain much more limited.

If some countries unfortunately continue to block full publication of all firm-level country-by-country data, the OECD should find alternative ways of making the data available for research and policy purposes. In our final section, we will elaborate on alternative options, such as publicly disclosing data aggregated at industry level and providing confidential data access to accredited researchers via a secured data system.

We are not recommending specific methodologies at this stage. It is obviously important that any reports issued by inter-governmental organisations be based on methodologies widely accepted as sound. We suggest that the OECD team working on this subject should issue a consultation paper when they are in a position to make proposals on how they intend to proceed. We would be happy to comment on such a paper. In the meantime, in our view, the more important questions at this stage are availability of and access to data.

2. Indicators of BEPS (Question A)

General indicators of BEPS include the locations where trade mark, patent and other intellectual property rights are registered and other measures of assets located in low-tax environments that may play a role in profit shifting strategies. Separate data on assets, capital flows and income of Special Purpose Entities (SPEs) could be a particularly relevant source.

The OECD itself has defined SPEs in its 2008 manual concerning Foreign Direct Investments (FDI) where “SPEs are defined either by their structure (e.g., financing subsidiary, holding company, base company, regional headquarters), or their purpose (e.g., sale and regional administration, management of foreign exchange risk, facilitation of financing of investment).” Furthermore, SPEs are considered to have “few or no local operations”. The OECD highlights they are set up for other than direct investment purposes. Despite this clear rationale for separate reporting on SPEs, as recommended by the OECD, very few jurisdictions collect separate SPE-related company-level or macro-level data. It would be important to know both company-level information on when a company is classified as an SPE, and their aggregate income arising from their own operations, interest, royalties, dividends and management fees. This should be available via the Central Bank as is the case already on an aggregate level in the Netherlands and Luxembourg. Separately, it would be critical to know what share of FDI flows and positions, per industry and other FDI reporting categories arises from SPEs. This would be important to better assess treaty shopping, for example, and understand the related impact of FDI in both developing and developed economies (see e.g. Weyzig 2013).
3. ECONOMIC ANALYSIS OF BEPS (QUESTIONS B AND C)

Financial Accounts – micro data

Establishing accurate and consistent measures, to track over time and across countries, will be central to any effective monitoring of progress against BEPS. In the words of the Action Plan, this requires in particular “measures of the allocation of income across jurisdictions relative to measures of value creating activities”. In principle, micro data from company financial statements could be used to produce both types of measures.

Company financial statements are commonly used in research on effective tax rates (ETR) (e.g. Markle & Shakelford 2012). Calculations of ETRs over time would be very relevant in calculating the impact of BEPS and effects of measures to combat it. However, this source is not very suitable because financial accounts state profits significantly differently from tax accounting standards. Company financial statements are also used in research on profit shifting through debt financing (e.g. Weyzig 2014, Buettner and Wamser 2007, Huizinga et al 2008). However, an important limitation in these studies is the limited country coverage and comparability across countries.

At national level, from the ‘host’ economy side, some data are available on the domestic activities of multinationals (and of purely domestic firms, for comparison). Most typically, this involves balance sheet data from company registers. The data collected, and the data published, are not necessarily the same, and nor are they necessarily consistent across countries. As a result, they may be less useful in establishing international patterns.

At national level again, but from the ‘home’ economy side, some countries collect and publish data on the global (FDI) activities of multinationals headquartered in their jurisdictions. Most well-known is the US BEA survey, which provides public access data on patterns of activity, aggregated at host economy and industry level. However, access to data relating to individual multinationals is only available to approved US citizens. Similar arrangements exist for broadly equivalent surveys of German- and Japanese-headquartered multinationals. The lack of broader coverage means that any analysis is inevitably distorted (e.g. research on US-headquartered multinationals may give a much more important role for profit-reporting to Bermuda than do those of Germany). Results from single national surveys (e.g. Cobham & Janský, forthcoming, using US data only) can show the broad contours – e.g. that lower-income, non-resource-based economies tend to see the biggest divergences between economic activity and tax base – but are of course unable to show the complete, global pattern.

Obtaining the type of international data that would allow a full tracking of BEPS, and progress against it, is therefore problematic. This could in theory be achieved by combining national datasets of type (1) or type (2) in order to achieve a global picture. In practice, however, there are currently insufficient national FDI surveys to achieve broad global coverage in this way, and insufficient comparability and consistency of (published) balance sheet data to proceed in that way.

Work with datasets that bring together national balance sheet and income account data (in which the private ORBIS database currently leads open sources such as OpenCorporates) demonstrates the weak coverage of developing countries in particular (see e.g. Cobham & Loretz, 2014) but also of some OECD countries, such a Germany (see Weyzig 2014). This is because data availability in larger datasets depends on underlying national sources.

Financial information is not always publicly available, particularly in developing countries. Although local stock exchanges require public limited companies to present financial records, the size of such stock exchanges tends to be limited, mainly due to the fact that in many developing countries there is
a predominance of foreign controlled companies. According to an Interamerican Centre of Tax Administrations (CIAT – Centro Interamericano de Administraciones Financieras) 2013 report on availability of public information, in Argentina, Brazil, Chile, Costa Rica, Ecuador, Venezuela, Paraguay, Uruguay, the law regulating commercial societies requires such companies to register in a public registry. In Argentina and Chile, such requirements include the presentation of annual accounting records that should be publicly available. Such information could be used for the creation of financial micro data sets. However, in Argentina, access to this commercial public registry is limited due to a recent discussion on the interpretation of the law in terms of the level of public availability versus the level of data protection that should be granted. Thus data is currently not accessible despite the fact that public availability of this information should be granted for commercial transparency reasons.¹

This leaves one obvious way forward: use of the consolidated and country-by-country reporting data, to be generated on the basis of the new OECD template, which should cover the operations of every multinational in every jurisdiction. It is our view that such data provides the only means to be able to meet the OECD commitment under BEPS Action Point 11, within any reasonable, foreseeable time horizon.

**Financial Accounts – macro data**

Several central banks, for example Argentina's Central Bank (BCRA), produce aggregate data that can be used to assess BEPS, such as data on intragroup loans. This data could be used in studies analysing the evolution of the use of intragroup financial mechanisms for base erosion and profit shifting. If produced by more central banks, such data could be used for a global study of the growth of such mechanisms and the consequences for different regions.

In addition, trade in services by country is usually available (e.g. CEPALSTAT Database), with data segregated by royalty payments and entrepreneurial services, among others. Even when it is not available per trading partner, this information could also be considered for global studies on the growth of such payments and complement other studies on the use of such mechanisms for base erosion and profit shifting.

However, the availability of macro data on financial accounts and trade in services and the level of detail differ between countries, restricting the suitability of such data for a comprehensive assessment of BEPS. Aggregate data such as the IMF’s Coordinated Direct Investment Survey lack sufficient detail to compare profit declaration with value creating activity, while UNCTAD data may lack robustness and is not fully comparable across countries.

**Tax Authority Data – micro data**

Regarding existing company data, a better source than financial statements would be tax returns themselves. Individual tax returns are generally regarded as confidential, although some have argued that at least for public companies there is no valid reason for this. In some countries, such as the US, researchers have been given access to the databases of revenue authorities under controlled conditions. Although this is a step forward, it is problematic if such access is limited and de facto discriminatory, since research outputs from such sources cannot be adequately cross-checked.

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Moreover, it can only be used to assess BEPS by multinationals based in a very limited number of OECD countries.

**Tax Authority Data – macro data**

Tax returns, usually kept confidential by tax authorities, could be used in aggregated format, particularly for research relating to the effective tax rates paid by different industrial sectors and countries. In the same sense, some tax authorities, such as Argentina’s, request companies to present special forms with information relating to transactions with related parties as well as with entities located in non-cooperative jurisdictions, and non-related parties, covering trade in goods: prices, volumes and trading partners. There should not be any obstacles for such data to be made available in aggregate form, both for research purposes and general public knowledge.

Some Latin American countries share data extracted from these forms (e.g. effective tax rates, intragroup transactions, and transactions with parties located in tax havens) with international organizations, such as the CIAT, upon request, even if they are not shared with the public. This could mean that there are opportunities for such data on developing countries to be constructed by international organizations. Therefore, Action 11 constitutes an opportunity for the OECD to work on the creation of relevant aggregate data for monitoring and measuring the impact of BEPS in such countries.

**Customs Data – micro data**

Customs micro data is not available in many countries. In some countries, like the US, the information can be obtained with enough detail to compare the prices used by multinationals with related and non-related parties, by country of destination, and product characteristics (see e.g. Bernard et al. 2006, Clausing 2003). According to the information gathered by the CIAT (2013) on Argentina, Brazil, Chile, Costa Rica, Ecuador, Guatemala, Panama, Paraguay, Uruguay and Venezuela, registers on importers and exporters, and the amounts traded per year, are available for public consultation in Argentina, Chile, and Uruguay. However, due to recent data protection discussions, in practice, micro data on Argentine trade is not accessible locally, though it is from private databases registered abroad (e.g. Penta Transactions). However, it does not allow for an analysis of prices and trade conditions between related and non-related parties; though it does have information on product, prices, volumes, insurance and transport cost, and countries of destination.

**Customs Data – macro data**

In addition to micro data, aggregated data on bilateral trade in goods can also be used to analyse potential profit shifting through trade mispricing. This method is used by Cobham et al (2014), for example. The Comtrade database is the most commonly used source for such research. However, the Comtrade data are not always of high quality. For instance, there can be large discrepancies between the figures reported for exactly the same bilateral trade flow by the importing and exporting country. Moreover, no such database exists for trade in services.

**Tax Revenue Data**

Tax revenue data are macro-level figures that may overlap with aggregated tax authority data. Such macro data are generally used to estimate, for example, a ratio of corporate tax revenues relative to GDP.
Currently the limited availability of government revenue data is limiting the robust analysis of tax revenue trends and assessments of the tax base of developing countries. The IMF’s Government Finance Statistics (GFS) and World Bank's Global Development Indicators database does not collect consistent and comparable tax revenue information as it often either does not distinguish whether a country’s tax collection is from central government or from all levels of government (e.g. in the case of India). Somewhat more detailed data are available in the African Economic Outlook 2010 and 2014 tax surveys conducted together with the OECD and the African Development Bank (AfDB), or the Latin American Economic Outlook 2014 which includes data collected by the Economic Council for Latin America and the Caribbean (ECLAC). However, no similar regional database is available for developing nations in Asia, coverage for Latin American and African countries is far from complete, and for countries that are covered separate data for withholding tax revenues are often not available. This limits possibilities for a comprehensive assessment of trends in corporate tax revenues.

An effort by the International Centre for Tax and Development (ICTD) at the Sussex University’s Institute for Development Studies (IDS) has combined the above-mentioned sources with additional data from IMF’s Article IV surveys into a comparable database, greatly improving data coverage across developing countries, while also drawing a clear distinction between resource and non-resource sources of tax revenue (Prichard et al. 2014). While not a substitute for long-term improvements in cross-country data collection by international organizations, it provides an immediately more complete basis for both research and policy analysis where developing countries are the focus. Separate data on corporate income tax revenues are available for many countries in the database, though not yet for all of them.

4. MAKING EFFECTIVE USE OF COUNTRY-BY-COUNTRY REPORTS (QUESTION D)

As our general comments already emphasised, all existing data sources have serious limitations, while the better the data the more difficult it is for researchers to access. Hence, the data generated by country-by-country reporting of multinational enterprises should become publicly available to enable research on BEPS. Only if the data will be public would they be accessible for journalists and civil society organizations around the world, which have played and will continue to play an important role in investigating and exposing BEPS. Moreover, country-by-country data will help to inform the public debate on corporate tax. In a survey by PwC of 1,344 CEOs around the world, 59% of respondents agreed that multinationals should be required to publish key financial data on a country-by-country basis. Thus, a clear majority of multinationals themselves also supports publication requirements.

Furthermore, publication of country-by-country data would be essential to identify in good time new BEPS problems, which may arise when the current action plans are being implemented. Without public data, tax authorities of individual countries may not be able to identify patterns in worldwide country-by-country data that point to new BEPS problems. Governments would also find it more difficult to develop targeted policy measures to address new BEPS problems if tax authorities cannot access the country-by-country data of individual firms.

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2 See also the final communiqué of the Global Partnership for Effective Development Co-operation (GPEDC) in Mexico in April 2014.

If some countries unfortunately continue to block full publication of all firm-level country-by-country data, the OECD should find alternative ways of making the data available for research and policy purposes. One way could be to aggregate data from all reporting firms worldwide by main industry classification and publicly disclose these data. Although this would be better than keeping the data secret, it would create some problems, e.g. in allocating some firms with varied business to particular sectors.

A key lesson from the analytical work that has been done on the tax dodging practices employed by leading multinationals is that, at an industry level, they tend to adopt variations on the same basic practices. For example, since the late 1990s, leading players in the global pharmaceutical and software industries have become increasingly involved in transferring the ownership of "intellectual property" to low-tax jurisdictions at very low initial costs, and then paying royalties to their own subsidiaries in these jurisdictions. While there are interesting variations in the practices employed by these companies, at the industry level many of the practices, and indeed the jurisdictions they use, are very much the same.

Similarly, in the case of global agribusiness (bananas, coffee, cereals and grains, etc.), similar practices have been developed to transfer key steps in the industry value chain to offshore low-tax jurisdictions, in many cases by establishing parent-owned service companies in low-tax jurisdictions like the BVI, Bermuda, or Cayman, and then selling management services, franchising, and financial services to the parent companies from these jurisdictions at prices that are very difficult to evaluate on the basis of arm’s-length criteria without extensive audits.

The use of offshore intra-company debt to "asset strip" subsidiaries in higher-tax jurisdictions is another common industry practice, especially in capital intensive industries like shipping, autos, industrial goods, oil and gas, and utilities.

Another method could be for the OECD to combine all country-by-country data reported by firms worldwide and provide confidential micro data access to accredited researchers via a secured data system. An example of an existing similar arrangement concerns the global financial database compiled by the Bank for International Settlements. This database combines confidential data from central banks and other sources all over the world. The full data set is not accessible even to the central banks reporting to the BIS. Only BIS researchers and accredited external researchers have access to the database, and as is usual with confidential micro datasets, research results can only be exported and published in a way that does not disclose confidential information about individual companies.

We encourage the OECD to think of more ways and arrangements of making the country-by-country data available. Note that different ways of making the data available, such as publishing aggregated country-by-country data and providing access to micro data for accredited researchers, can complement each other. Therefore the OECD should aim to make the data available in various ways and formats.

We emphasise once more that public availability of firm-level country-by-country data would offer many more possibilities for assessing BEPS than anything else. Alternative ways of making the data available may be a necessary but, we hope, temporary solution. Even though the OECD may not be in a position to recommend to all its members that data should be made publicly available, it could encourage individual members to introduce disclosure requirements at the national or regional level, building on initiatives such as the EU’s fourth capital requirements directive and the US Dodd-Frank Act. The existence of such requirements for specific sectors shows that there is no valid reason to regard this type of aggregate data as confidential. We understand that tax authorities are accustomed
to regarding tax returns as confidential. However, the data specific in the country-by-country reporting template proposed by the OECD in the report published this week is not of this type. It does not entail information that would normally be regarded as commercially confidential. It would be highly regrettable if simply because the template has been designed by tax officials the data supplied would be kept secret.

5. OTHER COMMENTS (QUESTION E)

Strategic spillover effects of tax policy

The IMF’s report concerning ‘spillover’ effects in international corporate taxation focused on two ‘spillover effects’ also known as fiscal externalities, first being a ‘base spillover’ where one country’s actions directly create an impact in other country’s Corporate Income Tax (CIT) base, while a second ‘strategic spillover’ induces directly or indirectly through investor or company pressure changes in other countries’ tax policies. The OECD BEPS project mainly discusses only the first type of ‘spillovers’, but fails to discuss the second type. It would be important to estimate the reduced policy space for developing countries in maintaining their desired set of corporate tax policies in a competitive environment. It would be important to know typical tax exemptions given to companies investing in both developing and developed countries and other possible reductions in effective corporate income tax rates that are beyond the nominal corporate income tax rates.

Capital flight

One way of estimating the fiscal damage of base erosion and profit shifting is through the analysis of capital flight. Capital flight has an effect on countries not only due to the movement of resources from developing countries to secrecy jurisdictions, but also due to the taxes that could not be collected in those countries where the profits were generated, as well as those that fail to be collected year after year on capital accumulated offshore; and the impact that such tax erosion has on infrastructure, health care, education, and general development possibilities. Therefore, Action 11 should also be an opportunity for generating data and methodologies that analyse and follow up on capital flight.

Different estimations have been made in relation to capital flight and illicit flows in recent years. For example, Henry (2012) makes an estimation based on the Balance of Payments residual model, taking 139 key countries (low or medium income countries) and calculating annual flows of capital flight from all of them. In Argentina, Gaggero et al. (2013) performed an analysis on capital flight in 2013 (the third of a ten year programme that started in 2006), as well as an initial assessment of the relationship between capital flight and aggressive tax practices. The research by Gaggero et el. is based on the Balance of Payments residual model, taking the data for 1970-1998 from a paper on Argentina's capital flight written by Basualdo and Kulfas (2002) and for 1999-2012, from the Balance of Payments, though taking into account that this method underestimates capital flight when a debt restructuring takes place, such as the one Argentina had in 2005. Gaggero et. all follow Henry’s methodology, calculating the yield generated by such offshore investments, arriving in that way at a more realistic figure of capital flight.

Global Financial Integrity (Kar 2013) has been monitoring global illicit financial flows through trade mispricing since a project by Baker, beginning with his book *Capitalism’s Achilles Heel* (Baker 2005); their latest work being on Brazil’s illicit flows between 1960 and 2012 (Kar 2014) In addition to using the Balance of Payments residual model for licit capital flight, Global Financial Integrity estimates illicit capital flows using IMF’s Trade Statistics, and uses the ‘gross excluding reversals’
specification to compare at the national level the reported exports and imports with those recorded by all potential partners globally.

REFERENCES


CIAT (2013), Disponibilidad de información pública de interés tributario en países de América Latina: Estado de Situación. Centro Interamericano de Administraciones Tributarias (CIAT).


**BEPS ACTION 11:**
Establish methodologies to collect and analyse data on BEPS and the actions to address it
4 August 2014 – 19 September 2014

Request for Input

A. Indicators of the scale and economic impact of BEPS

A.1. Indicators should be understood as tools aimed at providing general magnitudes or ranges which could be tracked to show trends over time for an individual country or globally, rather than necessarily being precise estimates of the scale and economic impact of particular BEPS behaviours (i.e. cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it.) or its total impact. Please provide any suggestions for possible indicators or sets of indicators that could be used on the basis of available existing data. Suggested indicators could be based on entities, cross-border groups of enterprises, tax jurisdictions or the global level, however, all types of indicators are welcome. Please note any caveats or limitations with the suggested indicators and data.

*A key and enduring difficulty with any indicator of alleged BEPS activity is determining, with a sufficient degree of confidence so as to be reasonably robust and reliable, whether a multinational’s cross border activities, including its value chain structure and funding, are dominantly driven by tax concerns or by other business reasons.*

*It is only if the apparent shift of activities or assets is primarily tax driven can a strong case be mounted that the arrangements are an instance of base erosion or profit shifting.*

*For example if a business has structured its business activities and their financing between say high tax country A and low tax country B primarily for non tax reasons (eg access to funding, access to markets, access to lower cost skilled labor, etc) then that part of the business activities and arms length profits associated with the low tax country B would not be an erosion of the tax base of Country A. These activities would not have otherwise been based in Country A even if the tax systems were identical.*

*Hence the suggested BEPS key performance indicator is: an analysis of the ‘n’ largest multinational economic groups data for alleged BEPS activity by an Advisory Panel of Tax Experts¹ and a subsequent Bayesian extrapolation of findings to the wider population of global businesses. (Essentially fitting the data obtained*

¹To limit allegations of bias or lack of understanding of commercial realities, it is recommended that the advisory panel be composed of a relatively small group of tax experts drawn from several leading tax administrations and the big four tax advisory firms, chaired by a neutral well respected and acknowledged subject matter academic such as Dr Brian Erard.
to a plausible probability distribution of BEPS activity. There are reasonably well-known and robust techniques for doing this from direct tax gap estimation approaches.

In practice, given the scale dominance of the largest global businesses (their cumulative share of the market) as well as their significant heterogeneity, the number ‘n’ should be able to be confined to a relatively small number (say ~30 or so largest Companies ranked by cross border sales). Analysing the 30 or so largest Companies tax outcomes should provide sufficient data for a robust indication of movements in overall BEPS activity over time.

It would seem likely to me that there would be calls to increasing the number ‘n’ of companies analysed above ~30 suggested (eg to the ‘Top 100’ multinational companies or to all multinationals greater than a certain size), but any increase in the sample size ‘n’ should be based on careful consideration of the information value of having a larger pool (the reduction in uncertainty of the estimate) versus the additional administrative time and costs of performing the survey as well as the compliance costs imposed upon those surveyed.

A.2. Please describe in detail what relevant data are currently collected and available for analysis in a specific country or for a larger group of countries. Please describe any other existing datasets that you are aware of that could be utilised to analyse and monitor BEPS, such as commercially available datasets. Please note whether the dataset contains information on companies’ country of incorporation and/or tax residence.

Given the current level of monitoring of the largest multinational corporations that is occurring, sufficient data on the country-by-country location of their functions, assets and risks, should already exist within tax administrations for a reasonably robust analysis of likely BEPS activity. Such detailed data is unlikely to be found in commercially available data sets.

B. Economic analysis of the scale and impact of BEPS

B.1. Measuring the scale and impact of BEPS (or the effects of counter-measures) could benefit from a baseline or “counter-factual” concept of corporate activity unaffected by BEPS behaviour. Please provide any suggestions on how to define and measure the non-BEPS counter-factual, or what issues should be excluded in a quantitative measure of BEPS.

As noted earlier, a key and enduring difficulty with any indicator of alleged BEPS activity is determining, with a sufficient degree of confidence, whether a multinational’s cross border activities, including the nature and location of its value chain structure and funding, are dominantly driven by tax concerns or by other business reasons.

In practice a case-by-case expert judgment needs to be made as to whether BEPS activities are robustly evidenced and what their nature and scale might be, hence the suggestion of a small Advisory Panel of Tax Experts for this purpose.
B.2. Please identify any potential methodologies for estimating the scale and impact of particular BEPS behaviours (either individually or in aggregate) based on available existing data for an individual country or globally. Methodologies using both available aggregate statistics as well as micro-level data are welcome. Please note any caveats or limitations with the suggested methodologies. For example, many data items in national accounts, financial statements, and tax returns may be impacted by BEPS behaviours, so what adjustments might be needed to reflect the BEPS behaviours, if any.

As is the case for top down measurement of income tax gaps, I would strongly suggest that top down methodologies based on national account data are not sufficiently robust to provide reliable data on BEPS on a country-by-country basis.

The signal of any BEPS activities that might be in the data is simply overwhelmed by the noise of economic movements.

B.3. Effective tax rates (ETRs) are used in many studies of the economic effects of BEPS. There are many different types of ETRs. Please suggest which specific ETRs should be used when measuring different types of BEPS behaviours and how to interpret them. If citing a particular analysis please be clear about the specific ETR being used, why it was selected, and any limitations. Effective tax rate measures may not capture all of the legislative and regulatory elements that affect BEPS behaviours. Please discuss any considerations of those other factors and how they might be included in an empirical analysis or how ETRs might be adjusted for them.

Differential effective tax rates (eg tax paid to accounting profit on a country by country basis) are at best a weak indicator of potential BEPS activities – their existence creates a ‘matter of concern’ to be reviewed (a potential review or audit case), but are not definitive of BEPS activity per se. That is, ETRs are useful intelligence for tax administration case selection, but are not good enough to draw a robust and reliable conclusion as to the ‘why’ the ETRs differ without a more detailed review/audit of the company.

Differential tax outcomes by Country could well be due to the existence of market pressures (eg market penetration activities), legitimate differential funding of markets, poor management, differential regulation, location specific environmental factors, prior year losses - or be indicative of BEPS activities undertaken for a dominant tax avoidance purpose.

Also as noted earlier, if tax is not the dominant or key reason for location specific functions, assets and risks of the multinational, the difference in ETRs may not be linked to BEPS. Tax differentials are only one factor, and often not the dominant one, in deciding where to locate various parts of the business value chain.

B.4. Please provide suggestions for currently available and potentially available data, methodologies, and available studies to assess BEPS-related spillover effects. Spillover effects may occur across countries (e.g. BEPS-related tax policy
aspects of one country that affects other countries’ economies) as well as within countries (e.g. competitive effects). Please note any caveats or limitations with the suggested methodologies.

C. Economic analysis of the impact and effectiveness of actions to address BEPS

C.1. Please provide any suggestions on additional existing available data and methodologies to develop economic analysis of the effects of BEPS counter-measures. If these data or methodologies are already mentioned above, please note their relevance for this purpose and indicate how they should be used. Are there specific sources of data, methodologies or analyses of any actions taken to address any of the particular BEPS behaviours discussed in the other BEPS action items?

See previous comments.

D. New types of data to be collected and tools to monitor the effectiveness of the actions taken to address BEPS on an ongoing basis

D.1. Please provide any recommendations for new types of data, including types of data that taxpayers should provide to tax administrators, to be collected as part of future indicators for monitoring the effectiveness of BEPS counter-measures and to improve economic analysis of BEPS. Please note how the data could be used, and any caveats or limitations of the dataset. Also, please comment on how the suggested data might be used in such a way to respect taxpayer confidentiality and minimize the administrative costs for tax administrations and businesses.

Rather than imposing a relatively costly census style data collection on corporates on a country-by-country basis, I would strongly suggest that a sample based approach of around 30 of the largest corporates data should provide sufficient information regarding the scale and nature of BEPS activities.

These very largest corporates would already be under regular review/audit by tax administrations so additional administrative and compliance costs would be minimized. The Exchange of Information articles of existing Double Tax Conventions /Agreements already provide for a mechanism by which to conduct the review in a manner that respects and protects taxpayer confidentiality. Tax administrations could release aggregated data on their findings BEPS activities in a manner that respects and protects taxpayer confidentiality.

(A separate question is why corporates really require confidentiality regarding their country-by-country tax outcomes. Some already provide such information as part of their annual report disclosure.)

D.2. Please provide any recommendations for additional tools, beyond those indicators specified in A.1., that could be used to monitor the effectiveness and economic impact of the actions taken to address BEPS on an ongoing basis.
E. Other comments
E.1. Please provide any other comments you may have regarding Action 11 of the BEPS Action Plan, including any additional information that you would consider useful in identifying tools and methodologies to analyse BEPS and the actions to address it.

E.2. If you have conducted research and analysis of the scale and economic impacts of BEPS and potential countermeasures, we invite you to share your analyses and datasets.

E.3. Responses to this invitation should be sent electronically (in Microsoft Word format) by email to CTP.TPS@oecd.org by 19 September 2014 at the latest. Unless otherwise requested at the time of submission, responses to this invitation will be posted on the OECD website. In order to maximise the effectiveness of your input we suggest you provide only brief comments or references to any publications that may contain more details. If you are making this submission on behalf of an organisation, please provide the name of the organisation.

Stuart Hamilton is currently completing a PhD at the University of New South Wales focused on tax risk management by large corporations. He is a former senior executive of the Australian Tax Office, the Organisation for Economic Co-operation and Development, and a big 4 accounting firm.