Transfer pricing: BEPS Actions 8–10 Financial Transactions

International Tax

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CIOT has responded to the OECD's Public Discussion Draft on transfer pricing for financial transactions, continuing the work of the G20/OECD's BEPS project under Actions 8 to 10 with the mandate to 'Align transfer pricing outcomes with value creation'.

In July 2018 the OECD published a non-consensus discussion draft on transfer pricing for financial transactions under the mandate of the Report on Actions 8-10 of the BEPS Action Plan (Aligning transfer pricing outcomes with value creation).

The discussion draft provided a lot of background information and raised some key questions in the development of guidance in this area in pricing specific transactions that have historically posed challenges. The CIOT welcomed this as providing a useful starting point to developing guidance that should benefit taxpayers and tax administrations. We noted that the discussion draft is generally well balanced, constructive and informative.

However, we also noted that the discussion draft sets out a broad framework to expand the existing guidance and to document practices in applying the OECD Guidelines. For the framework to be effective, it will require further explanation on how it should be applied in practice and consensus amongst OECD members. The fact that the OECD is at the moment unable to come to a consensus view on this, suggests that a public consultation on the issues raised in the discussion draft would be a useful next step. Our response set out some areas, which we think it would be helpful for the OECD to consider as it develops the guidance further.

We suggested that the OECD should consider the complexity and administrative burden arising from the suggested treatment in any guidance, particularly of the implication that a full functional analysis and documentation exercise is required for

all intra-group financial transactions. In our view this is overly burdensome and this use of thresholds and safe harbours should be considered to limit the time incurred by both taxpayers and tax administrations where the underlying exposure or risk is minimal. Cash pooling by treasury functions is an area where the use of thresholds/safe harbours may be particularly appropriate.

Increasingly, countries are introducing tax rules that impact cross border transactions that are not strictly aligned with the arm's length principle. More broadly, there remains areas of discussion among practitioners (which was common to the profit splits and hard to value intangibles projects) whether the purpose of the guidance is to identify the arm's length price for transactions based on what third parties actually do, or rather whether the objective is to identify what third parties placed in similar situations would do. We suggested that it may be useful to spell this distinction out more clearly, and to which transactions each approach should be adopted.

In relation to the section on Treasury functions (Section C) our submission to the OECD expressed some reservations about suggested approaches in terms of using the group credit rating as a proxy for local entity credit rating. We do not think that either of these would achieve tax certainty or easily enable tax compliance by MNEs and suggest that further detailed guidance is required as how such proposals should be applied. Furthermore, the approaches are not aligned with the commercial considerations that external lenders will have when making a lending assessment.

More generally, we welcomed the inclusion of examples in three sections of the discussion draft and said that it would be similarly welcome and useful to have examples in the remaining sections. In addition, as with all OECD guidance, the closer that several examples can be to demonstrating the salient features that would lead to the appropriateness of different approaches (or demonstrate the BEPS risk that the OECD seeks to address) would be welcome.

Our full submission can be viewed on the CIOT website.