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# Digitale Wirtschaft und BEPS – Ertragsteuerliche und abkommensrechtliche Aspekte

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Digitale Wirtschaft – E-Commerce im Lichte von BEPS  
Wien, 27. Jänner 2016

## Action 1 | Digital Economy

### ***ACTION 1***

#### ***Address the tax challenges of the digital economy***

*Identify the main difficulties that the digital economy poses for the application of existing international tax rules and develop detailed options to address these difficulties, taking a holistic approach and considering both direct and indirect taxation. Issues to be examined include, but are not limited to, the ability of a company to have a significant digital presence in the economy of another country without being liable to taxation due to the lack of nexus under current international rules, the attribution of value created from the generation of marketable location-relevant data through the use of digital products and services, the characterisation of income derived from new business models, the application of related source rules, and how to ensure the effective collection of VAT/GST with respect to the cross-border supply of digital goods and services. Such work will require a thorough analysis of the various business models in this sector.*



## Action 1 | *Berichte*

Datum	Bericht	Seiten
24. 3. 2014	Public Discussion Draft BEPS Action 1: Addressing the Tax Challenges of the Digital Economy (24 March 2014 – 14 April 2014)	81
16. 4. 2014	Comments Received on Public Discussion Draft BEPS Action 1: Addressing the Tax Challenges of the Digital Economy (16 April 2014)	463
<b>16. 9. 2014</b>	<b><i>Addressing the Tax Challenges of the Digital Economy – 2014 Deliverable</i></b>	<b>202</b>
18. 12. 2014	Discussion Drafts for Public Consultation International VAT/GST Guidelines – Guidelines on Place of Taxation for Business-to-Consumer Supplies of Services and Intangibles – Provisions on Supporting the Guidelines in Practices (18 December 2014 – 20 February 2015)	23
25. 2. 2015	Comments Received on Public Discussion Drafts International VAT/GST Guidelines – Guidelines on Place of Taxation for Business-to-Consumer Supplies of Services and Intangibles – Provisions on Supporting the Guidelines in Practices (25 February 2015)	240
<b>5. 10. 2015</b>	<b><i>Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report (5 October 2015)</i></b>	<b>290</b>

## Action 1 | *Inhalt*

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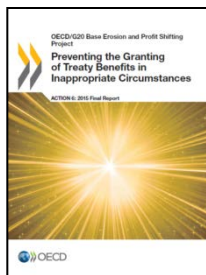
### ▪ Chapters

- Chapter 1. Introduction to tax challenges of the digital economy
- Chapter 2. Fundamental principles of taxation
- Chapter 3. Information and communication technology and its impact on the economy
- Chapter 4. The digital economy, new business models and key features
- Chapter 5. Identifying opportunities for BEPS in the digital economy
- Chapter 6. Tackling BEPS in the digital economy
- Chapter 7. Broader direct tax challenges raised by the digital economy and the options to address them
- Chapter 8. Broader indirect tax challenges raised by the digital economy and the options to address them
- Chapter 9. Evaluation of the broader direct and indirect tax challenges raised by the digital economy and of the options to address them
- Chapter 10. Summary of the conclusions and next steps

### ▪ Annexes

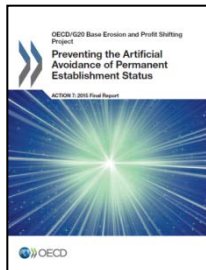
- Annex A. Prior work on the digital economy
- Annex B. Typical tax planning structures in integrated business models
- Annex C. The collection of VAT/GST on imports of low value goods
- Annex D. OECD International VAT/GST Guidelines – Chapter 3
- Annex E. Economic incidence of the options to address the broader direct tax challenges of the digital economy rule

## Digitale Wirtschaft | Themenstellungen



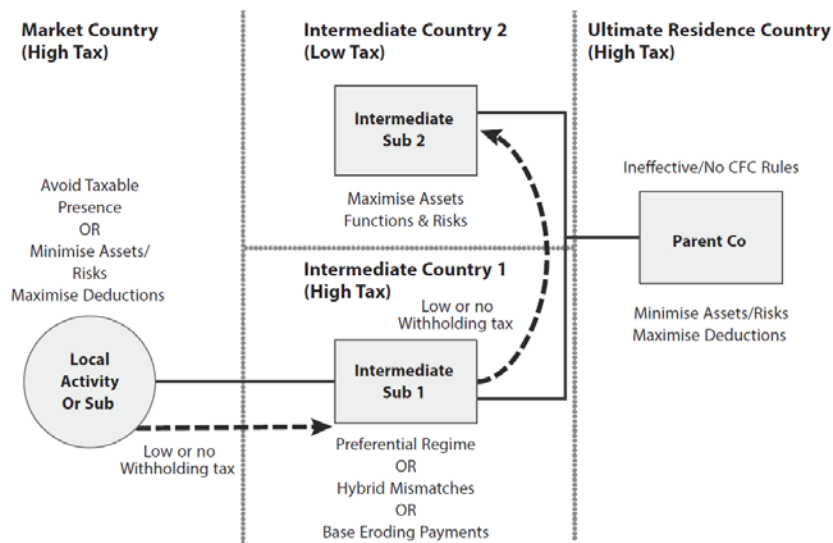
Action 1 (Rz 213 ff)

**Action 6**



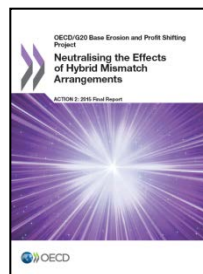
Action 1 (Rz 215 ff)

**Action 7**



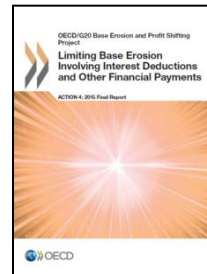
Action 1 (Rz 234 ff)

**Action 3**



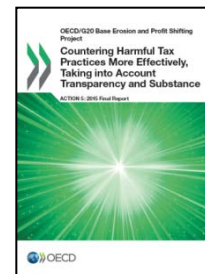
Action 1 (Rz 219)

**Action 2**



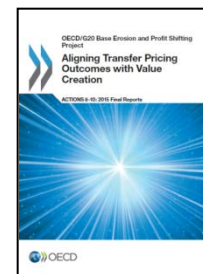
Action 1 (Rz 220 ff)

**Action 4**



Action 1 (Rz 223 f)

**Action 5**



Action 1 (Rz 225 ff)

**Actions 8-10**

## Betriebsstätten | *Ausnahmenkatalog*

- Action 1 (Rz 215 ff, 357) → Action 7
- Überarbeitung des *Ausnahmenkatalogs des Art 5 Abs 4 OECD-MA* und Einschränkung auf Tätigkeiten vorbereitender Art und Hilfstätigkeiten (samt Überarbeitung des Art 5 Z 21 bis 31.1 OECD-MK)
- Betrifft zB sehr großes Warenlager eines Online-Händlers

*Replace paragraph 4 of Article 5 by the following (changes to the existing text of the paragraph appear in bold italics of additions and ~~strikethrough~~ for deletions):*

4. Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:

- a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;*
- b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;*
- c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;*
- d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;*
- e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity ~~of a preparatory or auxiliary character;~~*
- f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), ~~provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character;~~*

*provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.*

## Betriebsstätten | „Anti-Fragmentation“

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- Action 1 (Rz 215 ff, 357) → Action 7
- Betriebsstättenbegründung auch bei ***Tätigkeiten vorbereitender Art und Hilfstätigkeiten bei ergänzenden Funktionen, die Teil einer zusammenhängenden Wirtschaftstätigkeit sind*** (samt Ergänzung des Art 5 Z 30.2 bis 30.4 OECD-MK)

*Add the following new paragraph 4.1 to Article 5:*

*4.1 Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and*

- a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or*
- b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,*

*provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.*



## Betriebsstätten | Vertriebsmodelle

- Action 1 (Rz 215 ff, 357) → Action 7
- Anpassungen des Art 5 Abs 5 und 6 OECD MA zur Begründung von Betriebsstätten bei **Kommissionären und ähnlichen Vertriebs- und Marketingmodellen** (samt Überarbeitung des Art 5 Z 31bis 39 OECD-MK)

*Replace paragraphs 5 and 6 of Article 5 by the following (changes to the existing text of Article 5 appear in bold italics for additions and ~~strikethrough~~ for deletions):*

5. Notwithstanding the provisions of paragraphs 1 and 2 *but subject to the provisions of paragraph 6*, where a person — ~~other than an agent of an independent status to whom paragraph 6 applies~~ — is acting in a Contracting State on behalf of an enterprise and ~~has, and habitually exercises, in a Contracting State, an authority to conclude contracts, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are~~

*a) in the name of the enterprise, or*

*b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or*

*c) for the provision of services by that enterprise,*

that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.



## Betriebsstätten | *Vertriebsmodelle*

- Action 1 (Rz 215 ff, 357) → Action 7
- Anpassungen des Art 5 Abs 5 und 6 OECD MA zur Begründung von Betriebsstätten bei *Kommissionären und ähnlichen Vertriebs- und Marketingmodellen* (samt Überarbeitung des Art 5 Z 31bis 39 OECD-MK)

6. ~~An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.~~

a) *Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.*

b) *For the purposes of this Article, a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.*

## Verrechnungspreise / Immaterielle Wirtschaftsgüter

- **Aktualisierung zB des Kapitels VI der OECD Verrechnungspreisrichtlinien (OECD TPG)**
    - Identification of intangibles (Z 6.5-6.31 OECD TPG)
    - **Ownership of intangibles and transactions involving the development, enhancement, maintenance, protection and exploitation of intangibles (Z 6.32-6.85 OECD TPG)**
    - Transactions involving the use or transfer of intangibles (Z 6.86-6.109 OECD TPG)
    - Supplemental guidance for determining arm's length conditions in cases involving intangibles (Z 6.110-6.212 OECD TPG)
- 6.34 The framework for analysing transactions involving intangibles between associated enterprises requires taking the following steps, consistent with the guidance for identifying the commercial or financial relations provided in Section D.1 of Chapter I:
- i) Identify the intangibles used or transferred in the transaction with specificity and the specific, economically significant risks associated with the development, enhancement, maintenance, protection, and exploitation of the intangibles;
  - ii) Identify the full contractual arrangements, with special emphasis on determining legal ownership of intangibles based on the terms and conditions of legal arrangements, including relevant registrations, licence agreements, other relevant contracts, and other indicia of legal ownership, and the contractual rights and obligations, including contractual assumption of risks in the relations between the associated enterprises;
  - iii) Identify the parties performing functions (including specifically the important functions described in paragraph 6.56), using assets, and managing risks related to developing, enhancing, maintaining, protecting, and exploiting the intangibles by means of the functional analysis, and in particular which parties control any outsourced functions, and control specific, economically significant risks;
  - iv) Confirm the consistency between the terms of the relevant contractual arrangements and the conduct of the parties, and determine whether the party assuming economically significant risks under step 4 (i) of paragraph 1.60, controls the risks and has the financial capacity to assume the risks relating to the development, enhancement, maintenance, protection, and exploitation of the intangibles;
  - v) Delineate the actual controlled transactions related to the development, enhancement, maintenance, protection, and exploitation of intangibles in light of the legal ownership of the intangibles, the other relevant contractual relations under relevant registrations and contracts, and the conduct of the parties, including their relevant contributions of functions, assets and risks, taking into account the framework for analysing and allocating risk under Section D.1.2.1 of Chapter I;
  - vi) Where possible, determine arm's length prices for these transactions consistent with each party's contributions of functions performed, assets used, and risks assumed, unless the guidance in Section D.2 of Chapter I applies.

## Verrechnungspreise / Immaterielle Wirtschaftsgüter

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### ▪ Aktualisierung des Kapitels VI der OECD Verrechnungspreisrichtlinien (OECD TPG)

6.71 If the legal owner of an intangible in substance:

- performs and controls all of the functions (including the important functions described in paragraph 6.56) related to the development, enhancement, maintenance, protection and exploitation of the intangible;
- provides all assets, including funding, necessary to the development, enhancement, maintenance, protection, and exploitation of the intangibles; and
- assumes all of the risks related to the development, enhancement, maintenance, protection, and exploitation of the intangible,

then it will be entitled to all of the anticipated, *ex ante*, returns derived from the MNE group's exploitation of the intangible. To the extent that one or more members of the MNE group other than the legal owner performs functions, uses assets, or assumes risks related to the development, enhancement, maintenance, protection, and exploitation of the intangible, such associated enterprises must be compensated on an arm's length basis for their contributions. This compensation may, depending on the facts and circumstances, constitute all or a substantial part of the return anticipated to be derived from the exploitation of the intangible.

6.72 The entitlement of any member of the MNE group to profit or loss relating to differences between actual (*ex post*) and a proper estimation of anticipated (*ex ante*) profitability will depend on which entity or entities in the MNE group in fact assumes the risks as identified when delineating the actual transaction (see Section D.1 of Chapter I). It will also depend on the entity or entities which are performing the important functions as reflected in paragraph 6.56 or contributing to the control over the economically significant risks as established in paragraph 1.105, and for which it is determined that an arm's length remuneration of these functions would include a profit sharing element.

6.56 In considering the arm's length compensation for functional contributions of various members of the MNE group, certain important functions will have special significance. The nature of these important functions in any specific case will depend on the facts and circumstances. For self-developed intangibles, or for self-developed or acquired intangibles that serve as a platform for further development activities, these more important functions may include, among others, design and control of research and marketing programmes, direction of and establishing priorities for creative undertakings including determining the course of "blue-sky" research, control over strategic decisions regarding intangible development programmes, and management and control of budgets. For any intangible (i.e. for either self-developed or acquired intangibles) other important functions may also include important decisions regarding defence and protection of intangibles, and ongoing quality control over functions performed by independent or associated enterprises that may have a material effect on the value of the intangible. Those important functions usually make a significant contribution to intangible value and, if those important functions are outsourced by the legal owner in transactions between associated enterprises, the performance of those functions should be compensated with an appropriate share of the returns derived by the MNE group from the exploitation of intangibles.

## Verrechnungspreise / Immaterielle Wirtschaftsgüter

- **Aktualisierung zB des Kapitels VI der OECD Verrechnungspreisrichtlinien (OECD TPG)**
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  - **Supplemental guidance for determining arm's length conditions in cases involving intangibles (Z 6.110-6.212 OECD TPG)**

### *Valuation is Highly Uncertain*

Would independent parties have agreed on a mechanism to address high uncertainty?

6.185 If independent enterprises in comparable circumstances would have agreed on the inclusion of a mechanism to address high uncertainty in valuing the intangible (e.g. a price adjustment clause), the tax administration should be permitted to determine the pricing of a transaction involving an intangible or rights in an intangible on the basis of such mechanism. Similarly, if independent enterprises in comparable circumstances would have considered subsequent events so fundamental that their occurrence would have led to a prospective renegotiation of the pricing of a transaction, such events should also lead to a modification of the pricing of the transaction between associated enterprises.

### *Hard-to-value intangibles (HTVI)*

*Ex-post* evidence as provides presumptive (= rebuttable) evidence for the valuation *ex-ante*.

6.188 In response to the considerations discussed above, this section contains an approach consistent with the arm's length principle that tax administrations can adopt to ensure that tax administrations can determine in which situations the pricing arrangements as set by the taxpayers are at arm's length and are based on an appropriate weighting of the foreseeable developments or events that are relevant for the valuation of certain hard-to-value intangibles, and in which situations this is not the case. Under this approach, *ex post* evidence provides presumptive evidence as to the existence of uncertainties at the time of the transaction, whether the taxpayer appropriately took into account reasonably foreseeable developments or events at the time of the transaction, and the reliability of the information used *ex ante* in determining the transfer price for the transfer of such intangibles or rights in intangibles. Such presumptive evidence may be subject to rebuttal as stated in paragraphs 6.193 and 6.194, if it can be demonstrated that it does not affect the accurate determination of the arm's length price. This situation should be distinguished from the situation in which hindsight is used by taking *ex post* results for tax assessment purposes without considering whether the information on which the *ex post* results are based could or should reasonably have been known and considered by the associated enterprises at the time the transaction was entered into.

## Fragen?

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