How Competing Agendas hurt Business in BEPS

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I "grew up" believing that publications of the OECD are the bibles of taxation. They are scientific master pieces, tell you what to do and, like other holy books, are often open for multiple interpretations. My multiple contacts with the OECD over several years strongly nuanced that view.

First, there were the invitations to congresses: in the 90's getting Jeffrey Owens to speak at an annual event of the now extinct European American Tax Institute was the Holy Grail. Public appearances by CFA staff were not that common.

Then came the new millennium and with it an increased openness from the OECD for stakeholder input. As representative for the Tax Executives Institute I was fortunate to participate in consultations ranging from business restructurings to the allocation of profits to PE's and finally intangibles. We were in awe of sitting in the big room with tables shaped in a horse shoe around the secretariat; the raising of the flags to say something; and the pre-meetings with BIAC, the Business and Industry Advisory Committee to the OECD, to discuss strategy. Though we disagreed strongly with many OECD points, we remained humbled by the thought that whatever we came up with among ourselves in a few hours of reading had to be put against the hundreds of hours spent by the CFA (Committee on Fiscal Affairs) Secretariat; they debated what to write with tens, if not hundreds, of people. We explained business as good as we could, the phrase "business should not care where they pay tax, as long as they pay it once only" became my mantra.

In the early 2010's disagreement with a CFO on tax policy landed me with a new job in the midst of tax policy: I became a delegate to the OECD for the Danish Competent Authority on transfer pricing. This allowed me a unique view of the drafting process, the initiating consultations, and – most importantly – the OECD member country input to those documents. My faith in the technical excellence of the secretariat was only confirmed: they have the power to compose the holy books of international taxation. My feelings are mixed about what the disciples from the different governments do with those drafts. The governments cover a wide range:

1. there is an often silent majority;
2. a handful of delegates who always participate actively, who are skilled, mostly even handed, and truly trying to create useful international tax guidelines; and
3. there are those who are run by fear and suspicion, who will try to stop anything hinting at improving taxpayer positions or taxpayer certainty, opting instead for continuously expanding the weaponry of government. To them double taxation is seemingly acceptable (if not justifiable) collateral damage. These people are often under strict instructions from home; they are there to protect or expand their countries tax base, they are not there to write clearer or better guidelines.

The latter changed with BEPS. The member troops were put on marching orders: there was grand goal to be reached on tight schedule and whoever did not follow orders was left in no doubt that such behaviour would not be tolerated. This was obviously made easier by the goal of BEPS: expanding government weaponry.

What nonetheless bind especially the active members, but also a wider circle, is the undeniable sense of camaraderie. Outside the meeting room during coffee breaks, lunches in nearby parks, and evening drinks at a nearby café, personal bonds are forged which pay their dividends back in the meeting room. Delegates know each other, trust each other, and are therefore all the more capable working through professional disagreements. This is the valuable unique intangible of regular face to face meetings at the OECD; it has a truly significant function.

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Having learnt what I have wished to learn from government's views on taxation, and missing business, I moved back “to the other side” a few months ago. This year I found myself again at the OECD tables. I participated in the public business consultations on BEPS; “public” has grown to become live video broad casts (what a difference compared to a mere twenty years ago).

What struck me during my visit in February and my visit last week is the clashing of agendas and the limitations in communication and missed opportunities they cause. Two examples.

First, the discussions on commissionaire PE’s. Zimmer, Dell, Roche and other Supreme Court decisions contributed to putting this item on the BEPS agenda. The OECD had alternative texts, and it was clear that business was divided: some – seeing opportunities – swore by alternative A, others saw escapes through B, C, or D. What business seemed united on, maybe even through a BIAC pre-meeting, was that the war about whether commissionaires constituted PE’s was by no means over. So much of the day was spent debating that issue, rather than suggesting how such a PE’s income should be allocated. Several commentators did note that the OECD provided no guidance on profit allocation in the draft. However – probably seeing a discussion of this topic as capitulation to the PE argument – business did not make any useful suggestions themselves on this matter. Marlies de Ruiter closed the day by saying that there is no time for a further face to face consultation on this. Business could have argued in the room that due to a lack functions in a commissionaire, the income allocable to a commissionaire PE is hardly worth the effort. But that opportunity is now gone and I do not see group 3 of the member state delegations here above, making that argument either.

Another example, from last week, may have gone unnoticed by many. An asset rich company was arguing the case against recharacterisation and special measures. Despite several hints from Italy and Holland the tax director kept on insisting to talk about the important functions that 55 people were performing in a Cayman ownership company. He argued that profits follow ownership, which follows capital. A false dichotomy was presented: to place profits at the sites of operation which was Gulf of Mexico yesterday, Nigeria today and Brazil tomorrow, or at the 55 strong fixed place of ownership, the Caymans. He never mentioned whether there were 550 people at a Swiss or a US office, and if there were, what they were doing and why the profit should not follow them. I do not know, but do suspect that he was under instructions not to do so; that was his agenda. He was there to protect or reduce his company's and his industry's tax rate, he was not there to write clearer, better guidelines.

It is a pity that in this process, the whole room, I guess close to 300, was robbed of the opportunity to discuss this difficult issue. How do you allocate profit between ownership functions and the functions managing a business? It seems obvious to me that there are situations in which the owner of drilling rig would find someone to market that rig and operate it for a fixed fee and let the owner keep all the profits. It seems just as obvious that sometimes a rig operating head office would be prepared to lease a rig for a fixed price, get someone to operate that rig and that the lessor and the rig operator would let the rig operating head office keep all the profits: afterall, it found the customer, negotiated the contracts, found the rig, found the crew, and most importantly, controls and bears all the risk. The question to answer is which happens when. We never got to that discussion. Instead it is left for the secretariat to figure out themselves, and then for the member state delegates – all three groups of them – to make the final text. Business has lost the opportunity to influence that discussion.

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Now that I have grown up a little more, I have come understand that the OECD publications are not holy books, but they are good books. They are books that reflect the remainder of the best intentions of the CFA as their original authors, after they have been shaped and reshaped by the imperfect communications between competing agenda's.

There is no doubt that today's public engagement of the OECD, compared to twenty years ago, makes for better OECD documentation. However, being relatively new at this, we the taxpayers, have to learn that you do not solve issues or improve them, by not talking about them. I know there will be people that disagree, but when faced between the choice of "clever agendas" and transparency, I will always choose transparency: agendas tend to be personal; daylight covers everyone.