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Transparency Under the BEPS Plan: What Holistic Approach?

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Spotlight was shed on transparency by the OECD's BEPS Plan, where a set of Actions was put forward under the flag of "ensuring transparency while promoting increased certainty and predictability". The document suggests a "more holistic approach" to the matter, and states that the obtaining of "timely, comprehensive and relevant information on tax planning strategies" should always be followed by the public implementation of mechanisms able to "provide business with the certainty and predictability they need to make investment decisions".

The wording as such is obviously praiseworthy. The Actions proposed under the cause for transparency, however, seem not to address the latter mechanisms as carefully as they deal with the former. Action 11 is concerned with the identification of taxpayers' data. Action 12 recommends the "design of mandatory disclosure rules for aggressive or abusive transactions". Action 13 is mainly intended to "develop rules regarding transfer pricing documentation to enhance transparency for tax administration", requiring that "MNE's provide all relevant governments with needed information". Article 14, when claiming the improvement of MAP procedures under tax treaties, is also much in the interests of tax administrations themselves, especially when authorizing agents to consult together outside formal diplomatic channels.

That is to say, the BEPS approach does not seem that much "holistic", and the terms of the Plan indicate that the taxpayer is the only one who is effectively required to be transparent. At the end of the day, transparency is considered a mere way towards wide exchange of information, and the debate underlying the BEPS initiative leaves aside the much broader meaning the concept can take.

Indeed, transparency is no new under the sun. The notion was construed as a precept of governance and has for long been a matter of concern to the international debate. In public finance literature, it is a key characteristic of an ideal tax system dating back to Adam Smith, who believed that taxes should be crystalline, that is, their amount should be clear and evident to the taxpayer, involving the lowest cost possible for collection. As early as in 1992, the World Bank's "Governance and Development"

Report clarified that “efficient and accountable management by the public sector and a predictable and transparent policy framework are critical to the efficiency of markets and governments”. Similar thoughts were soon presented by the United Nations in the 1997 “Governance for Sustainable Human Development”, where “transparency is built on the free flow of information”, implying that “process, institutions and information are directly accessible to those concerned with them”.

As means of good governance, transparency was previously addressed even by OECD itself. The “Enhanced Relationship” Paper launched in 2007 recognizes that “taxpayers will want the openness and transparency expected of them under the enhanced relationship to be reciprocated by revenue bodies”. The matter returned to the Organization’s agenda as recently as in 2010, when the “Citizens-State Relationship” Report concluded that “awareness and transparency are basic requirements for building public engagement and trust”, i.e. “citizens must be aware of the taxes they are paying and be educated about the system of taxation and budgeting, while government must be transparent about tax collection and public spending”.

While aggressive tax planning gained momentum, the BEPS Action Plan joined the call for transparency. Its proposal, however, is one-way oriented. The document focuses only on the perspective of tax administrations, and the notion of transparency, from a precept aimed both at taxpayers and States, ended up corresponding to tax agents having wide access to personal data belonging to the former.

Perhaps the overall reigning climate which inspired the BEPS initiative may explain the general tone adopted by the Plan when addressing the need to ensure transparency. Alleged undertaxation derived from international arbitrage was labeled as “unfair” in times of general economic downturn, and entities from the third sector were encouraged to demand from MNEs wide and public disclosure of information on structures adopted and corresponding amount of taxes collected. The OECD document is nothing but a solution derived from the intense political pressure placed on it to combat “aggressive” tax planning after the financial crisis that peaked in 2008.

If no doubt remains that taxpayers ought to be transparent in their transactions, so that illicit and harmful behaviors do not remain concealed from authorities, the reasons and circumstances for the advent of the BEPS Plan are not enough to justify the strong deviation found therein from previous works on tax transparency.

After all, the common notion whereby tax havens exist only in so far as tax hells are to be found elsewhere indicates that MNEs are not the only ones to blame for the alarming scenario presented as background by the Action Plan. While “aggressive” tax planning is encouraged by harmful tax competition undertaken by States themselves, elusive behaviors are also accompanied by much opaqueness on the part of the latter. Although no acknowledgment as such can be derived from the wording of the Plan, governments also have a lot to do with the circumstances under which the BEPS initiative was conceived.

This perspective is particularly important when it is realized that, whilst this unilateral transparency promptly enables a jurisdiction to clearly identify businesses undertaken

by its taxpayers elsewhere, the taxpayers themselves are frequently faced at home with an outrageously large set of rules. The complexity of these rules, in preventing laymen from gaining access to general tax information and making it extremely hard for resident companies to comply duly with their tax obligations, constitutes a serious lack of transparency on the part of the State itself.

This is simply ignored under the BEPS Plan. The terms of the aforementioned Actions are prone to give the reader the impression that, notwithstanding that “transparency at different levels” is suggested by Plan, all Actions remain linked to the prevention of planning and structures adopted by the taxpayers - which is, in fact, the ultimate purpose of the project. If “different fronts” were opened by the Action Plan on the movement towards transparency, the goal envisaged by this crusade led by the OECD seems to remain one and only one: make the taxpayer transparent to the widest possible extent to tax administrations worldwide.

The “more holistic approach” proposed by the Action Plan, by comparison with what some of its terms may lead one to believe, fails in convincing that a transparency other than the transparency of taxpayers’ vis-à-vis authorities is being dealt with effectively. Neither does this approach transcend, by any means, the spirit of the works carried out by the Global Forum, the standards of which currently steer the cause for transparency.

If the OECD recognizes the term “transparency” its broader meaning, thus extending it to the State itself and covering the tax system as a whole, issues like tax competition and the attitude of tax administrations towards taxpayers can be effectively brought to light. Only then can the BEPS phenomenon be properly dealt with. Should transparency remain a mere antithesis of tax secrecy, then strong criticisms of this biased movement are deserved both from the perspective of developing countries and general basic taxpayers’ rights.

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This entry was posted on Wednesday, June 24th, 2015 at 10:32 am and is filed under [BEPS, Tax Avoidance, Tax Treaties](#)

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