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OECD Struggling to Get to the BEPS Finish Line before G20 Project Collapses

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What is going on in the corporate tax world? In 2013 I predicted BEPS would be a success, at least based on the press release to be issued by OECD and G20 on January 1, 2016. I have always been a sceptic, if only because BEPS uses the wrong starting line for the project. It assumes countries are sovereign; they are not in an economic sense. At the Copenhagen IFA Congress 2013 Pascal Saint Amans implicitly acknowledged this by saying that not accepting sovereignty over tax matters would have been unacceptable for countries to start BEPS. Consequently, BEPS proposes many rules, much detail and thus conflicting interpretation rather than a simple approach where countries look each other in the eye and truly address the fact that the international business world is a global activity where borders are difficult to handle when it comes to allocating profits to countries; even when based on real activities. The effect of borders for tax means a reduction in global welfare (less dynamics, more paperwork, more unproductive activity).

What is going on?

The European Commission has published plans to jump ahead on BEPS, UNCTAD has published a report calling for a balance between anti tax avoidance measures and a good investment climate (FDI) (more details on these two aspects can be found in other blogs on this Kluwer site) and finally the United States have basically given up on BEPS and are wondering why they've ever started the process.

> Just one question before proceeding with the issues at hand: the current requirements to write TP reports for Revenue authorities around the world already burden the Revenue services such they frequently do not read the reports. How can one expect same Revenue services to deal with the avalanche of additional reports and information? How much extra staff is required and what are the estimated additional revenue proceeds? The business community is already gearing up to the additional compliance requirements by acknowledging more staff is required to collect the information and prepare the reports (= more deductible costs).

What does all this mean?

1. The EU wants to avoid the 28 member states adopt BEPS differently.

This is a legitimate concern since we don't have a true Internal EU Market. However the EU continues to speak about "aggressive tax planning" and at the same time France introduces measures in Spring 2015 soliciting for same aggressive tax planning behaviour (see my earlier blog). The EU is guided by the media in its expressions and not by sound politics with a vision. As part of tackling BEPS, the EU proposes a similar corporate income tax law text to be enacted as domestic law in all 28 member states (CCTB). To be administered by the various member states and conflicts to be resolved by domestic courts. Cross border losses to be spread over EU. Like in 2006 when Barroso pushed hard on CCCTB, again a pipe dream to think that losses will be spread across EU, let alone that there will be a second step, full consolidation. Meaning: EU will adopt BEPS measures (like the good obedient kid it wants to be vis-à-vis OECD), wasting time on proposing a half baked solution called CCTB and thereby weakens its internal market compared to other countries.

2. UN: the recent Addis Ababa conference shows in their final conclusions on tax matters a sense of carefulness missing in the EU.

Unlike the EU, the UN accepts that business is the engine for job creation and economic growth (para. 35). Where EU tries to lumber business with additional costs and difficulties without much diagnosis on effects, the UN embraces business based on a sound partnership and clear rules for both. The BEPS project is dealt with briefly "..(the UN) take into account the work of OECD for the Group of 20 on base erosion and profit shifting" (para. 28). That's it, no warm words of encouragement, no declaration to follow BEPS outcome and implement BEPS measures. Meaning more than half the countries in the world are not likely to follow BEPS proposals.

3. USA: finally a country that belatedly appears to realize what BEPS does to a country and to business.

A letter to Jack Lew, US Secretary of Treasury, dated June 9, 2015 from both the Chair of the Senate Finance Committee and the Chair of the House Ways and Means Committee does not spell much good for the OECD and BEPS project. It reads in part – after first detailing Congress' concerns about cbcr and issues like pe rules, GAAR rules and collecting sensitive data from US companies- as follows:

> *"In the coming months, we look forward to working with you with respect to the BEPS project. In the interim, we want to remind the Treasury Department that it has the ability to refrain from signing on to the BEPS final reports, and we expect you to do just that if doing so protects the interests of the United States and of U.S. persons. Many of the OECD's BEPS project objectives are sound, and international cooperation –as well as competition- in tax policies is desirable. We trust you agree, however, that precipitous decisions to impose constraints on U.S. tax policy and added burdens on U.S. companies, especially on the basis of weak empirics and metrics, are not desirable."*

At an OECD International Tax Conference in Washington on June 10, 2015 Robert Stack, US Treasury deputy assistant secretary (international tax affairs) expressed extreme disappointment in the OECD BEPS work. According to an article by Lee Sheppard in Taxanalysts on June 15, 2015, Stack said that the US is "extremely disappointed in the output and our collective failure in the BEPS project to do more and do better work than we've done". A Forbes article on the conference questions "Can the United States kill BEPS?". Many other reports have since been published, all agreeing the USA no longer dances to the OECD BEPS tune.

In addition, the USA has decided not to join the 80 countries working on BEPS action 15, Multilateral Instrument.

Altogether, the US does not appear to follow meekly the BEPS recommendations; on the contrary it will look at what's in it for them and for US business. If all countries would do so, BEPS would immediately suffocate.

Conclusions

It is evident that BEPS is not a given. On June 10, 2015 BIAC (the voice of business at OECD) issued a paper detailing its concerns about BEPS. It calls for a balance, addressing genuine concerns but at same time realizing that business creates jobs and is the growth engine for the world. That's the weakness of BEPS. Politicians have only listened to the media and not been strong in telling the true story (see my earlier blog about vote pleasers); now business, UNCTAD and US are telling OECD that a balance must be found. Else, BEPS will be derailed before it reaches the finish line. I am convinced, had the project used the correct starting line (acknowledging economic sovereignty no longer exists), this would not have happened. A waste of very valuable resources and the world is not much better off now.

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