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BEPS Project at half way – Entering the implementation stage

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Taxation is undoubtedly the unrivaled field where public interest needs and individual rights most evidently confront to each other. Until the second part of the last decade, the principle of reserve or legality which might be traced back to the Magna Carta, and was modernly adopted almost unanimously by western constitutionalism, set forth a clear dividing line between what was legitimate and what was not in arranging personal as well as corporate affairs from a tax perspective. In other words, it was beyond all dispute that nobody is obliged to contribute to public spending above the scope of a legal mandate, so that the discussion of what was one's fair share in taxes kept fully subsumed under the text and spirit of the tax laws enacted by parliaments in the exercise of the state tax jurisdiction.(1)

The well-settled traditional technical borders between tax planning and tax avoidance were deleted or at least diluted in the political language, particularly since the industrialized countries' profound dissatisfaction with revenue collection levels deepened after the 2008-9 world financial crisis. Unable to cut spending (including social spending) or raising taxes as means to balance national budgets, the political leaders tried to escape traditional legal concepts, replacing it for an all-embracing moral standard where everything appears to be reproachable except for a tax behavior consisting in the payment of the taxpayer's fair (maximum?) share under the circumstances, even if that outcome is somehow beyond the text and spirit of the law.(2)

And soon voices at both shores of the Atlantic spoke out in term of immoral or unpatriotic behavior,(3) as applied to the taxpayers' transactions that actually or potentially erode the national tax basis, even though their actions come within the scope of the law. At the basis of these developments there was a mistaken understanding of corporate life which can be predicated as follows: Money either goes as taxes to engross the government's coffer who applies it candidly to the finance of public needs (sometimes even beyond an adequate control), or to the pocket of greedy taxpayers that keep it for themselves against all sense of corporate social responsibility, or even worse, in violation of others' elementary human rights, including but not limited to the poorest' rights to be feed, sheltered, cured from diseases, and so on.

Under this over simplistic view, and in crisis times, the pendulum hit hard to MNEs(4) who allegedly, with the assistance of no less rapacious advisers,(5) manage to pay taxes nowhere in the world, making their owners richer than ever, and, thus, overcharging others (voters) with higher public levies. The mistake lays on the fact that money that do not fall within the government's coffer, do not directly make shareholders richer. In effect, while in corporate solution, resources are used to pay white and blue collar salaries, purveyors, contractors, are applied to finance R&D

expenses aimed at creating IP registrable patents and copyrighted property, then embedded in marketable goods and services that some way or another improve people's lives, to acquire business assets used in manufacturing and sales activities, and the like; i.e., they circulate among a wide spectrum of *flesh and bones persons*. Even if, as expected, businesses generate a distributable surplus, it must be kept in mind that most MNEs' capital is floated, so that the distributed income revert to the public rather than to a few selected group of super-rich owners.

Once the scapegoat was identified (i.e., MNEs), governments from industrialized countries went a step further and chose a hangman beyond national suspicion, i.e., they entrusted the work of changing the international corporate tax framework to a multilateral body which, in turn, were capable of summing up to the endeavor as much participants as possible; and, in this scenario, OECD took the lead first with the BEPS Action Plan developed together with G20 (countries accounting for 80% of global GDP),(6) and then by couching therein the particular BEPS-related needs of low income economies, working on them in conjunction with IMF, The World Bank, the UN and other regional tax bodies.

No matter the predominant political mood of the time, the most significant initial achievement of the OECD-G20 Project was to turn back the discussion of the international tax topics to a strict legal channel and out of the moral concerns which may not guide a legal analysis of the taxpayers' tax obligation and responsibilities.

OECD-G20's self-imposed goals under BEPS and the Action Plan were cyclopean : (i) making the global tax environment fairer than ever by closing loopholes provided by domestic rules in their intersection with each other, and adopting rules of international conventional law which would be adopted simultaneously and uniformly by all Nations through a new form of multilateral tax convention; (ii) all of that with the aim of making the global enterprise accountable for taxes at source (markets) and home, without altering the existent inter-nation equity and basic international tax paradigms, and within an audacious time frame (2 years). Not an easy task, beginning with listening to so many diverging voices at the same discussion table, overcoming different national or regional perspectives, and reaching workable and effective outcomes.

After two year of heavy work, the final report on the actions contemplated under the OECD-G20 BEPS Plan (consisting in more than 2,000 pages) were delivered on schedule, and approved by the G20(7) except for the case of the multilateral agreement that will embrace all proposals affecting DTCs, whose process is still active and programed to be terminated under a tight schedule.(8)

Soon after the October 5 final release, all type of comments coming from government, academia and business organizations were made on the Plan final outcomes; some very laudatory and others more or less critical. Some tax experts criticize that in some areas the outcomes did not go further, and others that at instances the standards adopted were too vague or remained open to optionality. The business community remained concerned with the fact that some recommendations might lead to double or multiple taxation.

In my view, there were no surprises: What had been done well before (i.e., in the discussion drafts enriched by the comments received and public hearings held during the 2-year process) remained satisfactory at the end, and what had been done poorly before was not significantly improved in the final reports.

At instances, as it happened with Action 1 and 7, on the digital economy and PEs, respectively, the

discussion drafts had fell short and the final documents, instead of stepping forward with a more precise definition, simply recognized that countries may wish to go further individually, such as adopting a digital PE concept, a withholding (such as the UK DPT) on digital economy's yields, or some sort of equalization levy. The level of optionality in this area does not sound very promising in terms of consistency between national tax systems.

If these moves were to become widespread it is not difficult to imagine a world where jurisdictional overlaps and cascade taxation will also become rampant soon. No clues are found on why formulary apportionment or other alternate paths to the arms' length principle (such as destination-based corporate tax)(9) were not pursued further in this area, but one can easily imagine that abandoning the traditional paradigms of international taxation was beyond discussion.

International coordination to avoid hybrid mismatch arrangement outside the umbrella of a treaty through primary and secondary or defensive adjustments, although a plausible initiative, is far from being a realistic, easily-implemented legislative tool at national level beyond the block of OECD-member industrialized countries.

As regards CFC regimes it is worth welcoming that the final recommendations appear not to be inclined to full income inclusion experiments like the Brazilian CFC regime, and that is certainly good news.

Similarly, substance and transparency are well balanced values in Actions 4 and 5 of the final reports.

PPT and LOB standards under Action 6 on treaty shopping are well received by the tax community at large, but would need to be kept as counter-balance measures aimed at avoiding abuses and nothing else; they should not stand by themselves or mistakenly understood by administrations as an ultimate DTT objective, since this is (as has always been) to avoid double juridical taxation.

As regards Actions 8-10, much has been already said during the process on intangibles, low-value added intra-group services, and cost contribution agreements. The good news is that, although using some wishy-washy language, the controversial issue of commodities valuation is finally set, preventing some over-aggressive tax administrations' interpretation. it is re-affirmed that whenever the taxpayers are able to provide reliable evidence on the execution date as the pricing date, and this is consistent with the actual conduct of the parties or with other facts of the case, that date must be respected, tax administrations should determine the price by reference to the pricing date agreed by the associated enterprises, and they are not allowed to resort to the price at boarding as deemed pricing date.

At first sight, there are no significant changes concerning Actions 12, on mandatory disclosure rules, Action 13 on CbC reporting and Action 14 on binding MAP arbitration

As regards Action 15, as anticipated, the implementation of the mandate is still to come.(10)

Finally, it is worth mentioning that for emerging economies there are some other significant issues beyond the content of the fifteen actions, such as policy and practical issues regarding the signing of tax treaties, and the granting of tax incentives, as well as guidance on voluntary disclosure programs, all of which have been addressed in other documents under the BEPS Project umbrella.(11)

And now it comes the implementation stage of the Plan where the risks are, *inter alia*, (i) a fierce states' competition on the grasping of the new (extended) global tax basis; (ii) a chauvinist sense of self protection on each player's MNEs vis-à-vis foreign MNEs, and (ii) the adoption of technically misaligned, uncontrolled, unilateral legislative measures which might lead to tax overlapping and cascade taxation in the international arena. Leading heads of the OECD/G20 project have long recognized that jurisdictional tax overlapping might occur for years to come, until countries harmoniously consent to the allocation of the new (greater) global tax basis.(12)

Bearing these risks in mind, the G20 Antalya Summit Communique calls for a "widespread and consistent implementation" monitored by OECD on the basis of a framework which includes even non-G20 countries committed to implement the BEPS project.(13) But serious doubts arise on how that mandate might be perfected in practice since OECD lacks coercive means on national governments beyond member states, so that chances of creating an un-level playing fields depending on the company's residence might arise. The own final reports conspire against consistency as the level of optionality available in a number of instances under the Final Reports allow countries decide how to implement recommendations with an aim at the protection of their own tax basis and competitiveness.

Moreover, since in real world tax innovations are more like a political game than a technical puzzle, so that legislative bodies in emerging economies might be tempted to subject BEPS final outcomes to an inter-nation equity scrutiny (e.g., the old but still alive residence-source conundrum), and, once filtered, they might try to cherry-picking from the fifteen actions and implement solely those outcomes (or those parts of them) which are beneficial in revenue terms, or at least neutral from a national perspective.

If as I envision it, that is going to be the case, an OECD-backed parallel educational process of national parliaments in emerging economies would be most advisable to make sure politicians understand the need and advantages of an *in totum* adoption of BEPS outcomes; but even that move, though desirable, may not secure success at national levels.

Local legislators will be starting from scratch, meaning that perhaps there are already rules or principles aimed at the same goal as that pursued by a given BEPS Action, so that from this angle, unless full replacement is decided, it would be almost improbable an *in totum* adoption of BEPS outcomes. In that case, the legislator will be faced with the decision to maintain the existing domestic approach (perhaps consisting in measures that have proved to be effective in the past) or combine it somehow with OECD-G20 newly-issued recommendations.

Looking at the Latin American region, finally, queries include whether OECD member countries like Chile and Mexico are going to amend recently enacted rules, including in the case of Chile, GAAR, CFC or thin capitalization rules; or in Mexico, rules dealing with situation dealt with in the final report of Action 2 (Hybrid Mismatch arrangements), or in the area of treaty shopping where the country has traditionally utilized LoB provisions and recently enacted rules to avoid double non-taxation under DTCs. Even other non-OECD countries in the region have modernized their tax system in recent years in areas which might overlap with BEPS recommendations including Brazil, Colombia, and Peru. Is a country like Argentina willing to abandon is widespread and longstanding application of GAAR in a treaty setting to replace it for LoB provisions or a treaty PPT? Time will tell how BEPS Action Plan's final recommendations are going to be accommodated at national levels, but disparities appears to be unavoidable.

(1) See, inter alia, *Gregory v. Helvering*, U.S. Supreme Court (1935); *SRL IKA Industrial Comercial Argentina*, Argentine Supreme Court (1958) and similar highest courts' cases elsewhere.

(2) The result was a sort of tax fundamentalism that having originated in the UK rapidly spread all over the EU.

(3) President Obama used this last expression to refer to *inversion* processes by U.S. MNEs.

(4) See, *inter alia*, Naville & Treavor, *Starbucks to Pay 20MM in Tax over Two years after Customers Revolt*, The Guardian, December 6, 2012; Bergin, *Amazon: Million-Dollar Tax shield*, Reuter, UK edition, Dec.6, 2012; White, *Foreign Companies Face UK Tax Investigation*, The Telegraph, March 25, 2013 (Facebook and Google cases); Dixon, Dawbagh & Artofky, *Google plans to litigate Us Tax Dispute with IRS*, Reuter, US edition, February 6, 2013; *A Choice for Corporate America: Are you with America or the Cayman Island?*, Sounders Business Blog, February 9, 2013; Kavoussi, *General Electric Avoid taxes by Keeping $108 Billion Overseas*, The Huffington Post, March 11, 2013.

(5) Although in a different context, and while discussing the exchange of tax rulings initiative, Angel Gurria (OECD Secretary General) fiercely attacked the legal profession by expressing: *"Many people try to kill our initiatives. Let's move with one united front and beware of legal dentist who want to take the teeth out of the legislation"*.

(6) In this matter, there is a line of OECD reports which are worth mentioning in chronological order: *Addressing Tax Risks involving Bank Losses* (2010), *Corporate loss utilization through Aggressive Tax Planning* (2011), *Report on Hybrid Mismatch Arrangements* (March 2012), *Report on BEPS –Base erosion and profit shifting* (October 2012), *Step Change in Tax Transparency* (June 2013), and, finally, *Action Plan on Base Erosion and Profit Shifting* (September 2013).

(7) The Final Reports were released on October 5, and approved by the G20 at the Antalya Summit on November 16, 2015.

(8) During 2016. This instrument, fair is to say, it is not yet fully free from conceptual and implementation question marks, and, at the very end, implementation would be conditioned upon a yet untested Nations' willingness to execute it.

(9) See on the topic, Devereaux and de la Feria, *Designing and Implementing a destination-based corporate Tax*, Oxford University Centre for business Taxation, WP 14/07, May, 2014; reproduced in Tax Notes International, May, 2015

(10) See note 8, above.

(11) See my earlier contributions to this blog.

(12) Pascal Saint-Amans recognized in a Fairfax interview that in the short term may be a *"…intensification of tax audits and tax controversy because governments are frustrated and may be more aggressive…" "As countries are more aggressive you have more controversy and more double taxation, but that's not due to a change in international rules ... That´s about countries trying to protect themselves."* See Brisbane G20 2014: Tax deal aims for even playing field, The Sydney Morning Herald, November 14, 2014.

(13) Communique, November 16, 2015.

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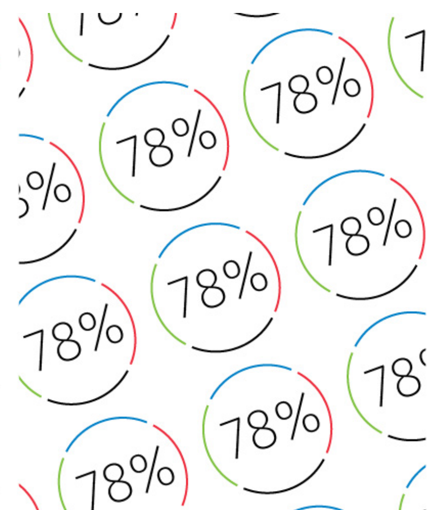

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