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# EDITORIAL

# The Base Erosion and Profit Shifting (BEPS) Initiative under Analysis

Ana Paula Dourado*

## 1 Recognition of the BEPS initiative as a brave step forward

The G20 call for a collective action on Base Erosion and Profit Shifting (BEPS)[1] took place at a moment where taxpayers, tax authorities and even most governments were still astonished by the unexpectedly fast developments in the international standard on exchange of information.[2]

One of the positive aspects raised by the BEPS initiative is that harmful tax competition and the phenomena of tax evasion and avoidance are no longer exclusively associated with tax havens. It is (finally) publicly acknowledged that they also result from inadequate international (The Organization for Economic Cooperation and Development (OECD)) rules to cope with the phenomenon of tax planning by multinationals and the increasing specialization of functions by related parties in different jurisdictions:

> loopholes, gaps, frictions or mismatches in the interaction of countries' domestic tax laws and any double non-taxation in areas previously not covered by international standards and that address cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it. Moreover, governments must continue to work together to tackle harmful tax practices and aggressive tax planning.[3]

As a matter of principle, the G20 initiatives and the informal global tax governance jointly exercised by the G20 and the OECD are welcome: Free movement of capital has been requiring for about two decades a move from bilateralism towards multilateralism. The 1988 Council of Europe/OECD Convention on Mutual Administrative Tax Matters and the 2010 Protocol was one of the first instruments to promote multilateralism. However, in the absence of an international judicial instance, promotion of international standards, such as automatic exchange of information, has to be cautious and cannot be a target in itself. Fundamental rights of taxpayers in that capacity and as citizens also have to be promoted and have to be seriously respected. For example, the rights of defence, including the right to be heard, are among the fundamental rights that form an integral part of the EU legal order (*Sopropé* and *Sabou* cases),[4] but this is not always the case on a worldwide scale.

The same cautions and worries should be present in the OECD BEPS Actions and proposals, especially because the deliverables are dealing with very tight deadlines.[5] For example, the promotion of a General Anti-Avoidance Rule based on a principal purpose test (as it results from recent OECD/G20 BEPS Action 6) [6] may raise constitutional issues in Member States.[7] Such a rule, if transposed into domestic laws, is in principle compliant with the constitutional principles of ability to pay and legal certainty if there is coherent and consistent case-law reducing its vagueness. But in those countries where courts, for some reason, are not effective guardians of the rule of law, taxpayers will face difficult times.

Besides the attention that has to be paid to taxpayers' rights, it is legitimate to suspect that a BEPS initiative may radically fail in an atmosphere of fierce tax

**Notes**

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1 In 2012, the G20 asked the OECD to analyse the topic of base erosion and profit shifting by multinationals, and to report on the progress of the work for their February 2013 meeting: as a response, the OECD (2013) issued the Report *Action Plan on Base Erosion and Profit Shifting*.

2 See for example: P. Malherbe & M. Beynsberger, *The Year of Implementation of the Standards?* in *Exchange of Information and Bank Secrecy* 122–124 (Rust A.& Fort E. eds., 2012); – *Exchange of Information and Validity of Global Standards in Tax Law: Abstractionism and Expressionism or Where the Truth Lies* EUI Working Paper RSCAS 2013/11, http://cadmus.eui.eu/bitstream/handle/1814/26059/RSCAS_2013_11.pdf?sequence=1.

3 OECD (2013) Report *Action Plan on Base Erosion and Profit Shifting*, p. 13.

4 ECJ Judgment of the Court (Grand Chamber) of 22 Oct. 2013, Case C-276/12 (2013), *Jiri Sabou v. Financni reditelství pro hlavnímesto Praho* (*not yet published*), paras 28, 38.

5 OECD (2013) Report *Action Plan …*, *supra* n. 3, at 29–34.

6 See OECD (2014), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing.

7 Raising doubts about its sufficient determinacy in light of EU Law: Kemmeren, Eric, *Where is EU Law in the OECD BEPS Discussion* 4 EC Tax Rev.4 (2014).

competition where national interests of OECD countries are still difficult to reconcile.[8] It is too soon to know what the final outcome will be.

## 2 Old problems, new solutions?

Interestingly, some of the fifteen OECD/G20 BEPS Actions (e.g., Actions 3 on the strengthening of CFC rules; 5 on transparency and substance; 6 on preventing treaty abuse; 10 on transparency, regarding data collection, targeted information and transfer pricing documentation) correspond to constraints already identified in the 1998 OECD Report on Harmful Tax Competition:[9] The 1998 Report makes 19 recommendations, divided in three groups, and aimed at improving international cooperation and responding to harmful tax competition: recommendations dealing with domestic legislation and practices (e.g., introduction of controlled foreign company rules; adoption of information reporting rules for international transactions; access to banking information for tax purposes), addressing tax treaties (e.g., greater and more efficient use of exchange of information) and recommendations to increase international cooperation in response to harmful tax practices (e.g., production of a list of tax havens).

Although it is not mentioned in the OECD Action Plan, the latter can be interpreted as a follow up to the 1998 Report. The focus of the OECD BEPS Action Plan now lies in the inadequacy of rules more than in the individual non-cooperative behaviour of jurisdictions, and therefore requires more fundamental amendments to the current rules and concerted action.

It is legitimate to ask if the BEPS initiative and process will effectively solve the current unresolved problems in international tax law and that are jeopardizing the allocation of taxing rights. Some may find the initiative too ambitious; others may find the solutions very conservative, as may be read in some of the articles published in this Special Issue.[10]

Section C of Action 6 can be seen as a novelty in the OECD tax policy. It is recognized that tax factors (such as low or zero taxation; withholding taxes and exchange of information), and non-tax factors can either lead to the conclusion, amendment or termination of a tax treaty and that each country is sovereign to decide on its tax treaty policy.[11] This open recognition by the OECD that tax treaties can bring more harm than good to the States may have a perverse effect. If the G20/OECD BEPS initiative is not successful in reducing tax competition and in leading to global coordinated action, it may become more appealing not to conclude tax treaties or to terminate the ones in force.

## 3 BEPS and the necessity to include developing countries in the process

OECD BEPS Action Plan (2013)[12] foresees that other States beyond the OECD Member States take part in the Plan: the G20 States that are not OECD Member States will be expected to be associate members and also other non-members can be asked to participate as invitees on an ad-hoc basis. The BEPS Action Plan does not clarify what the criteria underlying the decision to invite non-G20 States will be.

In respect of developing countries, the Action Plan recognizes that:

> they also face issues related to BEPS, though the issues may manifest differently given the specificities of their legal and administrative frameworks. The UN participates in the tax work of the OECD and will certainly provide useful insights regarding the particular concerns of developing countries. The Task Force on Tax and Development (TFTD) and the OECD Global Relations Programme will provide a useful platform to discuss the specific BEPS concerns in the case of developing countries and explore possible solutions with all stakeholders. Finally, existing mechanisms such as the Global Fora on Tax Treaties, on Transfer Pricing, on VAT and on Transparency and Exchange of Information for Tax Purposes will all be used to involve all countries in the discussions regarding possible technical solutions.

Developing countries have different administrative frameworks (i.e., simpler and lacking technical and human resources) that make it more difficult for them to approach transfer pricing issues and to introduce mechanisms of enhanced tax cooperation, such as advance pricing agreements, mutual agreement procedures and (international) tax arbitration.

*Notes*

8 For example, Escribano López, Eva – An Opportunistic – and yet Appropriate – Revision of the Source Threshold for the Twenty-first Century Tax Treaties (Action 1, BEPS), p. 6 ; Brauner, Yariv – Transfer Pricing in BEPS: First Round – Business Interests Win (But, not in Knock-Out), p. 72 ; Rinninsland, Robert G. & Lobo, Kenneth – U.S.-Based Pushback on B.E.P.S., p. 96.

9 OECD, *Harmful Tax Competition, An Emerging Global Issue*, OECD Paris, 1998.

10 See Escribano López, Eva – An Opportunistic – and yet Appropriate – Revision …, *supra* n. 8 ; Brauner, Yariv – Transfer Pricing in BEPS …, *supra* n. 8 ; Malherbe, Jacques – *BEPS, The Issues of Dispute Resolution and Introduction of a Multilateral Treaty*, p. 91.

11 OECD (2014) *Preventing the Granting of Treaty Benefits in Innappropriate Curcumstances*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, pp. 15, 102–104.

12 OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.

Most of them, however, have transfer pricing rules – or at least principles – and incoming international investment is to be dealt with according to transfer pricing methods, unless that investment benefits from tax holidays. This means that the legal framework is not different from the OECD Member States framework, the administrative constraints to raise revenue concerning multinationals is more serious and the BEPS effects have a much greater dimension, including the case of specific industries related to natural resources. It is clear that States outside the G20 are also affected by the BEPS phenomenon and some of them have attractive tax regimes for conduit companies and are concluding Tax Information Exchange Agreements (TIEAs) and therefore they should be fully included in the BEPS movement and actions proposed as soon as possible.

## 4 BEPS and the European Union

The European Union is following the BEPS movement by trying to find the adequate solutions to fight against tax evasion, tax avoidance and aggressive tax planning.[13] As it is widely known that the unanimity rule is a serious obstacle to harmonization of direct taxes, it is wise that the European Commission essentially handles the BEPS initiatives through Recommendations and soft law instruments in general.[14]

Two Recommendations were put forward in 2012 and are being debated at the Platform for Tax Good Governance: the EC Recommendation C(2012) 8805 of 6.12, regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters, and the EC Recommendation C(2012) 8806 of 6.12, on Aggressive Tax Planning, proposing a subject-to-tax clause against double non-taxation and a General Anti-Avoidance Rule to be adopted by the Member States. Both Recommendations illustrate the purpose of following the holistic approach and of combining action at the EU level with the OECD/G20 initiatives.

Moreover, a linking rule aimed to avoid double non-taxation and a General Anti-Avoidance Rule amending the parent-subsidiary Directive[15] were approved during the Economic and Financial Affairs Council (ECOFIN) meetings of 20 June 2014 and 9 December 2014, respectively, in which all Member States eventually agreed upon them.The aforementioned linking-rule means that Member States will henceforth refrain from taxing profits from the subsidiary only to the extent that such profits are not tax deductible for the subsidiary. In turn, the GAAR requires Member States to refrain from granting the benefits of the Directive (elimination of economic double taxation) if one of the main purposes of an arrangement is to obtain a tax advantage that would defeat the object or purpose of the Directive and such arrangement is not 'genuine'. An arrangement is not 'genuine' if it lacks economic reality. Since there is no clear guidance on the terms used in the GAAR, it allows Member States to first interpret these terms and in case of dispute, the European Court of Justice will have the final word.

It has been announced that a similar rule will be included in the EU Interest and

Royalty Directive. By adopting the GAAR, even if limited to one (or two) Directive(s) the EU goes in the direction of the OECD, which has proposed the adoption a 'principal purposes test' to be included in tax treaties, in Action 6 (treaty abuse).

A comparison between the European Commission approach on aggressive tax planning and the approach followed by the OECD/G20 is carried out in one of the articles published in this Special Issue.[16]

## 5 The BEPS initiative in Intertax

At this stage, a first set of seven deliverables described in the OECD Action Plan addressing BEPS[17] and due in 2014 have been adopted by the OECD Committee on Fiscal Affairs (CFA).[18]

The 2014 deliverables focus on rules aimed at neutralizing hybrid mismatch arrangements (Action 2); preventing treaty abuse (Action 6); assuring that transfer pricing outcomes are in line with value creation in the area of intangibles (Action 8); improved transfer pricing documentation and a template for country-by-country reporting (Action 13);

**Notes**

13 See the concept of aggressive tax planning below in Dourado, Ana Paula, *Aggressive Tax Planning in EU Law and in the light of BEPS – The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6*.

14 See the EU reaction to the anti-BEPS movement in: *Communication from the Commission to the European Parliament and the Council, An Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion*, (187637/12) Brussels (6.12.2012), COM (2012) 722 Final; *Commission Recommendation of 6.12.2012*, Brussels (6.12.2012), C(2012) 88006 final; *Conclusions of the European Council*, Brussels (22.5.2013), EUCO 75/13, pp.6-8; ECOFIN, *Conclusions on Tax Evasion*, Brussels (14 May 2013), 9549/13, FISC 94.

15 Council Directive of 30 Nov. 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (2011/96/EU) (recast).

16 Dourado, Ana Paula, *Aggressive Tax Planning … supra* n.13.

17 OECD (2013) *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.

18 OECD (2014), *Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project*, OECD: The OECD brought together forty-four countries on an equal footing (all OECD members, G20 and Accession countries). Other non-OECD / non-G20 economies as well as developing countries have been 'extensively informed' and participated in regional and global for a meetings (*ibid.* at 3–4).

Moreover, three reports were published addressing the tax challenges of the digital economy (Action 1); the feasibility of a multilateral instrument to implement measures tackling BEPS and to modify the network of bilateral tax treaties (Action 15); and a report on progress made to counter harmful tax practices more effectively, taking into account transparency and substance (Action 5).

Intertax is dedicating this issue to BEPS, where authors focus on most of the delivered Actions and Reports, pending Actions (Limit base erosion via interest deductions and other financial payments, Action 4) and the interaction between some of the European Commission recommendations on aggressive tax planning and some of the OECD/G20 BEPS proposals on the topic.

In addition, two other articles present a critical view against the standardization of the process: this critical view is presented in respect of the United States (how should the US address the current OECD move regarding BEPS)[19] and in the analysis of the role of tax holidays towards developing countries (tax holidays in a BEPS perspective[20]).

At this stage, where only part of the project has been accomplished, the purpose is to bring together different approaches and angles on the BEPS initiative and to contribute to the debate. In subsequent issues, Intertax will follow up and debate the deliverables, the discussions and the controversies raised by this process. There may be scepticism about the BEPS initiative, but since it has started, it will no longer be legitimate for the OECD/G20 States to complain about inadequate international tax rules, blame multinationals for exploiting gaps and mismatches and eventually for a deficit of tax morale.

Notes

19 Rinninsland, Robert G. & Lobo, Kenneth,*U.S.-Based Pushback … . supra* n. 8.

20 Bjerkestuen, Hilde Mæhlum & Wille, Hans Georg, *Tax Holidays in a BEPS Perspective*, p.105.

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