



Tax and Good Governance: Making the Link between Tax Evasion and Avoidance and Aggressive Tax Planning

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Outline

- 1. Good tax governance, its international boundaries and BEPS**
- 2. Going beyond countering evasion and avoidance**
- 3. Aggressive tax planning: between tax competition and tax avoidance**
- 4. The impact of anti-avoidance measures on aggressive tax planning**
- 5. Global problems require global answers: BEPS and tax transparency as tools to implement a new fight against aggressive tax planning and international tax avoidance**
- 6. Some possible developments**

1. Good tax governance

- ▶ **Good governance: ability to take decisions and implement them consistently with the desirable goals**
- ▶ **Components of good governance: (i) rule of law; (ii) accountability; (iii) transparency; (iv) participation; (v) organising capacity; (vi) technical and managerial competence**
- ▶ **Good tax governance: ability to have objective standards to steer tax governance on cross-border situations towards desired goals, in compliance with best practices (=> the building up of internationally accepted standards)**
- ▶ **From national good governance to global tax governance: transparent fight against harmful tax competition and avoidance**
- ▶ **BEPS + global tax transparency: tools of good tax governance**
- ▶ **Global tax governance: also an issue of inter-nation equity**

1. Different standards for global tax governance?

- ▶ **Global tax governance should not mean that there is one single standard of good tax governance applicable worldwide**
- ▶ **OECD and non-OECD countries may have different priorities within the common global commitment for countering BEPS**
- ▶ **Relevant elements for drawing the distinction**
 - ▶ Sustainability: tax policy, tax administration
 - ▶ Allocation of taxing powers and inter-nation equity
 - ▶ Right to remain the masters of own's international tax policy
- ▶ **BEPS should be adapted to the different context of developing countries, rather than being merely implemented**
- ▶ **Stronger integration may have impact on standards in EU**
- ▶ **Furthermore, there is a missing point: timely and effective remedies for global protection of taxpayers are an important component of a system that protects the rule of law**

2. Traditional approach: countering evasion & avoidance

- ▶ **Until BEPS most tax systems have countered fraud, evasion and avoidance, otherwise accepting cross-border tax savings**
- ▶ **Evasion: unpaid taxes or undeclared income (open violation)**
- ▶ **Avoidance: outcome of friction between form and substance geared at obtaining unintended tax saving**
 - ▶ Also described by reference to abuse, technique used to counter it
- ▶ **Growing trend in the past decades: increase tax competitiveness with race to the bottom and use of international tax gateways**
- ▶ **Absence of tax transparency had negative impact on analysis of substance, limiting fight against treaty shopping and mispricing**
- ▶ **Double benefits across the borders were legitimate insofar as they resulted from mismatching characterisation**
- ⇒ **Right to exploit unintended cross-border tax advantages?**

3. Aggressive tax planning: between tax competition and tax avoidance

- ▶ **National sovereignty determines limits to taxpayers' behaviour**
- ▶ **BEPS has proved that closing loopholes is not enough to secure level-playing field across the borders and avoid distortions**
- ▶ **Re-establishment of link between taxing powers and place of value creation**
- ▶ **Tax systems are now to impose stronger reaction to tax saving**
- ▶ **Aggressive tax planning becomes a form of unacceptable tax competition that erodes tax sovereignty and may produce harmful tax competition**
- ▶ **BEPS Actions 2, 4 and 5 counter aggressive tax planning**
- ▶ **BEPS Actions 3 and 6 counter abusive practices**
- ▶ **Further actions counter both phenomena**
- ▶ **Is aggressive tax planning structurally different from avoidance?**

3. Aggressive tax planning

- ▶ **Aggressive tax planning: a new phenomenon created by the BEPS project, but not defined by it**
- ▶ **Aggressive tax planning as exploitation of cross-border tax disparities aimed at achieving unintended tax savings**
 - ▶ Tax avoidance creates a friction between form and substance within one system, also if involving cross-border elements,
 - ▶ Aggressive tax planning operates across the borders only
- ▶ **Importance to differentiate from similar phenomena**
 - ▶ Tax competition is still allowed
 - ▶ Intended non-taxation across the borders is not prohibited
 - ▶ Tax sparing clauses confirm these phenomena
- ▶ **How about subject-to-tax and switchover clauses?**
- ▶ **Can CFC rules, LoBs etc. apply to aggressive tax planning?**

4. Anti-abuse measures and aggressive tax planning

- ▶ **CFC legislation: anti tax deferral or anti-abuse measures?**
 - ▶ EU – measures that should achieve a proportionate reaction to actual abusive practices
- ▶ **LoB clauses: can they be used to prevent risk of abuse?**
 - ▶ EU – 19.11.2015 announced action of infringement against NL for LoB clause in treaty with Japan (disproportionate restriction on right of establishment)
- ▶ **PPT: application of GAAR against abusive practices**
- ▶ **Subject-to-tax and switchover clauses**
 - ▶ Compensate lower taxes in State of source with higher taxes, or application of tax credit, in State of residence

4. Anti-abuse measures and aggressive tax planning

The fight against aggressive tax planning requires coordination

- ▶ **Some anti-abuse measures can be effective against aggressive tax planning (e.g. CFC, LoB) with minor adaptation**
 - ▶ BEPS 3 and 6 does not require this explicitly, but both instruments help effective countering of aggressive tax planning
- ▶ **Other measures can become effective against aggressive tax planning (GAARs) if interpreted in line of new BEPS context, i.e. also in respect of tax savings obtained across borders**
- ▶ **Other measures, including subject-to-tax and switchover clauses. may produce some significant overkill effects in relations with developing countries if applicable beyond abusive practices and in respect of intended tax savings**
 - ▶ Fight against aggressive tax planning does not imply total interference by residence country in tax policy of source country

5. Need for a global reaction against all phenomena

- ▶ **The BEPS and tax transparency project have developed a global tool for countering base erosion and profit shifting**
- ▶ **Multilateral instrument as tool of convergence**
- ▶ **Its implementation should be homogeneous at the global level, but adaptation of solutions is indispensable especially in the case of developing countries**
- ▶ **Implementation of BEPS project may increase legal uncertainty and also presents a risk for different levels of compliance**
- ▶ **Mock compliance by some countries as a legitimate reaction?**
- ▶ **Increased global burden for global players (MNEs) not necessarily compensated by standardization of tax forms**
- ▶ **Global reaction also includes global dimension for protection of taxpayers rights**
- ▶ **Digital economy: new frontier for global supranational tax law**

6. Some possible developments

- ▶ **Interpretation of tax fraud, tax evasion, tax avoidance, aggressive tax planning and legitimate tax savings to be more influenced by non-national administrative and judicial practice**
- ▶ **Clarify relation of aggressive tax planning with tax avoidance**
- ▶ **Difficulties in determining implications for BEPS purposes when interpretation and application of other countries law is required => importance of cross-border tax mediation and arbitration mechanisms**
- ▶ **Global multilateralism structured in regional blocks fine tunes implementation and adaptation of BEPS and tax transparency**
- ▶ **Dialogue with developing countries is particularly important**
- ▶ **The potential future role of the United Nations in tax matters**
 - ▶ Legitimacy with developing countries and taxpayers' rights



Thank you!

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