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
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
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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