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Final OECD/G20 BEPS Package is historic, but comes with a price tag: Strict business confidentiality and increased complexity

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1. On 5 October, the OECD delivered a final set of measures and recommendations on corporate aggressive tax planning, thereby completing the first phase of the 15-point Action Plan on Base Erosion and Profit Shifting (BEPS) adopted by the G20 in 2013[i]. The two-year negotiations process represents to most far reaching attempt in modern history to reform the global tax system. The outcome, however, comes with a risk of increased complexity of tax rules, notably in the area of transfer pricing, and of overly strict business confidentiality rules over global corporate tax affairs. Implementing the BEPS measures and the monitoring thereof will be crucial. To do so, OECD governments need to match their BEPS commitments with appropriately staffed tax administrations. Going forward, it will also be important to ensure a truly inclusive process for civil society and for developing countries.

2. Unlike tax evasion, which is illegal, aggressive tax planning lies in the grey area of compliance. Multinational enterprises (MNEs), as well as wealthy individuals, can exploit mismatches between domestic tax systems and treaties to artificially reduce their tax bill. Revenue losses from MNE tax avoidance practices amount to USD100-240bn annually according to conservative OECD estimates.

The Final Package

3. The original G20 mandate for the BEPS Action Plan was to reform existing rules and devise new ones to ensure that MNEs were to be taxed "*where economic activities take place and value is created*". The final package offers 'minimum standards' that governments will have to observe to prevent "harmful tax practices" by governments to attract foreign investors such as patent boxes (BEPS action point n°5), "treaty shopping" (n°6) and the manipulation of MNEs' transfer pricing of intra-group transactions (n°8-10). Minimum standards have also been agreed within a new country-by-country tax reporting framework for MNEs with over USD750bn turnover (n°13) and on dispute resolution between tax authorities (n°14). The 'Permanent establishment regime' (n°7) as defined in the OECD Model Convention has been tightened in order to neutralise techniques by MNEs to escape taxable presence in host countries.

4. The Final package includes recommendations and 'best practices' on other key sources of aggressive tax planning: the taxation of "controlled foreign companies", the absence of which results in tax incentives to attract foreign investors (n°3), of "hybrid mismatches" between jurisdictions regarding the tax treatment of debt and equity (n°2), and the tax treatment of debt interest deductibility within MNE groups (n°4). The final report on the digital economy (n°1) falls short in terms of specific recommendations but gives options for governments to take voluntary tax measures that are specifically tailored to digitalised

businesses. Some of the BEPS deliverables are to be implemented by a new "multilateral instrument" (n°15) to be agreed upon in the course of 2016.

Risks and Shortcomings

5. The BEPS Action Plan represents the most far reaching attempt at multilateral level to reform and align global tax rules and governance with increasingly globalised markets, trade and investment regimes. By that standard, the final package delivered today will mark a historical step within the post-crisis G20 policy process since 2008. Nevertheless, the BEPS agreements were reached on the back of increased complexity and confidentiality rules, which are not playing in favour of non-business stakeholders:

- **Increased complexity of transfer pricing rules:** the review of the transfer pricing guidelines was central to a successful outcome of the BEPS action plan. Throughout the process, OECD governments and business groups stood firm in defending the OECD preferred "arm's length" principle, which is based on the assumption that subsidiaries of a MNE group can be treated "independently" from one another. The alternative proposal was to treat MNEs for what they are - unitary entities that should be subject to unitary taxation at global level (e.g. formulary apportionment). This proposal was never part of the discussions. The end-result is a monumental review of the *OECD Guidelines on Transfer Pricing*, whose guidance document (already in the range of 350 pages) could end up doubling in size. There is hence a serious risk of adding another layer of complexity to an already highly complex rule-system.

- **Strict business confidentiality rules:** the entire BEPS process and outcomes have been based on strict confidentiality between tax collectors on one side, and corporate executives (and their tax advisors) on the other. The new country-by-country reporting framework leaves no option for public disclosure and the OECD made clear that it will never be up for discussion in the upcoming implementation phase. Yet, transparency over corporate tax planning schemes matters to all stakeholders and civil society, not just tax collectors. Business confidentiality should be respected but it should not become a tool to circumvent corporate accountability to other stakeholders, including workers and long term investors, and the public at large.

6. The release of the BEPS final package does not mark the end of the process. Some of deliverables will require further work and negotiations, notably regarding transfer pricing and rules on the attribution of profits (between local subsidiaries and parent companies). Swift and inclusive implementation of the BEPS package is crucial. Meanwhile, upcoming negotiations over the new multilateral instrument should be transparent. In this respect, maintaining political momentum within national parliaments is equally important.

The Implementation Phase

7. The implementation phase should also take on board the perspective and inputs of developing countries in a serious and institutionalized manner. Their weak representation in the first phase of the BEPS action plan was raised as a concern by civil society organisations and trade unions. The discussions on the creation of a new "International Tax Organisation" at the Financing For Development Summit in Addis Ababa have exposed the risk of growing divergence between OECD countries and developing countries regarding the shape of the international tax governance system. Therefore, it will be critical to ensure decisively greater inclusion of developing countries in the implementation phase.

8. Finally, OECD governments should match their commitments to curb aggressive tax planning with increased resources for their tax administrations. The new requirements under the BEPS Action Plan and the separate agreement on automatic exchange of information will put tax administrations under pressure. OECD countries need to commit more financial and human resources to tax administrations. We are not there yet. Total employment in OECD tax administrations has remained stable between 2011 and 2013 with important diverging trends between member states. Within tax administrations, human resources allocated to the tax audit and inspection function have grown in some countries, but remained predominantly inadequate in others.

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[i] http://www.oecd.org/ctp/beps.htm