



FIELD COURT TAX CHAMBERS

IFA Vienna
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Taxation in a Post-BEPS Era

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NB PB Speaking in personal capacity
Please - no tweeting etc.



Outline

- Was the BEPS project a success or a failure?
- Some consequences of BEPS
- Work left undone – and who will do it?
- The future of international taxation post-BEPS



Was the BEPS project a success or a failure?

- No success / failure criteria were agreed, so no easy answer
- Interim and final reports were agreed and published, on time (pretty much) – the OECD delivered the deliverables
- The Multi-lateral Instrument (“MLI”) was drafted and signed – there was a BIG signing ceremony (but without the US)
- More countries were engaged in the process – leading to the Inclusive Framework (“IF”)



Was the BEPS project a success or a failure?

- BUT
- There was no rational process behind the BEPS project
 - No identification of the real issues
 - No discussion of possible solutions
 - No success / failure criteria
 - No planned participation beyond the OECD/G20 countries
 - No apparent plan for the future – other than implementation



Was the BEPS project a success or a failure?

- BUT
- The essential issue behind BEPS was political concern in a few countries at aggressive tax planning by a small number of multinational enterprises leading to low taxation at source and no taxation at residence (overall, low effective tax rates)
- The proof of the pudding will be if multinationals continue to report low effective tax rates going forward



Was the BEPS project a success or a failure?

- Arguably the real problems leading to BEPS were:
 - Absence of tax reform in the US – but it had to be the **right type** of tax reform
 - Tax competition between a large number of source countries to attract mobile investment
- The underlying issues are:
 - Tax sovereignty
 - The international tax architecture – the structure of international institutions involved in tax policy



Some consequences of BEPS

The outcomes:

- Action 2 – complex discussion of hybrid mismatch arrangements (BUT no discussion of “Check-the-box”)
- Action 3 – CFCs (BUT no discussion of sub-part F)
- Action 4 – interest cap (will planning shift from interest?)
- Action 5 – harmful tax practices – resolved the issue of patent boxes (BUT is the patent box a good thing) and exchange of rulings
- Action 6 – treaty abuse – minimum standards



Some consequences of BEPS

- Action 7 – new PE definition (for those who want it) – deals with commissionnaires
- Actions 8-10 – TP (continuing ongoing work)
- Action 12 – DoTAS
- Action 13 – CbCR
- Action 14 – dispute resolution (plus an option for arbitration)
- Action 15 – MLI



Some consequences of BEPS

- Fundamental undermining of the reliance on the tax treaty network – PPT as a virus that has infected the network
- Failure to address the underlying problems of the TP regime – no consideration of alternative regimes
- Greater probability of unrelieved double taxation
- Enhanced position of the OECD makes it difficult to consider a reform of the international tax architecture
- More disputes – MAP and arbitration as a flawed solution



Some consequences of BEPS

- More uncertainty – which means a higher tax cost for investment
- Undermining of the system of rulings
- Is the MLI a suitable model for the future?



Some consequences of BEPS

- And look what the OECD was up to while we were not looking:
 - E.g. CRS without adequate data protection
 - E.g. No focus on taxpayers' rights



Some consequences of BEPS

- Failure to identify the real problems
- Real reform is made that much more difficult – no appetite for a similar process for perhaps a decade to come (a re-assessment of the effects of the BEPS project will be needed first)



Work left undone – and who will do it?

- Short term – the digital economy (and the failure of the other BEPS action points to deal with this)
- Short term – dealing with the consequences of US tax reform
- Short to medium term – dealing with the Inclusive Framework and new work styles
- Short to medium term – dealing with the proliferation of unilateral tax measures (some of them introduced because of the BEPS project)



Work left undone – and who will do it?

- Medium to longer term – dealing with the failures of transfer pricing
- Medium to longer term – opening up discussion of the residence/source balance (possibly may come up sooner – e.g. indirect disposals of “immoveable” property)
- Medium to longer term – dealing with issues of sovereignty and of tax havens
- Medium to longer term – initiating a proper discussion of international tax reform



Work left undone – and who will do it?

- Who will do it?
- We need a proper international tax organisation with:
 - Full representation by all countries
 - Operating on a modified majority basis
 - With proper involvement of the business sector, NGOs and academics
 - With proper dispute resolution mechanisms (with full taxpayer participation)
- We need this more now than ever before



The future of International Taxation post-BEPS





The future of International Taxation post-BEPS

- Pessimistic outlook: more disputes; more uncertainty; more unrelieved double taxation; tax issues impacting on investment and growth
- Perhaps it will take a decade to recover from BEPS
- Longer-term – recognition of the need for real reform
- We need to start that process now – and we can only do that if we move out of the shadow of BEPS



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