

BEPS: What to expect? A Brazilian perspective

Motivated by the 2008-09 financial crisis, international public opinion started to vigorously protest against international tax plannings of large multinational enterprises. Loopholes and mismatches in tax legislation of different countries were being used to achieve significant reduction or deferral of taxes.

Although such tax plannings were in accordance with the legislation, they were deemed immoral by politicians around the world, who found it hard to explain to the public the reasons why domestic legislation permits multinational enterprises to avoid their fair share of taxes.

In November 2012, in Mexico, leaders from the 19 largest world economies and from the European Union (the so-called G20) requested the Organization for Economic Cooperation and Development (OECD) to prepare a study to tackle tax base erosion and the shifting of profits to jurisdictions with low or nil taxation, or without substantial economic activity. The OECD Base Erosion and Profit Shifting (BEPS) project was founded.

The first report regarding the project was presented at the G20 summit held in Moscow in February 2013. To address the issue, OECD recommended the development of a global action plan.

Afterwards, OECD presented more detailed reports regarding the matter and fifteen action plans were deemed essential to tackle BEPS.

These action plans aimed at addressing the tax challenges of the digital economy; neutralizing the effects of hybrid mismatch arrangements; designing effective CFC rules; limiting base erosion involving interest deductions and other financial payments, countering harmful tax practices more effectively; preventing the granting of treaty benefits in inappropriate circumstances; preventing the artificial avoidance of permanent establishment status; aligning transfer pricing outcomes with value creation; establishing mandatory disclosure rules; developing a multilateral instrument to modify bilateral tax treaties, among other goals.

The action plans were structured based on the following pillars: (i) coherent interaction of the laws of the various countries; (ii) prevalence of substance over form in order to assure the taxation in the jurisdiction in which the economic activity and the value creation is located; and (iii) transparency and certainty for businesses and governments.

After thousands of pages of public comments regarding the fifteen action plans draft reports, panels at International Fiscal Association (IFA) conferences, OECD webcasts, lectures and articles, the final versions of the action plan reports were finally made available last October 2015.

But what should we expect now?

In order to achieve the intended success, it is crucial that the OECD recommendations are implemented simultaneously and harmoniously by all countries.

A consistent approach adopting the best practices recommended by OECD is necessary both for taxpayers and tax authorities in order to enable multinational groups to structure operations with higher predictability and legal certainty, and to reduce compliance and administrative costs. Besides, it would ensure an equal treatment among multinational corporations and local companies.

In that regard, some measures depend on the OECD itself to be implemented, such as

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adjusting transfer pricing guidelines and the model tax convention. Other measures depend on domestic legislation changes.

There is an expectation from the OECD that countries which were involved in the discussions and agreed on the final version of the reports will adopt the recommendations. Nevertheless it is not mandatory and some countries have already shown disapproval with the final outcome.

Countries may choose not to immediately implement the recommendations, even though they agreed with them. They might prefer to wait for other countries' decisions, as stricter rules tend to reduce the attractiveness of foreign investment and obstruct the global competition for national companies.

The implementation of the recommendations by only a few countries, apart from the probable inefficiency, might result in double taxation, which OECD has always endeavored to avoid in order to promote the exchange of goods and services and the movement of capitals.

Double taxation might also occur if countries decide to cherry-pick the recommendations that will benefit them and increase tax revenue, ignoring the damages to other countries and taxpayers. This risk is even higher in countries that are already known for disrespecting tax treaties.

Moreover, the feeling that the BEPS project is intended to benefit exclusively developed countries still remains. This sensation persists even though OECD emphasizes that at least forty developing countries contributed with commentaries to the action plan reports and more than a dozen joined OECD meetings, which also involved the United Nations, the International Monetary Fund, the African Tax Administration Forum (ATAF) and the Inter-American Center of Tax Administration (CIAT).

However, this argument may not convince developing countries in giving up their sovereignty to legislate according to their own interests.

In that regard, it is inconsistent that some OECD's member countries conducting the BEPS project continue to encourage harmful tax competition, by maintaining (i) advantageous tax regimes, (ii) treaties with *matching credit* and *tax sparring* clauses, and (iii) mechanisms allowing taxpayers to choose the entity and the country where they wish to be taxed by, whereas at the same time these same countries are now stimulating developing countries to adopt the action plans' recommendations and to abandon their own mechanisms of attracting foreign investment.

Also controversial is the exchange of information, whose benefits are undeniable for taxpayers and tax authorities. At IFA's last congress in Basel, an example concerning Japan and the United States was reported. It involved a Japanese taxpayer that would have asked American tax authorities not to provide his confidential information to Japanese tax authorities as they would leak to the press. The request was not observed and the information leaked.

If that can happen in developed countries, what procedures and precautions should be adopted regarding the confidentiality of information exchanged among countries where taxpayer's fiscal data are known to be treated with less care, and where the media is known for publishing private documents? Should the exchange of information be interrupted after the first leak or should it not even be initiated?

Brazil has already implemented some measures inspired by the BEPS Project, such as several exchange of information agreements.

Brazil has also tried to impose a mandatory disclosure program, not approved by Congress, which was unclear and generated uncertainty, and can be used as an example of rushed and misguided adoption of the OECD's action plans.

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However, it is less likely that Brazil is willing to change its domestic legislation to implement the recommendations regarding the fifteen action plans. That is due to the fact that Brazil has rules that are either stricter than the international standards, such as Brazilian CFC rules, or do not follow international standards, such as the Brazilian Transfer Pricing rules

Therefore, it is hard to predict the future of the BEPS project, notwithstanding the fact that it is certainly an important work from the OECD, perhaps the most important study regarding international taxation in nearly a century.

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