BEPS AND EMERGING ECONOMIES. HOW GLOBAL IS THE BEPS PROJECT?

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Introduction: the BEPS Project

The international tax system is undergoing complete renovation. Base erosion and profit shifting (BEPS) is the evil that must be curbed, reduced, most desirably totally eradicated on a worldwide scale.

To this end, the OECD and the G20 crafted the BEPS Project, launched in 2013 with the OECD's report "*Addressing Base Erosion and Profit Shifting*"[11]. It targets identified deficiencies in national and international tax rules leaving room for loopholes and mismatches[2]. These are exploited through aggressive tax planning by taxpayers wishing to minimize their tax burden with the (obvious) consequence that countries' taxable bases are minimized as well.
The Project signals the determination of such countries – having recognized the international reach of the issue – to coordinate their actions for the elimination of the deficiencies. Two years after the Project was launched, i.e., by 2015, specific recommendations had been issued by the OECD on the appropriate measures at national and international level to effectively counter BEPS[3]. In November 2016, a multilateral instrument envisaged to amend at once the more than 3,000 existing double tax treaties, was also released; it consisted of provisions which had been negotiated and agreed by more than 100 jurisdictions, including both advanced and emerging economies, comprising the inclusive framework for the implementation of BEPS Actions[4].
All countries are equally invited to implement the recommendations and ratify the multilateral instrument; the adherence of a large number – or hopefully all – tax jurisdictions around the world will determine the success of the Project.

Arguable Relevance for Emerging Economies

There is no question that the international tax world's very foundations have been shaken; the degree to which this "shaking" affects individual tax jurisdictions is however rather difficult to assess – and understandably so – in view of the differences characterizing the economic contexts of advanced vs. emerging economies.
The issue was raised during the 46th IAFEI World Congress "Africa Driving Global Change". According to the OECD, BEPS affects both advanced and emerging markets[5]. Furthermore, it is highlighted that more than 80 emerging economies engaged with the BEPS Project through various mechanisms, forums and bodies, including the Global Forum on Tax Treaties, the Global Forum on Transfer Pricing, the Task Force on

1 OECD, *Addressing Base Erosion and Profit Shifting*, 2013.

2 OECD/ G20, *Base Erosion and Profit Shifting Project. Information Brief*, 2015.

3 OECD, *2015 Final Reports*. Available at: http://www.oecd.org/tax/beps-2015-final-reports.htm; Gilleard M, T*he end of the (tax) world as we know it? OECD delivers final BEPS recommendations*, in International Tax Review, 2015.

4 OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*. Available at: http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm

5 Valente P., *Analyzing the Latest Developments in Base Erosion and Profit Shifting (BEPS)*, 46th IAFEI World Congress, November 2016, video participation.

Tax and Development and regional networks[6].At the other side of the spectrum, non-governmental organizations (NGOs) argue that “BEPS sidesteps some important issues for developing countries and that poor countries are not at the decision-making table[7].”
In any case, it cannot be denied that the instability, corruption and ethnic conflicts forming the current situation for most emerging economies cannot but undermine the prioritization of BEPS issues in their political agenda. Furthermore, no African country is a member of the OECD, only South Africa is part of the G20, while the vast majority of African countries is classified as “emerging economies[8]”.

What is Different About Emerging Economies

The answer to the aforementioned question necessitates examination of the potential impact of BEPS and BEPS Project on emerging economies in light of the distinctive features of their tax systems[9]. It is well known that at least most of them are characterized by significant capital import and foreign ownership of the businesses operating within the tax jurisdiction[10]. They constitute source rather than residence jurisdictions, implying that they rely on tax revenues from income earned within the jurisdiction, i.e., not fromcross border activities of tax residents.

Furthermore, they suffer from tax administrations' inefficiencies, due also to the lack of tools to collect information, analyze acquired data and inspire taxpayers' cooperation and voluntary compliance. Their inherent inability to correctly and definitively assess taxpayers' transactions and determine the tax due is amplified by lack of comparable indicators[11]. In principle, emerging economies dispose of a limited tax treaty network, including agreements for the exchange of information with other countries, leading to severe lack of the information needed to understand taxpayers' cross-border activities.

Other remarkable factors are: a) lack of adequate legislation; b) weak political will, if any, to remedy it; c) weight attached to withholding or consumption taxes, which collection is more straightforward[12].

This often causes double taxation and unavoidably incentivizes tax planning involving offshore jurisdictions for its avoidance. Finally, the diverse functional profile that multinational enterprises entering emerging markets need to adopt should not be underestimated; it demands differentiation of the applicable transfer pricing rules.
From the above, it follows that intrinsic deficiencies of the national tax system in emerging economies are highly likely to hinder the effectiveness of BEPS Actions, while simultaneously requiring a different prioritization of the reforms to be introduced.

BEPS Project: Emerging Economies' Perspective and Priorities

Notwithstanding the differences, emerging economies seem to share BEPS concerns and to have welcomed the Project, as they confirmed in relevant questionnaire of the competent UN Subcommittee[13].
The respondent jurisdictions put forward the hazards of transfer pricing for their taxable bases, eroded, mainly, by the payment of extraordinary management fees or passive income to other jurisdictions. Harmful tax competition by low tax jurisdictions or through preferential regimes was also a significant source of concern.
The lack of legislation and the limited capacity of national tax administrations causes such deficiencies rather difficult to be remedied. Hence, the BEPS Project is more than welcome.

Action 12 on mandatory disclosure of aggressive tax planning strategies, and Action 13 on transfer pricing documentation are prioritized by the majority of respondents, as capable of addressing lack of information issues.

6 Heike Buss, OECD Centre for Tax Policy and Administration, *The BEPS Project and the Engagement with Developing Countries*, June 2015.
7 Actionaid, *The BEPS Process: failing to deliver for developing countries*, September 2014. Available at: http://www.francophonie.org/IMG/pdf/beps_16th_sept_2014_actionaid.pdf; Tax Justice Network, *Developing Countries and BEPS: an equal footing?*, September 2015.
Available at: http://www.taxjustice.net/2015/09/23/developing-countries-and-beps-an-equal-footing/
8 United Nations (UN), *World Economic Situation and Prospects*, 2012. Available at: http://www.un.org/en/development/desa/policy/wesp/wesp_current/2012country_class.pdf; Despite the lack of a commonly agreed definition of “developing countries” / “emerging economies,” a typical classification criterion used by the UN is HDI or Human Development Index, referring to longevity, education and income. L. Nielsen, Classifications of Countries Based on Their Level of Development: How It is Done and How It Could be Done, IMF Working Paper, 2011.
9 Heike Buss, OECD Centre for Tax Policy and Administration, *The BEPS Project and the Engagement with Developing Countries*, Bonne, June 2015.
10 Peters C., *Developing Countries' Reactions to the G20 / OECD Action Plan on Base Erosion and Profit Shifting*, Bulletin for International Taxation, June / July 2015.
11 No more than 50 holding companies are incorporated in the entire African continent, according to Lermer D., as panelist in 46th IAFEI World Congress, November 2016, *Analyzing the Latest Developments in Base Erosion and Profit Shifting (BEPS)*.
12 WHT in African countries is at least 10% and on top of VAT and custom charges according to Engel K., as panelist in 46th IAFEI World Congress, November 2016, *Analyzing the Latest Developments in Base Erosion and Profit Shifting (BEPS)*.
13 Subcommittee on Base Erosion and Profit Shifting Issues for Developing Countries, Note. Available at: http://www.un.org/esa/ffd/tax/BEPS_note.pdf

Similarly, Actions 8 – 10 are also deemed important to enable proper transfer pricing and taxation of the value actually created within the emerging markets.

Actions Outside the BEPS Project Scope

Nevertheless, of the utmost relevance for emerging economies seem to be actions taken or envisaged beyond the BEPS framework.

The opening of the Convention on Mutual Administrative Assistance in Tax Matters in 2010 for such countries provides a good example[14]. Today 107 jurisdictions are parties to the Convention, including a large number of emerging ones. Setting the framework for enhanced cooperation between the tax authorities of its parties, the Convention enables not only the sharing of information but also cooperation to enforce national tax laws.

To the same effect, the CRS Multilateral Competent Authority Agreement (MCAA)[15] – already signed by 87 jurisdictions – allows information exchange on financial accounts. These instruments have the potential to effectively address the common problem of lack of information in emerging economies[16].

Moreover, remedying the inefficiencies of their tax administrations is the target of an innovative program launched by the OECD in 2015 – namely “Tax Inspectors Without Borders” (TIWB). It shall enable the onsite cooperation between tax experts from advanced countries with tax administrations in emerging ones, allowing effective sharing of expertise and know-how[17].

Other initiatives are more region-specific. For example, in Africa, the African Tax Administration Forum (ATAF) has released a new Model Double Tax Convention, which takes into account the particular characteristics and needs of African countries. It should facilitate the expansion of the tax treaty network of such countries.

Even if the BEPS Project might have less potential for emerging markets in comparison to advanced ones, action is taken to cure the former’s deficiencies and respond to their needs.

Working on an equal footing is an essential pre-condition to successfully implement and enforce BEPS recommendations and ultimately attain a fully renovated, equitable and efficient international tax system.

14 OECD, Convention on Mutual Administrative Assistance in Tax Matters. Available at: http://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm
15 OECD, Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information. Available at: http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/multilateral-competent-authority-agreement.pdf
16 Roeleveld J., *Analyzing the Latest Developments in Base Erosion and Profit Shifting (BEPS)*, 46th IAFEI World Congress, November 2016.
17 OECD, *Launch of Tax Inspectors Without Borders,* July 2015. Available at: http://www.oecd.org/tax/launch-of-tax-inspectors-without-borders.htm