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Comments on the Public Discussion Draft BEPS Action 11: Improving the Analysis of BEPS

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You will find below some general comments on the public discussion draft *BEPS Action 11: Improving the Analysis of BEPS* (the OECD draft) in reference to the consultation taking place from April 16, 2015 to May 8, 2015.

This document may be posted on the OECD website. Full credit goes to Robert Robillard, DRTP Consulting Inc.[1]

1. Background

We have had the opportunity to review this OECD Public discussion draft in an upcoming paper.[2] For the purposes of this OECD consultation, we shall provide a few supplementary comments.

At the heart of the matter is the fact that "significant limitations of existing data sources mean that, at present, attempts to construct indicators or undertake an economic analysis of the scale and impact of BEPS are severely constrained and, as such, should be heavily

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[2] This paper will be made available on drtp website in the coming weeks.

qualified."[3] The OECD also states that it is difficult "for researchers to disentangle real economic effects from the effects of BEPS-related behaviours".[4]

2. How to Measure?

These statements of fact create substantial methodological concerns for the measurement of the alleged BEPS phenomenon.[5] There exist significant practical shortcomings in the quest that is the measurement of the purported phenomenon termed "BEPS".

First, Borkowski (1992) suggested on transfer pricing:

> "Each decision is determined by the unique combination of environmental, international and organizational characteristics of an MNC [multinational company]. Contingency theory posts that each MNC will choose the optimal transfer price for a given situation whether domestic or international based on this singular combination of characteristics. Consequently, no one correct transfer price can be prescribed for all MNCs."[6]

Second, as it was indicated by Cravens and Shearon (1996):

> "Clearly any research in the area of transfer pricing faces important challenges including a lack of available data and use of surrogates and proxies."[7]

The OECD recognizes some of these challenges in Chapter 1 of although it does not address in any way, shape or form any type of practical solution in Chapter 2 or Chapter 3 of the draft.

The "dashboard of indicators" put forward in Chapter 2 is severely inadequate. It is incapable to make any worthwhile distinction between, on the one hand, the economic and commercial motivations and, on the other hand, any potential tax motivations that

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[3] See the key points in Chapter 1 of the draft.

[4] *Ibid.*

[5] The discussion below draws upon a brief discussion included in our Ph.D. thesis on the use, misuse and abuse of statistical analysis and quantitative method in social sciences.

[6] Susan C. Borkowski (1992), "Choosing a Transfer Pricing Method: a Study of Domestic and International Decision-Making Process", *Journal of International Accounting Auditing and Taxation*, Vol. 1, No. 1, pp. 33-49; p. 35.

[7] Karen S. Cravens and Winston T. Shearon Jr. (1996), "An Outcome-Based Assessment of International Transfer Pricing Policy", *International Journal of Accounting*, Vol. 31, No. 4, pp. 419-43; p. 441.

may be included in any type of commercial arrangement as it pertains to any controlled transaction.

3. Measuring BEPS: a Statistical or a Political Issue?

The alleged BEPS phenomenon remains first and foremost a social phenomenon with obvious political implications. It permeates from every OECD document on the matter that it is an industrialized countries issue. The reduction of the alleged BEPS phenomenon into a quantitative problem of insufficient tax revenues is worrisome.

This emphasis on the end-result is clearly ill-advised from a public policy standpoint. As once explained by Tribe (1972) in an influential paper on the matter of measuring any social or political phenomenon:

> "From many perspectives, the procedures that shape individual and social activity have significance independent of the final products they generate. Yet the traditional approach of both moral philosophy and welfare economics has been to focus exclusively on the end results of social and institutional processes in assessing their value"[8]

Clearly, this is the driving force behind the professed measurement of the alleged BEPS phenomenon. The main objective revolves around the measurement of the end-results which are expressed as alleged tax revenue losses by industrialized countries. The OECD draft focuses exclusively on this end-result.

Indeed, this deeply mistaken approach is palpable in every OECD draft, document and guidance that has been released on the BEPS initiative since its official launch on February 12, 2013.[9] OECD member countries, that is, industrialized countries, claim loud and clear their purported losses of tax revenues from the alleged BEPS phenomenon.

However, it is not so much the end-result of fully legitimate international tax planning that should be of concern to OECD member countries. It is rather the logical and internal processes of tax planning that should be of interest.

Simply put: why is tax planning of interest to any business already involved in complex commercial activities? Being in business is not a simple matter after all. So why would

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[8] Laurence H. Tribe (1972), "Policy Science: Analysis or Ideology?", *Philosophy and Public Affairs*, Vol. 2, No. 1, pp. 66-110; p. 79

[9] OECD (2013), *Addressing Base Erosion and Profit Shifting*, OECD Publishing, February 12, 2013.

any business bother with tax planning in the first place? Might it be that the tax burden itself is basically misguided, misallocated or misdirected?

Let us conclude by stating that, just like Don Quixote entrenched in his battles against windmills, the industrialized countries are mystically and obsessively involved in a sacred journey to fight the alleged BEPS phenomenon, as it pertains to corporate taxation.

It is clearly misguided and misdirected.

Moreover, as it is actually framed, this battle is a figment of their imagination or, at best, an expression of their egotistical self-interests.

But fortunately, both developing countries and businesses all around the world are no windmills…

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