OECD-BEPS: Should the U.S. Be Worried?

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Cheap carping first

Our gracious presenters, Tom Neubig & Grace Perez-Navarro, know Rule 1 of dedicated public service: “No good deed goes unpunished.”

You spend years on Herculean labors (for below-market pay), achieve much more, much faster, than seemed reasonably possible ...

Then, when you go public, all people want to do is criticize and carp – while failing to offer anything better, & ignoring the constraints you faced.

I will start by following this time-honored tradition.
Problems with OECD-BEPS

Two big problems cause me to doubt that OECD-BEPS can have the intended impact on MNEs’ tax avoidance.

First, little reason to expect sufficient multilateral cooperation.

Not the drafters’ fault – they had no mechanism to require general adoption – but relevant to forming expectations.

Second, hard to be optimistic about an approach that retains transfer pricing & separate-company accounting.

Once again, the drafters had no choice – but it means the approach is grounded in quicksand.
Best bets for lasting achievements

I’m enthusiastic about country-by-country reporting (CBCR), & hopeful that it can be sustained.

Grinberg 2015 predicts that the OECD Model Treaty-based components of the Report will be widely implemented & effective.

From a U.S. perspective (where these points aren’t central), 3 main questions:

1) Will the U.S. do anything about OECD-BEPS?
2) Should the U.S. do anything?
3) How will it affect us?
(1) Will the U.S. do anything about OECD-BEPS?

This is the easy one: No!

More precisely, we’re on our own track. Whatever happens to our rules depends on our own internal processes & debates.

Re. OECD-BEPS, not just Republicans but also Democrats have been skeptical at best.

This reflects the at least perceived “anti-U.S. companies” aspect of G-20 & EU tax politics that helped jump-start the process.

Big $$ will be deployed as needed to fight OECD-BEPS (& zero to support it).
(2) Should the U.S. do anything?

Responses could range from adopting proposals to actively fighting it.

But saying what we should do is harder than predicting what we will do.

The key question: absent robust multilateralism, how should we (as a residence & source country) respond to foreign-to-foreign tax planning?

(That is, creating stateless income / placing FSI in tax havens.)

The same set of questions underlie U.S. debate about subpart F, check-the-box, §954(c)(6), etc.

CFC rules are about foreign-to-foreign even when they focus on passive (i.e., mobile) income, rather than directly on the use of tax havens.
Why impede foreign-to-foreign tax planning?

Subpart F’s focus on foreign-to-foreign tax planning makes it dually paradoxical – though not globally unusual!

(1) Why would a residence country object to foreign-to-foreign tax planning? From the domestic standpoint, foreign taxes are just a cost.

(2) Why don’t source countries protect themselves more? After all, they’re the ones losing revenue in the first instance.

The good news analytically: there are answers to both conundrums.

The bad news analytically: Not clear when these answers are correct.

International tax policy is an ongoing N-person game in which no one agrees about the underlying payoff structure.
The residence country perspective

The best rationale for impeding foreign-to-foreign tax planning is that it’s backdoor residence tax base protection.

Once income is labeled as FSI, getting it to a tax haven is much easier.

If FSI is fixed, foreign-to-foreign tax planning serves unilateral national welfare – but when & to what extent should one think of it as fixed?

This conundrum leads countries to act ambivalently / inconsistently, as in the long U.S. saga with subpart F, check-the-box, §954(c)(6), etc.

And it explains the lack of scholarly consensus on these questions (E.g., should we believe Ed Kleinbard – or Jim Hines?)
The source country perspective

While impeding profit-shifting is hard, source countries have long been more tolerant than they (just technically) needed to be.

It’s targeted tax competition – lower effective tax rates for mobile inbound investment – that needn’t be explicit or acknowledged.

So why did G-20 countries – suddenly “shocked, shocked” by U.S. MNEs’ tax planning – start lining up to demand OECD-BEPS?

Just when the U.S. was growing more tolerant towards its MNEs’ foreign-to-foreign tax planning, they became less tolerant of it.

Conflict of interest? Only if we actually know what’s good for each side – notwithstanding the core ambiguities that I’ve noted.
What changed in the EU?

Partly the issue is that MNEs became too good at tax planning.

Comfort with *some* profit-shifting need not contradict discomfort with “too much.”

U.S. companies’ tax planning is the best-known, reflecting high quality of the U.S. tax press (and outstanding U.S. researchers, Capital Hill hearings / reports).

Also (obviously), much has happened recently – both in the world economy & in the EU.

If other countries decide to take a tougher line on our MNEs’ foreign-to-foreign tax planning, not clear how much we *can* do (even leaving aside the ambiguity of what we should want to do).
How will OECD-BEPS affect the U.S.?

Yogi Berra: “It’s tough to make predictions, especially about the future.”

For once, Yogi was wrong: it’s actually quite easy to make predictions! People do it all the time.

But it’s hard if you care about being right.

My best guess is that the upshot of OECD-BEPS will be anti-climactic – but perhaps my knowing the U.S. scene best makes me too pessimistic.

More generally, it seems to be the case that both “Something *must* happen” & “Nothing *can* happen.”