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

Daniel Shaviro, NYU Law School

American Enterprise Institute, December 18, 2015

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 (& 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."