

Thoughts on the OECD BEPS process: an NGO perspective

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The following are detailed thoughts on the OECD BEPS year one outcomes prepared by [friends and colleagues at Eurodad](#) (the European Network on Debt and Development).

Our overall feeling is that we're winning some minor victories in the battle against tax dodging, but we risk losing the war. We've gained a new template for country-by-country reporting, and some new anti-abuse provisions for tax treaties are emerging. But our political momentum to achieve a more fundamental change to the global tax system can be undermined by the fact that OECD sells these rather limited steps forward as a magic solution to tax dodging. Furthermore, some very concerning tendencies are developing:

- **Transparency** apparently no longer means "public access to information". Large parts of the BEPS process has happened behind closed doors and we've not been able to see the negotiating documents before they were agreed. The information from country-by-country reporting should — according to the OECD outcome — be highly confidential.
- **Global tax policies are being decided by 44 countries**, many of which are a core part of the problem (Switzerland, Luxembourg, the Netherlands, Ireland, just to name a few). Meanwhile, more than 100 developing countries are not invited to participate in the decision making.
- All these BEPS solutions build on and **reinforce the existing OECD system**, including the arm's length principle and a tax treaty system which gives preference to residency countries over source countries (roughly speaking: preference to OECD countries over poorer countries).
- Lastly, **this OECD outcome can be abused** by the business lobby to argue that the public country by country reporting, which has been adopted for banks in the EU, should be reconsidered. Of course, voluntary OECD guidelines cannot change an adopted EU directive. None the less, the business lobby have managed to get the OECD to agree with something they didn't manage to get through the EU, and they will no

doubt try to misuse this.

The atmosphere in the media

It's been very surprising to see how this package is being sold to the media. Confidential CBCR reporting, which the public will not be allowed to see, is being called "a major step forward in transparency" (explanatory statement, page 6). A package of decisions de facto means that governments will aim to stick up the existing complicated tax regime by adding new complicated rules on top is being sold as "extremely ambitious", "bold updates" which "kill" the problems, etc.

On the issue of developing country participation, the OECD line is that they have been "extensively consulted through numerous regional and global for a meetings and their input has been fed into the work" (explanatory statement, page 4). However, due to the lack of transparency in this process (see more on this below), it has been very difficult for everyone except the 44 governments that have been invited to the decision making table, to follow the discussions and participate in the real political debates, which have taken place behind closed doors.

What are these documents? Will they really be adopted?

The "explanatory statement" talks a lot about this, and it might sound a bit complicated but the bottom line is that ministers are very likely to sign off on this package, which means that a lot of things will be decided and it will be very difficult to reopen these issues again afterwards. Furthermore, as we saw from the OECD's media launch earlier this week, it is likely to be sold as a monumental breakthrough in the fight against tax dodging.

Why are ministers likely to sign off on this package? Because BEPS has been an extremely political process and the 44 governments have been heavily involved from the very beginning. If you read the foreword of Action 13, it clearly says that "[all OECD members (...) and G20 countries][have] adopted a first set of seven deliverables". So, it's already been agreed.

Then what's so complicated about it? Firstly, the package contains some elements that are still in brackets because they're not agreed yet. However, the issues that are most important to us are not in brackets.

Secondly, the package suggests that the documents should be "agreed but not formally finalized", because the BEPS project continues for another year and the decisions "may be affected by some of the decisions to be taken with respect to the 2015 deliverables".

And lastly, there will be a number of additional documents drafted. For example on CBCR, additional documentation on how CBCR information should be filed and

disseminated will be drafted.

But bottom line: The ministers will adopt this package and it contains a number of important decisions — see below.

Action 13 - Country-by-country reporting

This seems to be where we find the most substantial outcome of year one.

On the positive side, we now have a “CBCR template” for multinational corporations to report on a country-by-country basis. This template contains the elements we need, including information on the revenue of the multinational corporation, the profit before income tax, income tax paid and accrued, the location of the economic activity, all the constituent entities, and the nature of the main business activities.

On the negative side:

- The **confidentiality requirements** are more aggressive than we had expected. The fact that the secrecy doesn't only cover information that is “commercially confidential”, but also everything that is “commercially sensitive” sets a very bad precedent. If everything “sensitive” has to be kept from the public, it can become hard to get any information which can be used to even question corporate levels of tax payment. The fact that the secrecy also explicitly covers court cases risks eliminating a source of information which has previously been important to CSOs. (see para 44. on page 24 of the Action 13 document under “confidentiality”). Please also note that the OECD is selling this as “a major step forward in transparency” (Explanatory Statement, page 6).

The discussion about how to file and disseminate this information among governments is still ongoing, but now that the high level of confidentiality has been decided, there is a very clear risk that many developing countries will in the end have great difficulties accessing the information. One proposal is that the company should only submit the CBCR report in the country where the headquarter is located, and then governments should exchange information through treaty mechanisms. We know from previous experience that developing countries are not likely to get much information through such a system.

- **Verification of CBCR information.** The OECD document now allows the CBCR information to be outside of the statutory accounting (see page 40 of the Action 13 document under “Source of data”). In other words, the CBCR information does not have to be subject to the independent verification and the legal obligations relating to the statutory accounts of companies. This also seems to be something the OECD has snuck in to the documents at the last minute. Marlies de Ruiter, OECD Head of Tax Treaty, Transfer Pricing, and Financial Transactions said about this: “unlike the prior draft, there is no longer a requirement that statutory accounting be the sole source of data” ([see here](#)

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- **Risk that not all multinational corporations will be covered:** Marlies de Ruiter again: "Officials are considering whether to require reporting only for large companies".

Complexity and the arm's length principle

An important problem with the existing international tax system is that it assumes that multinational corporations are in reality separate entities which should be taxed independently, and that this can be achieved with the "arm's length principle". To make this work, the OECD has developed an extremely complex system of transfer pricing documentation.

With this new package, it seems the OECD is trying to solve the problem by sticking to the arm's length principle, but adding more complexity.

- **On Action 2 (hybrid mismatches):** They propose a complex set of provisions designed to be implemented independently by governments without any coordination between governments.
- **On Action 8 (intangibles, phase 1 – this work will continue):** They stick to old concepts of legal ownership and risk, and seem to be adding new levels of complexity to this system rather than developing alternative systems (such as the profit split method).

Lack of transparency

Generally: Even though this process have been going on for more than six months, we've only received very limited information about what the negotiating documents actually contained. Then two hours before the media launch, we receive over 500 pages of very technical text which according to the OECD is a major breakthrough in global taxation. Hidden in this pile is everything from very practical and technical discussions about details, to major political issues of crucial importance to taxation of multinationals globally – an issue which many people would have strong opinions on if the discussion wasn't covered up in 500 pages of technical terms. To state the obvious, it's very difficult for CSOs, developing countries, journalists and the broader public to participate in a meaningful debate on these terms.

Harmful tax practices

The OECD has tried to solve this since the 90s (see for example <http://ow.ly/BImqd>) but not made much progress. The BEPS process has now reopened the discussion in OECD, but despite the fact that "transparency" is supposed to be a key element of the work, the group has worked in secrecy. Looking at the 65 page long document that has now been sent out about this

work, they are engaging in a review of different practices, as well as the need for states to share administrative rulings with each other. This work will now continue — most likely in secrecy.

Action 6 — preventing treaty abuse

OECD are suggesting including references to preventing double non-taxation in the preamble of double-tax treaties. Furthermore, the report includes recommendations about inclusion of anti-abuse provisions, including limitation of benefit provisions. Work has been done to develop new domestic rules to prevent abuse. Lastly, OECD has identified considerations that countries should take into account before deciding whether they want to enter into a tax treaty.

One thing that has however not been part of the BEPS project is the discussion about allocation of taxing rights between source and residence countries, roughly speaking between OECD countries and poorer countries. As Michael Lennard from the UN Tax Committee has so clearly described here: <http://ow.ly/B1mps> this is one of the main differences between the OECD and the UN system, with the UN system being more accommodating to developing country interests.

Action 10 — A multilateral instrument

The OECD will be developing a mandate for negotiating a multilateral convention, in particular to promote implementation of BEPS outcomes through bilateral tax treaties.

One concern on this point is however whether the pressure will be stronger on developing countries to accept the OECD model tax treaty, including the disadvantages it has towards source countries (i.e. developing countries).

Other issues not included in the BEPS project

A number of issues which are important to developing countries have not been included in the BEPS process. For example:

- Tax incentives**
- Extractive industries**
- Allocation of taxing rights between source and residence countries**

The BEPS project also excludes any work to explore real alternatives to the current system, including unitary taxation.

Risk of undermining the progress that's already been made elsewhere

Not least a concern in relation to the public country-by-country reporting for banks, which was adopted under the Capital Requirements Directive last year, there is a risk that the OECD document will be abused by the business lobby to argue for dismantling this progress.

The victory under the capital requirements directive was possible because the European Parliament fought a brave battle against the business lobby and pushed it through. However, it seems the business lobbyist just took the train to Paris and now managed to get an OECD document saying CBCR should be highly confidential. It would be very surprising if they're not already running around in the corridors in Brussels saying "OECD agrees with me!!!".

Of course, a directive cannot be reopened by a piece of voluntary OECD guidance, and the EU governments deserve strong criticism for agreeing to this OECD document, which goes against an adopted EU directive. They were supposed to fix the problem, not sit and nod when the business lobby suggests rolling things backwards.