Post-truth in tax matters : Considerations regarding a recent Eurodad Report

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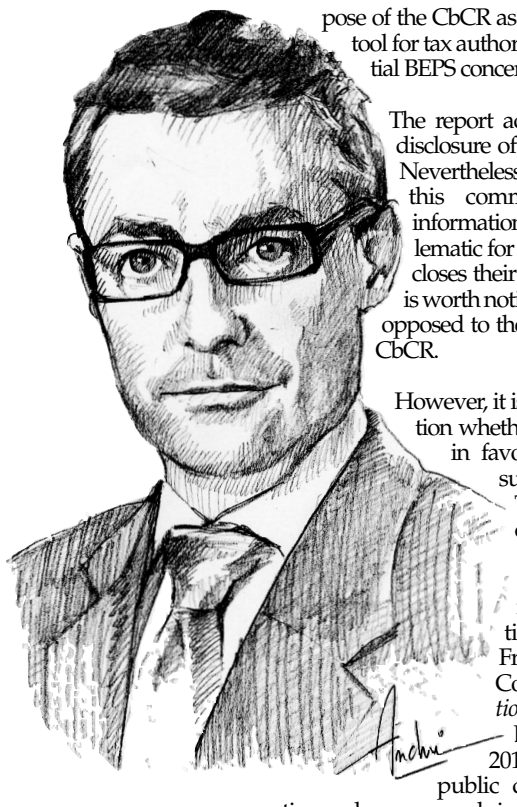

I. Introduction

On 7 December 2016, the European Network on Debt and Development (Eurodad) released a report entitled "Survival of the Richest: Europe`s role in supporting an unjust global tax system 2016" which was produced by NGOs in countries across Europe. At the core of the report is the accusation that the number of Advance Pricing Agreements (APAs), referred to as secret "sweetheart deals" in the report, significantly increased over the last years.

The key messages of the report have been much-cited in newspapers in Luxembourg and across the globe. Unfortunately, the journalists covering the topic merely relied on the information provided in the executive summary of the report without conducting a critical review of its content. Otherwise, the misrepresentations in the report would have been detected and pointed out. In this article, we analyse some of these misrepresentations.

II. Misrepresentations in the Eurodad report

1. Classifying APAs as secret "sweetheart deals"

An APA is an agreement between a taxpayer and a tax authority on the application of an appropriate transfer pricing methodology in regard to a specific intra-group transaction, confirming the arm`s length nature of the transfer price (i.e. the price for goods or services transferred between members of the same group). The latter has to be substantiated in a transfer pricing study that is consistent with the OECD Transfer Pricing Guidelines.

The report denounces APAs as secret "sweetheart deals" which is wrong in many respects. First, an APA only confirms the agreement of the tax authorities with the transfer pricing methodology applied by a taxpayer. As such, APAs do not entail any particular benefit to taxpayers.

Second, APAs are not secret at all since they are exchangeable with the tax authorities of all EU and OECD Member States. Hence, there is full transparency with all the tax authorities that are concerned. Starting from the position that not publishing something involves secrecy is a point of view but it should not be presented as objective in any way.

Third, the report impressively shows how statistics can be used to disguise or misrepresent information. According to the report the number of APAs in the EUhas soared from 547 in 2013, to 972 in 2014 and it finally reached 1,444 by the end of 2015. The authors of the report then compute a sharp increase of over 160 per cent between 2013 and 2015 (and an increase of almost 50 per cent from 2014 to 2015). The report further points out that the most dramatic increases have occurred in Belgium and Luxembourg where the amount of APAs "skyrocketed" increasing by 248 per cent and 50 per cent, respectively, in just one year (from 2014 to 2015).

The truth is that the report presents aggregated figures (adding the number of new rulings granted in a given year to the number of previously existing rulings) instead of APAs on a year-by-year basis. Hence, it is only natural that the number of rulings significantly increases over time as APAs usually remain valid for several years.

Last but not least, the report fails to explain what is wrong about taxpayers receiving up front confirmation of the transfer pricing policies that they adopt. This has been recognised as a positive development as it allows tax authorities in Europe and around the world to verify the Transfer Pricing policies up front. Even the EU Commission acknowledges the positive effect of APAs on removing legal uncertainty from transfer pricing and supports the continued use of this instrument by EU Member States.

2. Red cards for failing to support "public" Country-by-Country Reporting (CbCR)

The report rates countries "red" which are not in favor of public CbCR. However, this is reflective of the mindset of the report`s authors and lacks any sense of objectivity.

Notably, the OECD, as part of its Base Erosion and Profit Shifting (BEPS) Project, developed a template for multinational enterprises (MNEs) to report annually and for each tax jurisdiction in which they do business certain information on its group companies.

According to the OECD, CbCR should be automatically exchanged with all tax jurisdictions involved. Thus, all tax authorities that are concerned with the taxation of a MNE have access to this information. This is consistent with the purpose of the CbCR as a risk management tool for tax authorities to detect potential BEPS concerns.

The report advocates the public disclosure of CbCR information. Nevertheless, the disclosure of this commercially sensitive information is extremely problematic for MNEs as it also discloses their business strategy. It is worth noting that the OECD is opposed to the idea of publishing CbCR.

However, it is not simply a question whether one is personally in favor of public disclosure of CbCR or not. There may be fundamental legal objections to it relating to data or commercial confidentiality. Notably, the French Constitutional Court (*Conseil constitutionnel*) held on 8 December 2016 (No. 2016-741 DC) that the public country-by-country reporting rules proposed in French law on 8 November 2016 are not compatible with the French constitution and repealed the relevant Article from French tax law.

Thus, not only may the French tax authorities not publish CbCR but it may even not be possible to share CbCR with jurisdictions that would adopt "public" CbCR. These constitutional concerns may exist in other jurisdictions and render "public" CbCR non-practicable.

3. "Very problematic" tax treaties with developing countries

The report states that European governments continue to sign "very problematic" tax treaties with developing countries as they impose restrictions on tax systems in developing countries. However, this is what tax treaties do, they allocate taxing rights to the Contracting States and determine how double taxation is to be avoided. This quite naturally involves a restriction of the conflicting taxing rights of the Contracting States (notably, both Contracting States generally negotiate the same allocation and restrictions of taxing rights).

The primary purpose of tax treaties is the elimination of double taxation as an obstacle to international trade and investment. Tax treaties promote the development of economic relations between countries and foster cross-border business activities. Therefore, description of tax treaties as «very problematic» is entirely subjective. These tax treaties are negotiated between Sovereign states with their eyes open and reflect the balance of interests of both states and a desire to improve trade. A developing country can easily revoke a treaty if the terms are harmful to its best interest.

Most development specialists agree, however, that trade and foreign investments are the most important means for developing countries to improve their status, so encouraging trade by double tax treaties should be encouraged not discouraged.

4. Red cards for failing to support "public" registers of beneficial ownership

The report further classifies countries red that rejected the option of establishing public registers of beneficial owners of companies and trusts. Again, this is a question of opinion, more than any objective assessment of how useful this is to create greater tax justice. Provided that the tax authorities have the information (which should be the case under CRS), tax justice can be served. While taxpayers have to disclose their investments to the tax authorities of their residence state and automatic reporting is available to enforce this, there are many concerns (including a potential incompatibility with the constitution) about making such information publicly available for everybody.

In addition, the report "redcards" Luxembourg for its ranking in the TJN financial secrecy index, on the basis that Luxembourg has the "highest level of financial secrecy out of the 18 countries included in this report (ranked at number 6 at the global level)". If the authors had taken the time to actually read how the index is made up, they would have realized that it is a composite of the level of secrecy and the importance of country in financial markets and, in fact, on the level secrecy per se, Luxembourg ranks 65th, not 6th and is behind Germany.

5. Red cards for failing to support the establishment of an intergovernmental body on tax matters

The report calls for the establishment of an international tax agency under UN auspices to combat tax avoidance and tax competition between countries and red cards countries for failing to support this proposal. The purpose of this agency would be to ensure that developing countries are able to participate in the definition of global tax standards. The report criticizes the BEPS initiative as consisting of "minor tweaks to deeply flawed system" and criticizes the OECD as being exclusive. The reality is that the BEPS project has been widely recognized as having made major steps forward in a very short period of time. While a complete rework of the global tax system involving all countries globally might be a worthwhile aspiration, if the OECD and G20 had chosen this path at the start of the BEPS initiative, we would still be discussing the terms of reference.

III. Conclusions

The Eurodad report is presented as a scientific analysis of empirical data with objective conclusions. However, in reality the report is an accumulation of opinions of the NGO activists who drafted the report. While the opinions are legitimate and merit discussion, they are not true nor are they objective and the authors of the report (not disclosed, in a demonstration of double standards where transparency is concerned) have regrettably chosen to lead with slogans rather than substance.

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Risk Appetite Framework : premiers constats, prochaines étapes

Par Anatole DE LA BROSSE, CEO Sia Partners Luxembourg

Les établissements affinent le dispositif opérationnel de l'Appétit aux Risques et notamment son déploiement aux lignes métier, sous l'œil toujours très attentif des régulateurs. L'ECB (Banque Centrale Européenne) vient de sortir un rapport du SSM (Single Supervisory Mechanisme) sur leurs attentes pour le déploiement du RAF (Risk Appetite Framework) comme le fondement du dispositif de gouvernance.

Les régulateurs attendent des institutions une définition détaillée de leur appétit au risque articulée autour des mesures qualitatives et quantitatives spécifiques. Les institutions doivent clairement spécifier les niveaux de tolérance aux risques les plus importants et s'assurer de les intégrer au niveau opérationnel en restant en ligne avec les process de gestion des risques en place.

Les éléments qui soutiennent l'appétit au risque et notamment le couple Profil de Risque/Rendement doivent ainsi être accompagnés par des précisions sur des limites et sur les seuils de tolérance, déployés dans l'ensemble des lignes métiers, activités, filiales ... Les éléments pris en considération, comme par exemple la sensibilité des résultats aux cycles conjoncturels, aux événements de crédit, de marché ou opérationnels et l'impact de l'environnement macro-économique, doivent désormais être matérialisés par des critères quantitatifs et qualitatifs très précis. Les exigences des régulateurs sont très fortes, notamment avec la demande de preuve d'interaction entre le RAF et l'ICAAP, l'ILAAP, le Budget, les plans de remédiation et la rémunération.

Les SI (Significative Institutions) sont en train de développer leurs RAFs (30% RAF développés, 12% en cours de développement). Le premier constat du JST (Joint Supervisory Team) qui émane du rapport est que le dispositif est assez récent et son rodage est loin d'être parfait. Les risques matériels d'une institution sont identifiés par le JST et doivent couvrir les risques suivants : business risques et rendement, risque de solvabilité, de liquidité et risque de taux pour le banking book (IRRBB), le risque de crédit, marché, liquidité, donc en synthèse les risques reconnus et traités par le comité de Bâle plus le risque de business et de profitabilité.

En plus, l'ECB attend à ce que les institutions financières incluent dans le RAF de façon claire et explicite les risques non-financiers, exprimés par des proxies quantitatifs ou des déclarations qualitatives. Cela concerne, en particulier, le risque de compliance, de réputation, de systèmes d'information (IT Tools), le risque légal et éthique. Le JST considère que le nombre optimal des métriques pour présentation au Board doit être entre 20 et 30, en fonction de la taille et la complexité de l'institution. Donc un nombre suffisant pour couvrir les différentes dimensions mais assez restreint pour assurer une clarté dans la lecture du tableau de bord. La revue thématique du JST a également considéré les limites associées au RAF, et leur retour a été assez critique : des limites qui ne permettent pas de gérer la prise de risque de façon efficace, qui n'incluent pas une concentration par domaine (par émetteur, secteur ou pays).

Egalement critique vis-à-vis de la procédure d'escalade en cas de dépassement de limites qui n'est souvent pas définie/documentée ou doit être largement amendable, avec une détermination claire des rôles et des responsabilités des parties prenantes. A cet égard, le JST signale que les systèmes d'information, la remontée en temps et en heure des dépassements des limites et l'agrégation des données vont être dans le viseur de la surveillance du SSM pour 2016. La détermination et la formalisation de l'appétit au risque passent au premier plan et peuvent donner place à une appréhension légitime au top management quant à la marge de manœuvre que les politiques et procédures concises peuvent laisser au business. En particulier, on peut s'interroger sur les impacts lors d'une période d'appétit au risque structurellement très faible et les modalités d'ajustement du cadre de l'appétit au risque lors d'un possible retour à la normale. L'arbitrage pouvant apparaître entre les objectifs business et le niveau d'appétit au risque, notamment lorsque ce dernier est structurellement faible, nécessite des décisions de mise en cohérence au niveau du top management. Afin de les éclairer, il est nécessaire de s'appuyer sur une formalisation idoine de l'appétit au risque, et d'un processus d'actualisation régulier.

Plus précisément, les institutions devraient développer un tableau de bord, agrégé et consolidé, comparant les limites d'exposition au risque et de risque à l'appétit pour les risques financiers et non financiers. Ce tableau de bord doit être présenté au conseil d'administration régulièrement (au moins tous les trimestres pour les grandes institutions) pour soutenir son examen, la surveillance et suivi du profil de risque de l'institution. Au-delà des aspects réglementaires, in fine assez théoriques, il serait intéressant de suivre comment le dispositif de Risk Appetite va faire les preuves de son utilité et sa flexibilité dans un contexte particulier avec l'intégration par exemple du risque de Brexit qui peut impacter tous les établissements d'importance systémique.