

Tackling Tax Havens in the US and EU

A Strategy of Not In My Backyard (NIMBY)

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Introduction

The question of how to tackle the problem of tax havens has never before been so pressing. In April 2009 a G20 communique announced the intention to take action against non-cooperative jurisdictions, proclaiming themselves to be, 'ready to deploy sanctions to protect [their] public finances and financial systems', and the, 'era of banking secrecy is over.' This coupled with the increasingly corrosive impact of tax avoidance and evasion on the tax bases of states that are negotiating the politics of austerity has proved fertile grounds for a plethora of policy debates and initiatives. While these policy debates and processes are nascent, numerous and now unfolding, this Brief seeks to take stock of the current direction of travel.

The regulation of tax havens has persistently foundered on the rocks of territorially bound, mutually exclusive legal authority and increasingly mobile capital. Those seeking to ameliorate, what is now widely understood to be, the deleterious impact of tax havens on the world economy face an apparently intractable collective action problem. First, each state stands to gain from imposing the least exacting tax and regulatory requirements upon mobile capital. Second, in the absence of unanimity amongst states and uniformity in terms of tax and regulation, policy and regulation which is not universal will necessarily be gamed. As such, delivery on the promise of the G20 seems to rely upon a 'World Tax Authority' or the closure of national borders to economic transactions.

While, harmful tax competition remains rife, with in particular recent moves by the UK government standing out in this regard, one emergent trend seems to counter this conclusion and promise more than might at first appear. Both the US and the EU are shifting to-

wards unilateral policy as a basis upon which to reinvigorate and reinforce what has been a largely ineffective multilateralism. This involves a new concern with establishing rules within their own jurisdictions that potentially severely curtail the capacity of individuals and corporate entities to simultaneously live or do business within their jurisdictions while taking advantage of the differential services offered by tax havens. 'Not in my backyard' seems defeatist and piecemeal, but given the combined economic weight of the US and the EU appearances in this case may yet prove deceptive. 'Not in my backyard' may open the way to an effective multilateralism, but by the backdoor.

Information on request as precedent

THE OECD Model Convention and Model Tax Information Exchange Agreement (TIEA) require tax information exchange on request, merely allowing for automatic information exchange on separate agreement. The model was published in 2002 by the Global forum on Taxation formed in 2001 as a result of the OECD's Harmful Tax Practices Project. Under a TIEA a government can only request information on a specific and named taxpayer who can be shown to have given due reason for suspicion. Further, the investigating tax administration would need to know in which jurisdiction the individual held an account and with which specific financial institution the account is held.

Obvious limitations effect information on request. Firstly, the fact that these are bi-lateral agreements reduces the potential benefits flowing to developing countries as these countries are likely to be hampered in identifying and tracking suspect account holders by an ineffective and under-resourced tax administration. The bi-lateralism of OECD TIEAs has only generated a few links between a limited number of players.

Secondly, the few agreements in place include, for instance, those between the British Crown Dependencies (Jersey, Guernsey and Isle of Man) and the Faroe Islands and Greenland. The mechanism seems open to calls of window dressing. Thirdly, TIEAs rely upon governments already having in hand precisely the type of information that tax havens are designed to conceal, and consequently represent a simple case of placing the cart before the horse.

That the OECD deemed any tax haven which signed 12 TIEAs to be internationally compliant, and that this 12 might include an agreement between any 2 jurisdictions indicates significant policy weakness. The apparent failure of the OECD initiative to generate substantive results in combination with an historical conjuncture circumscribed by the financial crisis, recession and a 'fiscal crisis of the state' laid the ground for the recent shift towards more unilateral moves.

The U.S. Foreign Accounts Tax Compliance Act

FATCA was enacted in 2010 by the U.S. Congress to target avoidance and evasion by U.S. taxpayers using foreign accounts. The legislation requires foreign financial institutions from 2014 to report to the Inland Revenue Service the value and income accruing to accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial interest. The legislation covers both accounts held directly and those held by corporate entities benefitting U.S. individuals.

The leverage of FATCA pivots on the importance of the U.S. market for intermediaries worldwide. Foreign Financial Intermediaries are placed in a position where non-participation renders them uncompetitive. Non-participating intermediaries are subject to a punitive withholding tax on payments from U.S. sources. Withholding tax is levied on payments to the foreign intermediary as well as those to U.S. individuals, and participating intermediaries are required to impose the same tax on non-participating intermediaries. Effectively, a potential policy diffusion process has been built into legislative enforcement mechanisms on the basis of market power and the threat of direct or indirect market exclusion.

Tones of 'not in my back yard' may be evident. However, features of the agreement provide grounds for some optimism. Access to the U.S. market will be dependent on compliance with high levels of information exchange. The benefits of this seem to flow largely to the United States, but it may serve as precedent for bi-lateral and multilateral exchanges. Notably, any firm which is compliant, in being able to identify U.S. account holders will necessarily have corresponding

information on the accounts of other nationals. FATCA then could constitute the basis of cascading reciprocity.

Europe's tax haven agenda

The development of a European policy towards tax evasion has been somewhat tortured in the navigation of the strictures of the Treaty of Rome and the conflicting policies and preferences of its member and associated states. In December 1997 the EU Council agreed a set of measures to tackle harmful tax competition in the EU which included a code of conduct on business taxation, the taxation of savings income and withholding taxes on cross border interest and royalty payments. In 1998 the EU Commission proposed a directive intended to ensure that a minimum effective tax rate was imposed on interest income earned through accounts held by a resident taxpayer in a foreign EU country. A draft directive was agreed by ECOFIN in November 2000.

Under the Directive all member states would provide automatic exchange of information. However, the EU's own tax havens – Austria, Luxembourg and Belgium – are afforded a 7 year transition period during which they may choose to impose withholding tax. The agreement of these jurisdictions relied upon equivalent measures being adopted in non-EU member states and dependent territories such as Switzerland, the U.S. and the Channel Islands. In effect then, the insistence on equality of treatment by the EU's tax havens provides a basis for EU policy to constitute a multilateral mechanism with the broadest geographical coverage.

Amendments to the Mutual Assistance Directive (COM 2009 29) reinforced this trajectory. First, a Most Favoured Nation clause was introduced obliging member states to provide another member state the level of cooperation they have accepted in relation to a third party. Second, it prohibited the reliance on bank secrecy for non-residents in a refusal to supply information on a taxpayer. This then provides a bridge for the transposition of FATCA rules into EU practice and weakens the secrecy on which tax havens rely.

By announcing that the U.S. would not agree to full information sharing on U.S. savings accounts held by EU residents the Bush administration in 2002 had temporarily derailed the progress of EU policy. However, the European Union Savings Directive (2003/48/EC) came into force in July 2005 with the limited aim of ensuring information exchange or withholding tax on interest payments made to the accounts of EU residents at intermediaries in Europe. The Savings Directive left EU policy in a curious half way house. Firstly,



it could not capture interest payments accruing to accounts held by corporate entities rather than individuals. Changing the identity of the beneficial owner from a natural person to a trust or limited company meant transparency could be circumvented. Secondly, member states could choose either to exchange information or withhold. The three European tax havens and most of the dependencies of the Netherlands and UK chose the withholding model.

While this impasse remains in place, in February 2011 the Directive on Administrative Cooperation in the Field of Taxation the EU (2011/16/EU) mandated the Commission to widen the categories of income that member states must report beyond interest payments and therefore rendered the EU regime potentially compatible with FATCA requirements. This along with proposed changes to EU Savings Tax (COM 2008 7279), which extend the coverage of the Directive to interest payments to EU residents channelled through tax-exempted structures established in non-EU countries and target the use of structured financial products that obscure the link between the payer and the ultimate beneficiary potentially lends EU policy real substance.

In March 2011 the European Commission proposed a common system for calculating the tax base of businesses operating in the EU. The Common Consolidated Corporate Tax Base (CCCTB) would mean that companies would consolidate all profits and losses incurred across EU jurisdictions and pay taxes according to 'formulary apportionment'. The proposal maintains the sovereign rights of member states to set their own corporate tax rate. Group profits will be taxed once across the EU and tax revenues, in contrast to systems which prioritise legal form over economic substance, will be distributed among countries according to 'real economy' criteria such as sales, capital invested and employee numbers. While at present the proposal remains mired in the conflicting preferences of member states, it is notable that the Financial Transaction Tax has been established in the absence of unanimity. It may be that the CCCTB can be carried forward on a minority basis under the 'enhanced cooperation' procedure.

Under the direction of Algirdas Šemeta, Commissioner responsible for taxation and customs union, audit and anti-fraud, the EU is accelerating its efforts to tackle tax havens. The imminent release by the Commission of a statement of intention, 'An Action Plan to strengthen the fight against tax fraud and tax evasion', is likely to compound the accelerating trend. While progress in the fight against tax havens has been slow, haphazard and hampered by the EU Treaty and divergent interests amongst members, a

certain direction of travel is discernible. The EU Savings Directive and the Directive on Administrative Cooperation in the Field of Taxation contain the seeds of automatic exchange with non-member countries and dependencies in the form of built-in mechanisms of extension. The strategy of 'not in my backyard', which the EU shares with the U.S., may, perhaps ironically, be the wellspring of an effective multilateral mechanism.

An Elephant in the Room

Agreements struck between Switzerland on one hand and Germany and the UK on the other cloud what might otherwise seem sunny horizons. Amidst the rising tide of debate and policy, Switzerland, the home of some 27% of global wealth, has opted to pursue a withholding tax strategy. Under the 'rubik' agreements Switzerland will, in lieu of exchanging information on the accounts of non-Swiss residents, tax investment income and capital gains at an agreed rate varying according to country and income category. A one-off charge will be levied against accreted principal to compensate for past tax evasion. The agreements also allow Swiss account holders to relocate to other tax havens and avoid paying the lump sum or withholding at all.

These agreements represent a blueprint for an alternative to the emergent information exchange regime. The choice is stark. The withholding model condones tax evasion by default. Evaders are in effect allowed to pay a fine for past misdemeanours but are not forced to defer from such behaviour in future. Further, the model institutionalises the differential capacity of the most wealthy to utilise tax havens in a way that is not available to less mobile parts of the economy. Third, there is no mechanism built into the Swiss model which would encourage the emergence of a multilateral system the benefits of which could be made available to developing and developed countries alike.

Conclusions

Under pressure from civil society organisations, electorates unlikely to tolerate an overtly skewed distribution of the tax burden, large fiscal gaps and a so far elusive search for renewed growth, the politics of tax have risen to the top of the agenda. Within this conjuncture, both the U.S. and the EU have taken substantive unilateral steps towards reconfiguring their relationships with some offshore jurisdictions. These steps, while still nascent, promise both a significant curb on tax evasion and a more transparent global financial system. However, progress is fragile and a less coherent admixture of initiatives enacted by individual countries remains a genuine prospect.

In looking forward, 4 issues might deserve highlighting:

- It is likely that some jurisdictions will be subject to calls of hypocrisy. The U.S. and UK host perhaps the largest of offshore centres. A sense of indignation in the face of this contradiction may undermine multilateral potential.
- The rise of China and the Singaporean tax haven may pose an insurmountable barrier to universal regulation. Politics among the BRICS may be definitive in the future shape of global tax regulation.
- The EU may need to transgress the strictures of the Treaty to enforce its preferences on EU tax havens and EU member state dependencies. Unanimity cannot be counted on.
- The OECD may need to reconsider its role in this arena moving from the generator of global initiatives to acting as a technical forum to facilitate the integration of distinct policy initiatives.

About the Author

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