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DEBATE

Global Enterprise Taxation (GET) May Be Hard to Get, but It Should Be the Future

Comments to Bellingwout's Paper

Hein Vermeulen*

This comment is divided into three parts. Firstly, I summarize my understanding of Global Enterprise Taxation (GET). Secondly, I share my considerations assuming that the world is not ready to abolish corporate taxation by relying on only sales taxes, VAT, and wage taxes. The note ends with a conclusion.

1 My takeaway of GET

In 2014, Bellingwout published an article in which he developed a plan to tax multinational enterprises (MNEs) in lieu of the corporate tax systems as we know them. This idea was charged by the BEPS Project that seeks to tackle tax avoidance by repairing holes in the corporate tax system rather than designing a completely new system. He then proposed to address only a part of the problem.[1]

In his currently published article, Bellingwout no longer feels constrained to solve only a part of the puzzle and aims to outline a wholly new system to subject so-called global enterprises (GE) to corporate tax. It is key to see the difference between GEs and MNEs in this respect. The GEs are a world on their own, and their size is so enormous that they can best be compared to countries, according to Bellingwout. The idea is to essentially design a new system for GEs next to the current system for enterprises that operate locally (SMEs) and MNEs that are not the size of a GE. Stated differently, the unhappy marriage of SMEs/MNEs and GEs in one corporate system is fractured, and each party goes on living their separate lives.

In his opinion, the GE should be taxed on a world-wide basis, i.e. on the total profit of the GE, which is then allocated to the countries through a type of apportionment. This may sound familiar if one looks, for instance, at Maarten de Wilde's proposal for 'Sharing the Pie',[2] but the difference is that Bellingwout's idea is out-of-the-box in the way that he completely abandons current concepts. In a sense, therefore, there is a similarity with the European Commission's proposal for a Common (Consolidated) Corporate Tax Base (C(C)CTB), albeit on a global level and by charging an autonomous party and not the principal taxpayer's Member State with the task to set the taxable profit. In this respect, Bellingwout suggests that the OECD takes the responsibility in this respect. Also, completely different from other proposals is to divide a GE into relevant business units in order to derive a better approximation of the profit attributable to them.[3] In keeping with the metaphor that a GE should be considered as a country, these business units are the provinces of that country. For me, this makes it a charming idea: it is not a one-size-fits-all-approach but much more tailored to reality. Of course, there is some 'harmonization' in Bellingwout's proposal, but it is more close to reality than the C(C)CTB or the Unified Approach of Pillar I,[4] for that matter.

2 Considerations

2.1 Global Approach Next to Separate Entity Approach

The Global Approach seems convincing to me. The Separate Entity Approach is simply no longer fit for the purposes of GEs. This can best be demonstrated by the OECD's recent ideas for Pillar I and II. The drawback of Pillar I is that it keeps the Separate Entity Approach alive. In Bellingwout's proposal, that is no longer the case. There are two systems that work next to each other that

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1 J. W. Bellingwout, *Corporate Income Tax: Marking the Passage of Time*, 54(4) Eur. Tax'n 171–176 (2014).

2 M. F. de Wilde, *'Sharing the Pie': Taxing Multinationals in a Global Market* (IBFD 2017).

3 I take it that, when the Consultation Document of the OECD on the 'Unified Approach' under Pillar One uses the phrase 'business line', cf. para. 30, it is not considering this as business units. OECD, *Secretariat Proposal for a 'Unified Approach' Under Pillar One*, Public Consultation Document 9 Oct. 2019–12 Nov. 2019 (OECD Publishing Oct. 2019).

4 OECD, *supra* n. 3.

do not interact. GEs should be subject to GET only. In my view, this should be feasible from a State aid perspective. In the recent judgments, the General Court accepts an inherent Arm's Length Principle to set stand-alone and group enterprises at par only if a Member State's corporate tax system seeks to tax stand-alone entities and group entities in the same manner.[5] As a result, there is opportunity for two (or maybe even more) systems: the current system based on the Separate Entity Approach with BEPS patchwork for SMEs and MNEs, on the one hand, and a brand new GET system for GEs, on the other hand.

2.2 *Business Units*

The drawback of the Unified Approach is that it again is a one-size-fits-all approach in a way that a consumer facing business is an overly broad concept. In this way, it resembles the CCCTB proposal albeit that the proposal for the CCTB contains special provisions for financial undertakings.[6] In fact, the OECD also acknowledges this as it states that extractive industries and perhaps also the financial services sector should not be in the scope. Bellingwout brings nuance to the table by dividing GEs into business units that can be compared to those of other GEs. This approach is advantageous in that it can better properly assess the profitability of the components of the GE and thus result in a better profit allocation to countries.

As a starting point, Bellingwout examines global commercial profit. This needs to be adjusted to the taxable profit. He proposed that the OECD establishes this taxable profit. This will, of course, maintain the relevancy of the OECD. This idea of charging the OECD with this task is *contraire* to Yariv Brauner's recent plea that the OECD and its Model Tax Conventions are too dominant. In short, this is the message of the 2019 Klaus Vogel Lecture that he addressed in Vienna on 4 October 2019.[7] Although Yariv Brauner surely has convincing arguments supported by empirical research, for brevity's sake I refer to his lecture to be published soon, I believe that small countries will always have an interest in aligning interests in an international organization so as to gain weight when negotiating with large countries. On their own, a small country has little bargaining power when concluding (tax) agreements with a large country. I take it, therefore, that there will always be a need for an international organization, such as the OECD. The Inclusive Framework shows that it is even possible to align 135 countries. In short, therefore, this should not be a deal breaker or at least there may be alternatives such as an international court.

2.3 *Profit Allocation*

Perhaps overstating it, the current state of play is that profits are allocated to functions. In my view, the 2008 Authorized OECD Approach (AOA) approach[8] is, in that sense, leading the way. The so-called PE (Permanent Establishment)-context sets the standard. In absence of contracts or legal personality, one must look at the functions performed by the head office and other parts of the enterprise, i.e. the PEs. This is also what we see in OECD BEPS Action Plans 8–10: ignore the contract(s) and look at DEMPE (Development, Enhancement, Maintenance, Protection and Enhancement) functions. That is a good idea to take a substance-over-form-approach or a more economic approach, but it still does not address so-called market intangibles.

In his proposal. Bellingwout wants to capture the entire global footprint of the GE and, therefore, takes into account all interests (functions, assets, market intangibles, etc.) but, of course, there can be debate over the questions of which interest is served best under the waterfall he proposes, and which numbers to put to low-risk (routine), sales, and medium-risk? The charm, however, is that profit is allocated to respective business units and, subsequently, the profits is allocated to the relevant jurisdictions.

A deliberate choice is thus to allocate profit not only to functions. Also, sales are a factor for apportionment. As a result, even without physical presence, a State with customers from sales or services is allocated taxing rights. This is a significant step in comparison to the current taxation of only functions. What, in my view, should incite controversy is that the residual profit is not allocated to 'market states' as the residual profit is shared between the countries that have personnel in a way that each person is equal. This inherently means that small countries, let us take a small sunny island as an extreme example, are limited in being awarded a lot of the residual profit. This can be supported by a substance-over-form approach. Profit is not only taxed where value is created but also where the GE is relevant both from a client perspective and a manufacturing perspective. However, I suspect that market jurisdictions will want a larger piece of the pie based on ideas on *user participation*.

Overall, it comes down to eliminating major drawbacks of the current system. In short, the advantages are the following: (1) no discussion on residence versus source State, (2) no double taxation, (3) no need for withholding taxes, and (4) no equity or debt bias.

A flaw in the concept, as I see it, is that it takes care of B2C (Business to Consumer) but not or at least not

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5 General Court 24 Sept. 2019, Case T-760/15, *Starbucks*, ECLI:EU:T:2019:669 and General Court 24 Sept. 2019, Case T-755/15, *FIAT*, ECLI:EU:T:2019:670.

6 Cf. Art. 28 CCTB for insurance companies. European Commission, *Proposal for a Council Directive on a Common Corporate Tax Base*, COM(2016)658 final (25 Oct. 2016).

7 Y. Brauner, *The True Nature of Tax Treaties*, Bulletin for International Taxation 2020 (Volume 74) No.1.

8 Or the 2010 AOA Approach for that matter.

enough of B2B (Business to Business). However, perhaps that can also be said for the Unified Approach that has 'consumer facing businesses', whatever that means, in scope.

Finally, of course, one needs a great imagination to see whether countries would adopt a proposal like the one of Bellingwout. However, instead of trying to fix holes, designing a completely new system seems a tempting option to me. Why not waste a good crisis? A multilateral instrument could perhaps be the engine that drives this proposal forward.

3 Conclusions

In conclusion, Bellingwout proposes a completely new reallocation of taxable profit over countries. It goes much further than the Unified Approach. I feel that Bellingwout should receive warm applause for sharing his learned thoughts. In my view, it should and will bring more and well-deserved nuance to the current discussions on the Unified Approach. Currently, it is (perceived as) being written too much for only certain digital companies. This is, in fact, thus aimed at a certain part of the economy and, by the framing of the project as 'digital', in my mind, it did not receive the attention and feedback that it should have gotten from industries that are more traditional. The 2,500 page consultation feedback do not make that different for me. As a result, the current discussion is biased and overly one-sided. Conversely, Bellingwout's ideas are holistic and aimed at the wider spectrum of businesses. Therefore, I see them as a dot on the horizon to which the OECD should aim to strive for: Global Enterprise Taxation (GET) may be hard to get, but it should be the future.