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Article

BEPS: Will the Current Commitments and Peer Review Model Prove Effective?

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1 Introduction[1]

Had anyone asked a tax specialist seven years ago, say, whether countries could ever have agreed on anything like the Base Erosion and Profit Shifting (BEPS) package, and whether some of what they had agreed would also be implemented through a multilateral instrument (MLI), the reactions would most certainly have been extremely pitying. However, since the G20 leaders first called on the OECD in June 2012[2] to work out a plan to combat BEPS, countries within the OECD/G20 and EU have proved able to find common ground. This was seen when they responded to pressure from public opinion and rising levels of sovereign debt by starting to work on joint actions to combat tax planning by multinationals (MNOs) under the guidance of the OECD Secretariat and the European Commission. Another reason for their willingness to cooperate is that they know that tax policies based on 'every man for himself' are more likely to lead to lower rather than higher tax revenues.[3] And that, in turn, will put even more pressure on high-quality and fair social, ecological and tax policies.[4]

It was in 2013 that the OECD identified a total of fifteen action items needing to be addressed in order to combat BEPS,[5] followed two years later by the publication of a plan for each action point. Surprisingly, however, after two years of meetings, the OECD and G20 countries have so far only been able to agree on minimum standards for implementation in the case of four of these action items. The various countries committed themselves to: (1) implementing anti-abuse provisions (Action Point 6), (2) introducing standardized Country-by-Country reporting (Action Items 13), (3) revitalizing the peer review process so as to combat harmful tax practices (this includes embracing the modified nexus approach for IP regimes and the compulsory exchanging of information on six types of rulings) (Action Item 5), and (4) introducing effective mutual agreement procedures (Action Item 14). Of these four minimum standards, the first and the last are to be implemented via the MLI (Action Point 15), while a common approach has been devised for (1) neutralizing hybrid mismatches (Action Item 2) and (2) combatting excessive interest deductions (Action Item 4). Lastly the various countries reached agreement on best practice guidelines for a CFC measure (Action Item 3) and compulsory disclosure of aggressive tax structures (Action Item 12).

This contribution considers the extent to which these commitments to combatting BEPS will prove effective in practice. We zoom in specifically on the choice by the OECD and G20 for a monitoring and peer review model to ensure countries comply with their BEPS commitments. In an earlier contribution to *EC Tax Review* we criticized the way in which the EU had responded to the BEPS outcomes by opting for a directive as its implementation instrument of choice.[6] We concluded at the time that it would be preferable for the EU to implement the outcomes through a peer review system, structured along the lines of the model opted for by the Global Forum on Transparency and Exchange of Information for Tax Purposes (Transparency Forum) rather than through a directive.

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[1] This contribution has been adapted from an article published earlier this year in the Dutch *Maandblad Belastingbeschouwingen.*

[2] *See* para. 48 of the declaration by the G20 leaders during their summit meeting in Los Cabos on 18–19 June 2012. This declaration can be found on https://www.g20.org/Content/DE/_Anlagen/G7_G20/G20-loscabos-leaders-declaration.pdf?__blob=publicationFile&v=2.

[3] *See also* A. C. G. A. C. de Graaf, *'Excessieve' gedragingen en internationaal fiscaal beleid* 20–23 (The Hague: Sdu Uitgevers 2013).

[4] *See also* D. Lesage, *Mondialisering en fiscale rechtvaardigheid. Belastingpolitiek in een open wereldeconomie* 12, 51–52 and 67–71 (Louvain: Uitgeverij Acco 2006); and D. Lesage, *Een kader voor rechtvaardige fiscaliteit als mondiaal publiek goed*, in *Het beheer van de wereld* 105 (D. Lesage et al. eds, Ghent: Academia Press 2006).

[5] OECD, *Action Plan on Base Erosion and Profit Shifting* (Paris: OECD Publishing 2013).

[6] Arnaud de Graaf & Klaas-Jan Visser, *ATA Directive: Some Observations Regarding Formal Aspects*, (4) EC Tax Rev. 199–210 (2016).

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Before addressing the issue at the heart of this contribution, we will outline the background to the current international tax system in section 2. In contrast to the EU and the International Monetary Fund (IMF), the OECD's efforts to combat BEPS have paid barely any attention to tackling the problems in the current international tax system at the source. We therefore first discuss why the current tax framework facilitates BEPS by MNOs. In section 3 we discuss the policy strategies devised by the OECD and the EU in their efforts to combat BEPS, while also briefly considering how the malfunctioning of the current international tax system could be addressed at the source. Section 4 focuses on the respective methods chosen by the EU and the OECD for implementing and enforcing the BEPS commitments, while our closing comments are set out in section 5.

2 Current tax framework: Overtaken by globalization with residual profits ending up in favourable tax jurisdictions

2.1 Introduction

The OECD responded to the G20's call for an action plan by firstly seeking, in the second half of 2012, to establish the extent of the BEPS problem. As part of its research the OECD also set out to identify the global developments influencing the organizational forms that enterprises are nowadays choosing to adopt. According to the OECD, globalization and digitalization mean individual enterprises within a group now operate under the policies and strategies of the group as a whole. This in turn has contributed to the creation of 'global value chains' and, therefore, to the further growth of MNOs. And this, in the OECD's view, is one of the factors creating the conditions needed for an MNO – acting as a single, integrated enterprise – to operate a global strategy targeting profit maximization and cost reduction, including the use of opportunities for tax-saving.

These developments, as the OECD explains, take no account of national taxes and the international rules for allocating taxation rights between countries. The OECD discusses this issue in more detail in its 'Addressing BEPS' report. Its explanation is based on three examples, which show the tax benefits that MNOs' cross-border economic integration allows them to obtain by exploiting loopholes in the 'outdated' international tax framework. To make matters worse, MNOs are even being assisted in this process by countries either consciously or unconsciously using tax competition as a means of attracting inward investments. The OECD therefore concludes from the above that:

> the international common principles (…) may not have kept pace with the changing business environment. Domestic rules for international taxation and internationally agreed standards are still grounded in an economic environment characterised by a lower degree of economic integration across borders, rather than today's environment of global taxpayers, characterised by the increasing importance of intellectual property as a value-driver and by constant developments of information and communication technologies.[7]

In other words, the OECD recognizes a more fundamental policy issue as being the underlying cause of BEPS.

In the light of this conclusion, it is in our view remarkable that neither in its 2013 'Addressing BEPS' nor in the subsequent 2013 'Action Plan on BEPS' reports, the OECD raises questions about or makes any proposals for reforming the way in which MNOs' profits are currently taxed.[8] Even though the February 2013 identifies the foundations on which the current tax framework is based and why these are creaking at the seams – due to the 'separate entity approach', and the use of the arm's length principle to determine the profits of each entity within a group , the OECD nevertheless opted to preserve these creaking foundations, by making it more difficult for MNOs to exploit differences between countries' national tax systems through international tax schemes.

Before we move on, in section 3, to discuss the OECD's policy strategy in seeking to combat BEPS, we will outline, in section 2.2, the background against which the connecting factors currently used in national tax systems were established in the early twentieth century. In section 2.3 we then discuss the enormous expansion of enterprises in recent decades, how these enterprises started structuring themselves differently, both legally and organizationally, and how these developments have resulted in the existing connecting factors for taxation no longer being 'fit for purpose'. This huge expansion of enterprises, combined with organizational change, has been driven primarily by the rapid acceleration in technological and logistic innovations in the fields of transport and communications ('time-space compression') and economic liberalization from the 1970s onwards.[9] Lastly, section 2.4 examines how MNOs are able to apply the outdated connecting factors to keep their residual profits outside the scope of countries' taxation systems.

2.2 Origins of the Current Connecting Factors in Corporate Tax

The taxation of enterprises in the Western world has developed since the early twentieth century, when countries started introducing systems to tax entities' profits. At that time, most enterprises operated within a single

[7] OECD, *Addressing Base Erosion and Profit Shifting* 5, 7, 27, 28 and 49 (OECD Publishing: Paris 2013).

[8] The OECD states on p. 14 of its 'Addressing BEPS' report that *There is consensus among governments that moving to a system of formulary apportionment of profits is not a viable way forward.*

[9] For more details, *see* de Graaf, *supra* n. 3, at 9–18.

legal entity and from a single location close to their customers. All the enterprise's functions,[10] assets and risks were concentrated within that single entity, to which and from which all products and services were supplied. This can be illustrated by the example of a potter making all his earthenware pots by hand at the back of his workshop, firing them and then displaying them, ready for sale, in his shop window. All the value chain activities are then performed within a single legal entity and at a single location.

Given the ties that most entities had at that time with their locations, it was perfectly logical for countries to base their taxation of enterprise profits on entities' nationality or place of residence. An entity normally derives its nationality from the company laws of the country in which it is established or has its principal place of management. The basis on which a country determines whether it sees an entity as one of its nationals depends on the doctrine that the country chooses to apply: in other words, the place of incorporation (or statutory seat) doctrine, or the actual seat of management (real seat) doctrine. If a country chooses an entity's place of residence as the basis for levying corporate tax, this place will normally be determined by the location from which the entity is effectively managed.

Apart from a country using an entity's nationality or actual place of management as the basis for subjecting it to corporate tax, a country can normally also tax a 'foreign' entity on profits generated on activities performed in that country. Before a country can tax an entity on these activities, however, there will need to be a certain presence, or nexus, in that jurisdiction. If a 'foreign' entity has a nexus with another country, such that it can be regarded as having a permanent establishment, the entity will be taxed in that other country to the extent that the profits obtained from the business activities are generated by means of the permanent establishment in that country.

2.3 Current Connecting Factors for Corporate Tax Have Become Outdated

As explained above, it is the entity rather than the enterprise that is the taxable person as far as countries' corporate tax systems are concerned. An entity is taxable in a specific country if it has (1) the nationality of that country, (2) its place of residence in that country, or (3) a permanent establishment in that country. By now, however, seeking recourse for taxation purposes to the entity's nationality or (actual) place of residence, or to the presence of a permanent establishment, has long since ceased to align with the way in which enterprises are structured, either legally or organizationally. Whereas the location and composition of an entity's management and the place from which the entity's enterprise is managed were previously one and the same, the developments outlined above mean that these places have become increasingly divergent over the past few decades. From a legal perspective, an MNO now comprises hundreds of entities established in many different countries and managed by executives operating across the globe. Whereas enterprise functions, assets and risks were previously concentrated within a single entity and at a single location close to its customers, as in the case of the potter, MNOs have since replaced this traditional structure by locating enterprise functions, assets and risks within the group entity and at the location regarded as most suitable for the purpose.

These days, the place where an MNO performs its operating activities is determined primarily by factors such as labour productivity, trade barriers, import duties, transport costs and the proximity of suppliers and customers. Since the 1980s and 1990s, however, certain factors affecting the localization of MNOs' operating activities have changed, particularly in Asia's favour, and MNOs have responded by operating on an increasingly international scale.[11] According to research conducted by the CPB Netherlands Bureau for Economic Policy Analysis, the factors playing an important role in determining where R&D activities are located include the past, the availability of suitably qualified researchers and the quality of the public knowledge infrastructure.[12] An MNO's strategic functions, by contrast, tend to be centralized close to a major urban hub in a variety of networks (financial, transport and communications) and held through a top holding company. At the same time, and for reasons of efficiency, MNOs have chosen to locate their management support services (such as sales activities, invoicing, procurement, customer support, HR policy and group financing) in what are known as shared service centres, ideally in countries offering a favourable tax regime, such as Ireland and Switzerland.[13]

Apart from enterprises structuring themselves differently in legal and organizational terms, further emphasizing why the current connecting factors are not satisfactory, technological and logistic innovations exacerbated this trend further. The emergence of online business models has enabled certain MNOs[14] to sell their goods and services in countries without an immanent need for a physical establishment there. This made it more difficult for a country (destination country) wanting to tax the profits generated by an MNO entity

[10] In other words, their operational, strategic and support activities and their R&D.

[11] *See also* Ángel Gurría, *The Emergence of Global Value Chains: What Do They Mean for Business. G20 Trade and Investment Promotion Summit* (Mexico City: OECD 5 Nov. 2012).

[12] *See* M. Cornet & M. Rensman, *The Location of R&D in the Netherlands: Trends, Determinants and Policy* 7 and 37–41 (The Hague: CPB 2001).

[13] de Graaf, *supra* n. 3, at 30–31.

[14] Such as Google, Facebook, Amazon and Apple.

on sales of goods or services to demonstrate that these profits have been generated through a permanent establishment in its jurisdiction. Under the international definition of a permanent establishment, dating back to the early twentieth century, merely having a visible presence in the form of a store front (either physical or digital) or sales staff is not sufficient to constitute a taxable presence. For a permanent establishment to exist however, a physical establishment has to be available to the enterprise on an ongoing basis. As a result, the profits of such MNOs are consequently taxed only marginally, and sometimes not at all, in the countries where they sell their products and services.[15] In itself, this is perfectly understandable, given that the existing international tax rules allocate profit taxation rights primarily to the countries from which the goods and services originate (i.e. where entities deploy their capital and labour). And the OECD, G20 and EU have so far not moved away from this basic principle of international tax law. Indeed, the decisions made in respect of the BEPS project have in effect renewed support for this principle by stating that the rights to tax enterprise profits should be assigned to the countries where value is added.[16]

It is not only the vanishing need for MNOs to have a physical presence in countries in order to be able to supply their products and services, but also the fact that they no longer need to operate through a local entity in such a country that is making it increasingly difficult for countries to tax MNO profits.

2.4 Residual Profits Outside the Scope of Traditional Corporate Tax Connecting Factors

Insofar as an MNO has a physical presence in a country (i.e. a limited liability to tax) or is present through a group entity (i.e. a full liability to tax), the question arises as to how much of the MNO's profit can be attributed to that local presence (i.e. the extent of its taxable base). An MNO can minimize its local 'presence' by having as few functions, assets (in particular intangible assets) and risks as possible in the relevant jurisdiction. Wherever possible, an MNO will prefer to allocate or reallocate functions, assets and risks (and the related profit-dependent remuneration) to group entities in tax-friendly, or more tax-friendly, jurisdictions. Countries' tax rules normally align with these legal and, insofar as required, actual allocations or reallocations of enterprise functions, assets and risks.[17] By allocating or reallocating functions, assets and risks in this way, an MNO can in effect strip out (or, in OECD/G20 terms, erode) its presence in high-tax countries, with only minimal levels of profit still able to be attributed to the residual (eroded) local presence.

By applying a strategy of 'eroding and shifting' MNOs have been able to shift residual/combined profits from high-tax to low tax nor no tax jurisdictions. Such strategies generally prove successful because countries have traditionally attributed the liability for corporate taxes to entities as taxable subjects rather than to enterprises because entities are individually liable for tax (i.e. the 'separate entity' approach). This approach allows entities within an MNO to engage in intra-group transactions that are, in principle, in accordance with the tax rules, because they are all recognized for tax purposes. The 'separate entity' approach and the tax recognition of transactions between affiliated entities makes it relatively easy for MNOs to exploit rate (and other) differences between national tax systems.[18] By, on the one hand, maintaining only a minimal presence in terms of functions, assets and risks in high-tax countries and, on the other hand, maximizing their presence in low-tax countries, MNOs can successfully minimize their overall tax burden. It is these opportunities – alongside business economic, organizational and company law-related reasons – that explain why today's MNOs consist of hundreds of entities spread across the world, including in tax havens, and that account for the multitude of transactions that such entities enter into with other members of their group.

From the 1960s onwards, tax authorities, and the US Internal Revenue Service (IRS) in particular, became increasingly aware of these 'erode and shift' strategies. In an attempt to combat such strategies, the US government decided that intra-group transactions should subsequently be governed by the arm's length principle, which had its origins in the 1930s. In order to put this concept into practice, the US Treasury devised a series of

[15] *See* Arnaud de Graaf, Paul de Haan & Maarten de Wilde, *Fundamental Change in Countries' Corporate Tax Framework Needed to Properly Address BEPS*, (5) Intertax 310–311 (2014).

[16] *See* e.g. OECD, *supra* n. 7, at 10; OECD, *Executive Summary, OECD/G20 Base Erosion Profit Shifting Project* 27–32 (OECD: Paris 2015); and the first sentence in the recitals of the EU's Anti-Tax Avoidance Directive. This system of allocating taxation rights on the basis of production factors largely benefits countries with a trade surplus and is disadvantageous for countries with a trade deficit. Countries in the latter category, such as the United States, consequently have much to gain from an apportionment method based on sales' destination. *See* e.g. Reuven S. Avi-Yonah, Kimberly A. Clausing & Michael C. Durst, *Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split*, (5) Fla. Tax Rev. 509–510 (2009).

[17] The situation is different, however, if the structure involves a well-capitalized group entity based in a low-tax jurisdiction and used for receiving dividends, interest and royalties. Under CFC regulations or the new BEPS Action Points 8–10, the profits of such an entity can then be attributed to group entities in higher-taxed countries. Many countries view such situations as artificial and so evidently tax-driven that the economic rather than the legal reality is allowed to prevail.

[18] A group entity in a low-tax country can, e.g. grant a loan to a group entity in a high-tax country. The borrower can, in principle, deduct interest paid on the loan at the higher rate of tax, while the interest received by the lender is taxed at a low rate or may not even be liable for tax. Countries can also create such 'loopholes', either consciously or unconsciously, to make themselves more attractive for MNOs wishing to establish or invest.

transfer pricing guidelines, which also formed the basis for the OECD's 1977 Transfer Pricing Guidelines.[19] Alongside these developments, other countries increasingly started imposing limits on the deductibility of interest paid on intra-group loans in order to prevent further erosion of their tax bases. This was followed by the introduction of the CFC regulations. The OECD's 1977 Transfer Pricing Guidelines provided only three methods for determining a commercial or arm's length price for intra-group transactions: (1) the comparable uncontrolled price (CUP); (2) the cost plus, and (3) the resale minus. In the vast majority of cases, however, these three traditional methods were inadequate as no comparable transactions between non-affiliated parties could be identified. In 1995, therefore, the OECD responded to this lack of comparability, once again following an example set by the United States, by introducing two new methods: the transactional net margin method (TNMM) and the transactional profit split. Of these two calculation methods, the latter can be seen as a move, to some extent, in the direction of the global formulary apportionment method.[20] Until the BEPS package, however, neither of these methods offered sufficient scope for 'value-creating countries' to effectively tax residual profits. That is understandable, given that both methods are still based on the principle of tax recognition of the relevant group entities and the contractual transactions they enter into with each other.[21] The outcomes of the BEPS Action Points 8–10 have since resulted in revised OECD Transfer Pricing Guidelines being published on 10 July 2017. The OECD Member States' aim in revising these guidelines is that, as far as the apportionment of profits is concerned, transfer pricing outcomes should reflect the economic rather than the legal reality. However, these proposals, too, continue to be based on the existing connecting factors for corporate taxes (i.e. entities and transactions) and so essentially do not represent a real solution to the problems countries face in seeking to tax the residual profits of MNOs.

3 OECD/G20 and EU Strategies for combatting BEPS

3.1 Introduction

It is generally recognized by now that the 'base erosion and profit shifting' strategies of MNOs create an unfair playing field between enterprises: where two enterprises have the same functions, assets and risks, an internationally operating enterprise – the MNO – can achieve a lower effective tax burden than an enterprise operating within a single jurisdiction.[22] This difference in the availability of opportunities for enterprises operating exclusively locally creates a perverse incentive for them to expand internationally, without any business economic reason for doing so, in order to achieve higher returns. It was this unintended adverse effect, combined with the loss of tax revenues and the undermining of a fair and equitable tax system, that was behind the efforts to devise policy strategies for combatting BEPS. The various strategies favoured by the OECD/G20 and the EU in their attempts to combat BEPS are discussed below. We first discuss those put forward by the OECD, in section 3.2, while also briefly considering alternative ways to tax MNOs' profits. In section 3.3 we describe how the EU has responded to the outcomes of the OECD/G20 BEPS Action Plan. Not only is the European Commission encouraging efforts to address BEPS in the short term, but it has also long envisaged a more structural solution for combatting BEPS. This, too, we will discuss in brief.

3.2 OECD strategy for combatting BEPS

As discussed above in section 2.1, the OECD's Action Plan has chosen not to seek a more structural solution for the problem of BEPS. While its 'Addressing BEPS' report admits that the generally accepted principles for attributing tax jurisdiction may not have kept pace with the changing business environment, the OECD does not see this as a reason to move away from the current tax framework. By maintaining this framework, the OECD has opted for a strategy aimed at combatting the artificial tax-planning arrangements known to be used by MNOs. It is seeking to achieve this by (1) making it difficult, if not impossible, for MNOs to exploit differences between national tax systems[23] and to avail themselves of

[19] *See* Reuven S. Avi-Yonah, *Between Formulary Apportionment and the OECD Guidelines: A Proposal for Reconciliation*, (1) World Tax J. 3 (2010).

[20] The OECD is not in favour of the global formulary apportionment method, given that countries will be very divided on the exact composition of the formula and it will be very difficult, if not impossible, to reach consensus. *See* G. Cottani, *Formulary Apportionment: A Revamp in the Post-Base Erosion and Profit Shifting Era?*, (10) Intertax 755–756 (2016). And while the United Nations' Transfer Pricing manual admittedly does not reject the global formulary apportionment method outright, Member States are warned that applying it on a global scale could result in double taxation if countries do not first reach agreement on a suitable uniform method of apportionment. *See* United Nations, *Practical Manual on Transfer Pricing for Developing Countries* paras 1.4.13 and 3.2.3 (2013).

[21] This is also recognized by the OECD. *See* e.g. its response to question 53, one of the frequently asked questions about BEPS: 'How does transfer pricing lead to BEPS? The arm's length principle has proven useful as a practical and balanced standard for tax administrations and taxpayers to evaluate transfer prices between associated enterprises, and to prevent double taxation. However, with its perceived emphasis on contractual allocations of functions, assets and risks, the existing guidance on the application of the principle has also proven vulnerable to manipulation.'

[22] *See* e.g. OECD, *supra* n. 7, at 48; and OECD, *supra* n. 5, at 8.

[23] By neutralizing the effects of hybrid mismatch structures, tightening the CFC rules, limiting the deductibility of interest to a specific percentage of EBITDA, mandatory stipulating of the 'nexus approach' for patent box regimes, and using revised TP guidelines to combat cashboxes so that transfer pricing outcomes align with the place where an MNO adds value.

international tax schemes,[24] but also by (2) encouraging MNOs[25] and also national tax authorities,[26] via transparency requirements, to be more cautious about exploiting tax rules or schemes. What these two categories of BEPS measures have in common is that both aim to prevent MNOs using legal, but artificial arrangements to locate their functions, assets and risks in tax-friendly (or more tax-friendly) jurisdictions. It follows from this that the OECD supports the general principle of aligning the application of tax rules with the legal form. It is willing to abandon this principle only if the legal reality is totally at odds with the economic reality. This immediately highlights the weakness of the measures proposed for combatting BEPS as these measures will have no effect on tax planning by MNOs if, for example, the activities performed by the latter do not result in a local 'presence' or if intra-group transactions are used as a means of exploiting rate differences. The only situation in which the BEPS measures will affect tax-planning structures is if these structures are considered artificial. This was also acknowledged by the Dutch tax authorities and the Ministry of Finance in an internal memorandum in which they outlined possible alternative scenarios for the hybrid entity structures covered in ATAD 2.[27] The IMF staff reached the same conclusion in their report entitled 'Spillovers in International Corporate Taxation' of 9 May 2014.[28]

This is why we believe that a structural solution to tax planning by MNOs demands a different approach to taxation. In our view, this should seek to reflect the economic rather than the legal reality, given that the latter can be manipulated, as shown in the various BEPS reports and the IMF staff's Spillovers report. In the introduction set out in section 3.1, we referred to the factors driving the BEPS Action Plan. The adverse effects of BEPS could be more radically eliminated if the consolidated worldwide profits of MNOs (the object) were to be determined uniformly ('unitary and consolidated basis') and then appropriately apportioned to the various countries ('global formulary apportionment'). According to the IMF Spillovers report, taxation on this basis would admittedly limit 'conventional transfer pricing problems, but would create new difficulties around the factors used to apportion profits across jurisdictions, and would not necessarily shift tax base towards developing countries'.[29] Steps will need to be taken, therefore, to prevent the choice of the components to be used in the apportionment formula simply creating new opportunities for MNOs and countries to engage in arbitrage. Manipulation of these components could be avoided by opting for 'sales' as the sole component (and so excluding capital and labour – i.e. wages and employees). Tax literature on the subject has proposed switching towards a taxation on the basis of destination instead of origin.[30] The IMF Spillovers report shows moreover that opting for such an apportionment formula would have less of an impact on countries in terms of their corporate tax revenues than a formula that comprised other components.[31] However, it is important in this respect to define what is meant by 'sales'. After various US states opted for an apportionment formula based entirely on 'sales', other states followed their example,[32] given that an additional benefit of such an apportionment formula is that it is corporate tax-neutral as far as the locating of operating, R&D, strategic and management support functions are concerned.

For a while it seemed as if the United States would introduce a destination-based corporate tax,[33] which would have represented a complete trend break in the international tax playing field. Ultimately, however, this plan failed to be adopted, both because of national and international lobbying, and has since been abandoned. It remains very important, however, to consider what the effect would be on EU Member States if the US or another major trading block were to introduce such a tax based on destination. The question of whether other countries would then have to follow this example, either autonomously or under an EU banner, also needs to be considered.

3.3 EU strategy in response to BEPS package

The EU responded to the BEPS package by adopting the Anti-Tax Avoidance Directive (ATAD) on 12 July 2016.[34] In doing so, it sought to accommodate the BEPS outcomes by introducing a restriction on interest

[24] By preventing treaty shopping and artificial avoidance of permanent establishment status.
[25] Mandatorily requiring MNOs to: (1) disclose their aggressive tax-planning structures to tax authorities; (2) provide information on their transfer pricing policy for their worldwide activities, and (3) prepare Country-by-Country reporting.
[26] By compulsorily requiring the automatic exchanging with other countries of information on six types of rulings, specifically (1) rulings relating to preferential regimes; (2) cross-border unilateral APAs; (3) informal capital rulings; (4) permanent establishment rulings; (5) conduit rulings, and (6) other rulings designated by the OECD Forum on Harmful Tax Practices.
[27] Annex to the letter from the Ministry of Finance of 27 Mar. 2017, ref. 2017/60179, *CV/BV-structuren in Nederland, analyse n.a.v. het voorstel tot wijziging van de Richtlijn anti-belastingontwijking (ATAD 2)* at 16 and 17.
[28] IMF Staff Report of 9 May 2014, Spillovers on International Corporate Taxation, at 35.
[29] *See supra.*
[30] *See* Arnaud de Graaf, Paul de Haan & Maarten de Wilde, *supra* n. 15, at 316 and the sources referenced there.
[31] At 40, Table 4.
[32] *See* M. F. de Wilde, *Sharing the Pie. Taxing Multinationals in a Global Market* 417 (PhD thesis, Rotterdam 2015) and the sources referenced there.
[33] GOP Tax Reform Task Force, *A Better Way: Our Vision for a Confident America* (24 June 2016), https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf [perma.cc/G6B3-YMT3]. For a critical commentary, *see* Reuven S. Avi-Yonah & Kimberly A. Clausing, *Problems with Destination-Based Corporate Taxes and the Ryan Blueprint, Washington Center for Equitable Growth* (Feb. 2017).
[34] Directive 2016/1164, OJEU 2016, L 193, at 1–14.

deductibility in the form of an earnings-stripping provision (Article 4), by establishing CFC rules (Articles 7 and 8) and by neutralizing certain qualification differences (Article 9). In the EU's view, introducing legislation for these relatively 'voluntary' BEPS outcomes on the basis of 'every man for himself' rather than at an EU level would not be effective and would also not help to promote a level playing field within and outside the EU. By adopting a second, amending, directive on 21 February 2017, the Council also extended the ATAD's territorial scope of application with regard to the neutralizing of qualification differences so as to include third countries, while also extending its material scope of application by neutralizing other qualification differences.[35] This Directive not only contains provisions implementing these three BEPS action points, but also two other provisions, specifically an exit tax (Article 5) and a general anti-abuse provision (Article 6). The ATAD has to be implemented by 31 December 2018 and applicable from 1 January 2019, while the Amendment Directive has to be implemented by 31 December 2019 and applicable from 1 January 2020. However, provisions relating to reverse hybrids do not need to be implemented until 31 December 2021 and applicable from 1 January 2022.

Not only did the EU respond to the BEPS package by adopting the ATAD, but also by adopting two other directives on transparency. Its Directive 2015/2376 of 8 December 2015 amended the Administrative Cooperation Directive 2011/16 of 15 February 2011 to take account of the BEPS commitments on the mutual exchange of information on various types of rulings and transfer pricing agreements (BEPS Action Point 5). This Amendment Directive requires EU Member States automatically to exchange information on all cross-border rulings and transfer pricing agreements. On 25 May 2016, the Council then adopted Directive 2016/881, which also amended the Administrative Cooperation Directive. This new, second Amendment Directive deals with the BEPS commitments on Country-by-Country reporting (BEPS Action Point 13). Lastly, in June 2017, the European Commission issued a third proposal for amending the Administrative Cooperation Directive.[36] Under this proposal, intermediaries will be required to disclose certain tax structures, which do not necessarily have to be harmful, to their local tax authorities before these arrangements are implemented. The tax authorities then have to enter this information in a database that can be accessed by the tax authorities of all the EU Member States.

Further progress was also recently achieved in respect of the resolution of cross-border tax disputes within the EU, with the Commission's October 2016 proposal for a directive on tax dispute resolution mechanisms in the EU being adopted by the Council in early October 2017.[37]

Even before the BEPS package was published, the European Commission announced in 2013 that it would use the state aid instrument against multinationals exploiting differences between national tax systems. By invoking this instrument, the EC was seeking to create a more level playing field between multinationals and the EU Member States. The EC consequently decided in summer 2013 to set up a Task Force Tax Planning Practices,[38] primarily to investigate EU Member States whose tax authorities were known to have entered into unilateral advance pricing agreements (APA) with MNOs. According to the EC, these unilateral APAs often result in multinationals being able to artificially allocate their profits to other countries without any liability for any corresponding taxes in those countries, with the result that they are able to achieve double non-taxation. Even if that were to be the case, the next question would be which country or countries should then tax this residual profit. Does the EUR 13 billion of state aid that the EC has ordered Ireland to claim back from Apple actually represent non-collected tax on Irish profits? Apple's two Irish companies admittedly contractually purchased products from other group companies and then contractually sold the final products to consumers, but that does not mean that the residual profit, comprising the margin between the purchasing and selling prices, is automatically Irish profit. Under the Transfer Pricing Guidelines and given the activities of the two companies in Ireland, Ireland would attribute a considerably lower share of the profit to Ireland. It therefore considers the EC to be fundamentally wrong in ordering it to impose tax retrospectively on US profits. The fact that these residual profits of Apple are not liable to tax in either Ireland or the US is the result of Apple's conscious decision to create a mismatch in the way in which its two Irish subsidiaries are classified for tax purposes. In essence, the EC should have called on the US to tax Apple's as yet untaxed residual profit.

By adopting the ATAD, as well as the two directives amending the Administrative Cooperation Directive, the Dispute Resolution Directive and the agreements reached within the Code of Conduct Group on patent box regimes, and also by invoking the state aid instrument, the EU is seeking to prevent multinationals from 'artificially' exploiting differences in tax rates, taxable objects and taxable subjects. Until recently, EU Member States were only obliged: (1) to relinquish, in whole or part, their entitlement to impose tax in order to avoid international double taxation on intra-group

[35] Amending Directive 2017/952, L 144, at 1–11.
[36] Proposal for Amendment of Directive, 21 June 2017, COM(2017) 335 final.
[37] Directive 2017/1852 of 10 Oct. 2017, OJ L 265, at 1.
[38] *See* http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html.

payments of dividends, interest and royalties; (2) to refrain from harmful tax practices when seeking to attract mobile capital; (3) not to provide state aid incompatible with the internal market, and (4) to respect the EU treaty freedoms. The adopting of the BEPS package and specifically the adopting of the ATAD further restrict EU Member States' freedom with regard to their corporate tax policies.

These increasing restrictions on EU Member States' policy freedom, as well as Member States' growing awareness that none of these measures will wholly put an end to tax planning by multinationals, may ultimately pave the way for a consolidated European tax base. Indeed, the EC made a fresh proposal on 25 October 2016 to 'Europeanise' Member States' corporate tax bases. In contrast to its Common Consolidated Corporate Tax Base (CCCTB) proposal of 2011, the EC's 2016 proposal suggests that a European CCTB should be mandatory for all multinational groups operating in the EU and having consolidated revenues exceeding EUR 750 million, while also making provision in a later, second phase for full tax consolidation of the revenues of multinational groups within the EU. If a CCTB ever materializes, the EC wants to ensure that consolidation will also be possible. The EC has also announced a separate proposal for a directive[39] for the second phase, including a formula for apportioning multinationals' taxable base between Member States. However, two thirds of this formula still comprises the traditional production factors (capital and labour), while only one third relates to sales. Continuing to allocate taxation rights on the basis of the traditional production factors, as described in section 3.2, will not put an end to tax arbitrage.

Under these 2016 proposals for directives, the Member States remain free to determine the rate at which they tax the taxable base apportioned to them. The EC has not previously been in favour of a uniform rate or, indeed, even a minimum rate. It is now changing its views, however, partly in response to pressure from Germany, France, Italy and Spain,[40] so as to reverse a further race to the bottom on rates, including under a CCCTB. As yet, however, it has not dared to speak out publicly in favour of a minimum corporate tax rate because of not wanting to upset opponents of this, such as Ireland.

In addition to the work being carried out within the EU, the OESO/G20 has also set up an Ad hoc Group, comprising delegates from nearly a hundred countries, and which formulated the MLI provisions, recitals and explanatory notes (Action Point 15)[41] published on 24 November 2016. The MLI published contains material provisions on hybrid mismatches,[42] treaty abuse,[43] the use of artificial structures to avoid permanent establishment status,[44] improvements in the mutual agreement procedures,[45] improvements in corresponding transfer price adjustments[46] and binding arbitrage.[47] The only situations where provision is made for a minimum standard are for combatting treaty shopping and improving the mutual agreement procedures, for which the MLI offers countries a wide range of implementation methods.[48] While these other provisions are of a less binding nature, the keenness to persuade countries nevertheless to implement them explains why the MLI provides a multitude of possible ways for countries to do so in a customized fashion. The MLI and the proposals for directives published by the Commission and adopted within the EU will overlap to some extent, either partially or fully, while the way in which the various instruments will relate to each other in EU law also remains to be seen.

3.4 Abridged overview of the BEPS follow-up by the OECD/G20 and EU

A brief overview is provided below of the commitments and follow-up agreed on by the OECD/G20 and EU in respect of the fifteen BEPS action points. In the final column, we also indicate the response required from the individual countries.

39 Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) of 25 Oct. 2016, COM(2016) 683. At first sight this proposal could seem to represent a solution for the above problem. However, it targets only larger enterprises. Furthermore, it makes no provision for a minimum rate, with the result that the apportionment formula would still allow rate arbitrage to occur. Owing to these two aspects, the European Commission's CCCTB proposal does not even enjoy the support of larger Member States such as Germany and France.

40 During a special hearing of the European Parliament on 22 Sept. 2015 the finance ministers of Germany, France, Italy and Spain said that a minimum tax rate would help combat aggressive tax planning by MNOs. *See* http://www.politico.eu/article/finance-ministers-luxleaks-call-for-minimum-eu-tax-rate/.

41 As of 2 Mar. 2017 the Ad hoc Group had 106 members.

42 Part II, Arts 3–5.

43 Part III, Arts 6–11.

44 Part IV, Arts 12–15.

45 Part V, Art. 16.

46 Part V, Art. 17.

47 Part VI, Arts 18–26.

48 (1) Enforcement of existing treaty provision, providing this is in line with the minimum standard; (2) the MLI has effect, with the text offering various alternatives for implementation; or (3) the treaty is kept fully outside the MLI's scope of application.

BEPS Action Items		*OESO/G20 Follow-Up*	*EU Follow-Up*	*Countries' Reaction to BEPS*
1	Digital economy	Framework to develop and monitor control mechanisms[49]	–	–
2	Hybrid mismatches	MLI to implement treaty aspects + 2017 update of OECD Model	Amendment of Parent/Subsidiary Directive	Unilateral national implementation and amendment of treaties
		Framework to monitor implementation/ joint approach	Art. 9-9b ATAD[50]	
3	CFC rules	Framework to monitor implementation of best practices	Arts. 7 and 8 ATAD	Unilateral national implementation (obligatory for EU Member States)
4	Interest deductions	Framework to monitor implementation/ joint approach	Art. 4 ATAD	Unilateral national implementation (obligatory for EU Member States)
5	Harmful tax practices	Forum on Harmful Tax Practices to monitor implementation via peer review. Modified nexus approach to patent box regimes	EU Code of Conduct[51]	Unilateral national implementation (obligatory for BEPS-committed countries)
		Forum on Harmful Tax Practices to monitor minimum standard for exchange of rulings via peer review	Amendment of Administrative Cooperation Directive[52]	
6	Treaty abuse	MLI to implement minimum standard + 2017 update of OECD Model Framework to monitor implementation of minimum standard via peer review	Recommendation by EC[53] to insert a PPT into treaties	Amendment of treaties (treaty shopping: obligatory for BEPS-committed countries)
7	Permanent establishment	MLI to implement + 2017 update of OECD Model	Recommendation by EC to implement the new provisions of Art. 5 OECD Model in their treaties	Amendment of treaties
8-10	Transfer pricing	Framework to develop standards and implementation guidance for tax administrations and taxpayers	Joint Transfer Pricing Forum working on EU approach to reviewing and updating of transfer pricing	Unilateral national implementation
11	BEPS data analysis	Framework to develop + monitor control mechanisms	–	–
12	Disclosure of aggressive tax planning	Framework to monitor implementation of best practices	Proposal to amend Administrative Cooperation Directive[54]	Unilateral national implementation
13	Transfer pricing documentation	Multilateral Competent Authority Agreement on exchanging of CbC reporting to enable automatic exchange under Multilateral Competent Authority agreement[55] Framework to monitor minimum standard of Country-by-Country reporting via peer review	Amendment of Administrative Cooperation Directive[56]	Unilateral national implementation (obligatory for BEPS-committed countries)
14	Dispute resolution	MLI to implement minimum standard + 2017 update of OECD Model Framework to monitor minimum standard via peer review	Dispute Resolution Directive[57]	Amendment of treaties (MAP: obligatory for all BEPS-committed countries) & unilateral national implementation of EU Directive
15	Multilateral instrument	Signing of MLI by seventy-one countries[58]	–	–

[49] *See* the OECD Background Brief – Inclusive Framework on BEPS, Jan. 2017.
[50] Directive 2016/1164, OJEU 2016, L 193, at 1–14.
[51] *See* EU Council document 15148/15 and EU Council document 6900/16.
[52] Directive 2015/2376 of 8 Dec. 2015 amending the Administrative Cooperation Directive 2011/16 of 15 Feb. 2011 as regards mandatory automatic exchange of certain types of rulings and transfer price agreements.
[53] EC Recommendation of 28 Jan. 2016, C(2016) 271.
[54] Proposal to Amend Directive of 21 June 2017, COM(2017) 335 final.
[55] Multilateral Competent Authority Agreement for the Automatic Exchange of Country-by-Country reports.
[56] Directive 2016/881 amending the Administrative Cooperation Directive as regards the BEPS commitments on Country-by-Country reporting (BEPS Action Point 13).
[57] Directive 2017/1852 of 10 Oct. 2017, OJ L 265, at 1.
[58] As at 25 Oct. 2017.

4 Choice of instruments for combatting BEPS

4.1 Introduction

In order to achieve timely, consistent and widespread implementation of the four minimum standards, the OECD decided in January 2016 to establish the Inclusive Framework on BEPS, or the BEPS Implementation Forum, ('the Framework'). A system of monitoring and peer review, with which the OECD and G20 have had good experience in the Global Forum on Transparency and Exchange of Information for Tax Purposes, will be used to encourage Framework members to implement and also apply the minimum standards. At the same time, the Framework is going to monitor the implementation of the rest of the BEPS package, including the two common approaches and the two best practice guidelines mentioned in the introduction. In addition, the Framework will work on finalizing the remaining parts of the BEPS package. Lastly, the Framework has been tasked with devising control mechanisms to gain more insight into developments in the digital economy (Action Item 1) and the economic impact of the BEPS package (Action Item 11). The data gathered in this respect will provide a basis for further action by the OECD and G20.

Whereas, however, the OECD and G20 are seeking via peer review (following the example of the Transparency Forum) to persuade countries to incorporate the BEPS commitments into their national legislation and to implement and apply procedures and treaties, the EU Member States have chosen to pursue a different route by opting to transpose the less 'binding' BEPS measures and other counter-measures into national legislation via the ATAD. In the following subsections, we discuss firstly the instrument chosen by the EU and then that chosen by the OECD.

4.2 EU: Directive

In a contribution published last year in *EC Tax Review* we examined the EU's decision to use a directive as its instrument of choice for combatting BEPS by MNOs. We concluded that contribution by expressing doubts as to whether opting for a directive would prove effective, given its nature and how the process would work in practice, in meeting EU's wish for legal certainty and a level playing field. In our view, these objectives could be satisfactorily achieved if the EU Member States were to base their monitoring of the implementation and application on the example set by the Transparency Forum. Consistent implementation and application of the anti-avoidance measures would seem then to be more assured, despite the 'soft law' nature of these measures and the model used for monitoring how they are implemented and applied.

4.3 OECD: Soft Law and Peer Review

The OECD established its Inclusive Framework on BEPS in January 2016. By November 2017, a total of 104 countries[59] had joined on an equal footing, with six organizations[60] admitted as international observers. The structure of this Framework is based on that of the Transparency Forum, which by November 2017 had a total of 146 members/countries and 15 international organizations admitted as observers. The Transparency Forum uses a peer review to monitor the extent to which the standards agreed for the exchange of information between countries are being implemented and complied with. Although the Transparency Forum is structured differently from the other OECD global forums, it has been seen to be working effectively, and its structure was consequently chosen as the basis for the Framework.

The OECD and G20 had two objectives in setting up the Framework. Firstly, they wanted to ensure that the four minimum standards agreed – harmful tax practices (BEPS 5), tax treaty abuse (BEPS 6), Country-by-Country reporting (BEPS 13) and dispute resolution mechanisms (BEPS 14) – would be implemented and applied by the countries committed to BEPS. The mechanism that has been chosen for this purpose is a peer review process. The second objective is to further develop the action points that have not yet resulted in agreement on minimum standards and joint approaches, with the main emphasis in this respect being on the deductibility of interest payments and transfer pricing. The OECD has not yet published any policy papers on this second objective.

As far as performing the peer review process is concerned, the OECD has by now published three of the four peer review documents, while the document on tax treaty abuse will follow in 2018. These documents discuss how to check whether countries have implemented the minimum standards for exchanging information and for improving and accelerating the procedures for resolving disputes on the application of tax treaties in national law. The reviews consequently focus on the operating processes within and between tax authorities, as well as on the operating and other processes in the interaction between taxpayers and tax authorities in the event of disputes concerning the application of tax treaties in MAP procedures. In other words, the main focus of the peer review is on provisions in national formal law and on these provisions' interaction with tax treaties.

The main outline of the peer review process is as described above, with the procedures varying from one

59 http://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf.

60 The African Tax Administration Forum (ATAF), the Centre de rencontres et d'études des dirigeants des administrations fiscales (CREDAF), the Centro Interamericano de Administraciones Tributarias (CIAT), together with other international organizations such as the International Monetary Fund (IMF), the World Bank (WB) and the United Nations (UN).

action point to another in terms of duration and level of detail. Local implementation of the standards is to be verified on the basis of a pre-determined criteria, which are detailed in the peer review documents as 'terms of reference', and specify all the elements to be complied within the local regulations and procedures. The verification methods to be used are then detailed, with the primary method being standardized lists. A country first has to indicate on the standardized lists whether its local legislation and procedures are consistent with the terms of reference. Once a country has submitted its input for the peer review process, its compliance with the standards is assessed. This is followed by recommendations being sent to the relevant country. The latter has the opportunity to respond, and this may result in the recommendations being revised. The final recommendations will then be adopted country by country and grouped together for all the countries.

In the case of the said BEPS action points, the peer review and monitoring are very formalized processes. As they do not directly affect a country's taxable base, they are not likely to attract any wide-ranging opposition (see below, however). We expect the reactions to differ, however, once it comes to assessing local rules on interest deductibility and transfer pricing rules: when third countries assess whether a country has implemented the agreed standards, an adverse assessment could affect the tax base and, therefore, the opportunities to conduct policy designed to attract investments. The peer review that the Netherlands once unilaterally conducted of tax legislation and regulations in other EU Member States shows that if material regulations are subjected to review, it is very important to set clear, relatively objective standards on which to base a constructive dialogue between countries.

This latter example raises the question of whether the OECD's peer review process provides sufficient protection against political intervention, and whether all countries will in fact implement and apply the minimum standards. On the one hand, the group of countries participating in the review[61] is broad-ranging – both in terms of size and development levels, without any formal hierarchical structure – and so should be able to ensure that countries can speak freely. On the other hand, however, it is not clear how the governments in countries that fail to implement certain minimum standards should be called to account.

There is an inherent tension in the peer review process in that while a government can undertake to transpose certain standards into domestic legislation, the adopting of these standards will have to be in accordance with the requirements of domestic legislation and regulations and democratic representation. A government can succeed or fail in that respect, depending on its intentions, on the prevailing circumstances and on the dynamics of the local political climate. The most likely scenario is that the vast majority of countries will implement the agreed minimum standards. However, the OECD documents make no provision for procedures to deal with the situation where a commitment has been given, but has later been withdrawn, or where the accompanying legislation and regulations have not been implemented in time or correctly.

A recent example of this can be seen in the OECD file[62] on the automatic exchange of information on savings, where the United States' own legislation and regulations prevent this country from meeting the minimum standards set by the Transparency Forum.[63] The problem here is that under basic American law, not all US companies are required to apply for a federal EIN,[64] and this makes it impossible in certain cases to gather and subsequently exchange information on the parties associated with the company.[65,66] Although the Speaker of the House of Representatives was requested during the Obama administration to introduce legal provisions to deal with this issue, while at the same time proposals for an administrative rule to remedy this loophole were made, the problem continues to exist at a federal (i.e. central) government level, with the result that the United States appears not to be complying with the minimum standards agreed within the Transparency Forum.[67,68]

61 *See* e.g. the Framework steering group: http://www.oecd.org/tax/beps/steering-group-of-the-inclusive-framework-on-beps.pdf.

62 The United States does not participate directly in the Common Reporting Standard. *See* fn. 1 in the AEOI Commitments of 23 Feb. 2017: *'The United States has indicated that it is undertaking automatic information exchanges pursuant to FATCA from 2015 and has entered into intergovernmental agreements (IGAs) with other jurisdictions to do so. The Model 1A IGAs entered into by the United States acknowledge the need for the United States to achieve equivalent levels of reciprocal automatic information exchange with partner jurisdictions. They also include a political commitment to pursue the adoption of regulations and to advocate and support relevant legislation to achieve such equivalent levels of reciprocal automatic exchange.'* (https://www.oecd.org/tax/transparency/AEOI-commitments.pdf).

63 To which the Greens in the European Parliament drew attention: *see* Greens-EFA.EU and https://www.greensefa.eu/legacy/fileadmin/dam/Documents/Studies/Taxation/The_US_as_a_tax_haven_Implications_for_Europe_11_May_FINAL.pdf.

64 Employer Identification Number, a registration equivalent to the Dutch tax identification number. This is applied for on the SS-4 form.

65 Under the currently applicable regulations, no EIN has to be applied for if a corporation does not have a bank account at a US financial institution and has no or virtually no US activities; to put it briefly, if it has no employees, no qualifying pension plan, no obligation to prepare returns for payroll taxes, withholding taxes, profit taxes and duties, and no involvement in certain types of organizations, legal persons and assets. *See* https://www.irs.gov/businesses/small-businesses-self-employed/do-you-need-an-ein.

66 In addition, only the 'responsible party' in a US corporation, rather than the ultimate beneficiary, has to be stated; *see* https://www.irs.gov/businesses/small-businesses-self-employed/responsible-parties-and-nominees.

67 *See* the letter from the Secretary of the Treasury, Lew, of 6 May 2016.

68 The situation in the US illustrates a possible bottleneck underlying all the BEPS standards: does a country that has committed itself to

Similar problems could also arise when it comes to implementing the minimum standards agreed in respect of BEPS Action Points 5, 6, 13 and 14.[69] This potential shortcoming requires action from the other countries that have committed themselves to implementing the BEPS outcomes. Whether intentionally or otherwise, the United States created an interesting precedent and possible solution for this problem when it unilaterally enacted the FATCA legislation, which is intended to ensure the exchange of information relevant for federal taxation purposes.[70] If certain countries' governments prove unable to comply with what has been agreed, this legislation allows other countries, groups of countries or international organizations with regulatory powers to initiate legislation or regulations that would in effect force the non-compliant countries to implement the minimum standards because the economic and other consequences of not doing so would be so severe.[71] Such an initiative is currently being worked on within the European Code of Conduct Group (Business Taxation), specifically including criteria for assessing the harmful nature of arrangements from a transparency and transfer pricing perspective. If a country does not meet the criteria, the plan is that it should be placed on a blacklist. A country on the blacklist will then face tax sanctions by the EU Member States. What these sanctions will entail is currently being discussed by the members of the Code of Conduct Group.

5 Closing comments and summary

We conclude that it proves very difficult to effectively combat tax planning by MNOs within the current, fundamentally outdated tax framework. As we see it, the only effective way to address this problem is by conducting thorough, in-depth research into structural solutions for BEPS within the OESO, G20 and/or EU.

Furthermore, minimum standards have been set for only some of the outcomes of the BEPS action points, one of which relates to improvements in dispute resolution mechanisms and so not combatting of BEPS. Viewed from that perspective, the results of the OESO/G20 BEPS Action Plan can so far be regarded as disappointing. On the other hand, the EU seems albeit slow making progress within the scope of its opportunities to implement the BEPS recommendations and taking measures that will genuinely have an impact. We expect that this process can be further accelerated by making provision for a peer review within the EU, based on the example set by the OECD and that has proven to be an effective way of monitoring the implementation and application of mutual agreements. Within the EU, a peer review structure comparable to the OECD's Framework would produce a structured and public inventory of the varying levels of BEPS progress achieved by the individual Member States, large or small. Making these results public will, for example, result in far more information becoming available, with the result that all sorts of parties, including outsiders, will be able to express their opinions and thus exercise informal pressure within the EU. Within the OECD, by contrast, countries could fail to get the minimum standards transposed into their local legislation and regulations. In that case, informal pressure could also obviously be exercised; however, the dynamics within the OECD are different from those in the EU. What it really comes down to is that this will require an initiative from countries, or groups of countries, with sufficient weight to exert the pressure needed to persuade those countries that are lagging behind to abandon their resistance and proceed to implement the standards.

these standards also have the statutory and administrative powers needed to convert this commitment into enforceable law? The US is a good example of how complicated this can be: the US government has no right to initiate legislative proposals; only the House of Representatives and the Senate have this right. And even if a law includes powers to issue administrative rules, all the stages of the Administrative Procedure Act have to be completed before the regulations become final. It can therefore take years for such regulations to be finalized. Lastly, the same regulations can also be withdrawn by a future administration, providing certain conditions and procedures are complied with. The replacement of the Obama administration by the Trump administration has clearly highlighted these aspects, and the question of whether the Trump administration will actually implement commitments given by the Obama administration also remains open.

[69] Does US national legislation and regulations allow the requested information on MNOs to be supplied? Although it would admittedly seem less likely that MNOs will have US companies that are not required to apply for an EIN, it nevertheless remains possible that an MNO may, e.g. have a US LLC without an EIN. And even if an American corporation has an EIN, the information that has to be passed to the IRS will be determined by federal legislation and legislation at a state level.

[70] The consequences of non-compliance were so draconian that other countries proved willing to eliminate obstacles in their national regulations that prevented this exchange of information. By now, 110 countries are collecting information for the US tax authorities and 200,000 financial institutions have registered with the IRS. *See* e.g. the letter from the Secretary of the Treasury Lew of 6 May 2016.

[71] An example of this is the proposal by parties such as the European Parliament to add the United States to an EU blacklist of tax havens (to be compiled).